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The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary

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Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary

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ABSTRACT

In 1993, the Hungarian Constitutional Court upheld a draft law that would allow the prosecution of crimes committed during the 1956 uprising, despite the expiration of statutes of limitations. In reaching this result, the Court raised international law to the level of a constitutional standard by which Hungary's domestic laws would be judged. In this Article, the author examines the impact of the Court's decision to transform international law into domestic law. The author explores the implications of adopting international law on the relationship between the Court and other branches of the government, the development of domestic law, the growth of substantive rights, and the access of an individual to the Constitutional Court. The author also notes that these legal developments in Hungary

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will likely be played out in other Eastern European and former Soviet states.

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I. INTRODUCTION

The long debate in Hungary about whether and how to administer "retroactive justice"—punishing individuals for atrocities committed during the 1956 uprising[1]—ostensibly ended with a decision of the Hungarian Constitutional Court in October 1993 (*Retroactivity Case II*).[2] In *Retroactivity Case II*, the Court decided that crimes governed by statutes of limitations that have expired may still be prosecuted if (1) they "qualif[y] as a war crime or crime against humanity under international law," and (2) Hungary is required by its international obligations to prosecute the acts.[3]

Retroactivity Case II follows a previous decision by the Court on retroactive justice. In the earlier case (*Retroactivity Case I*), the Court examined a draft law that attempted to reactivate lapsed statutes of limitations for crimes committed under the Communist regime, "provided that the state's failure to prosecute for said offenses was based on political reasons."[4] Although couched in general terms, the draft law clearly was designed to enable prosecutions of serious crimes committed during the 1956 uprising in Hungary. The Court held that the draft law was unconstitutional because it retroactively changed domestic law.[5] The Court concluded that the act was unconstitutionally vague[6] and that it violated principles of the rule of law, particularly the guarantee of *nullum crimen sine lege,* which prohibits retroactive criminal prosecution.[7]

While scholars generally praised the Court's decision in *Case I*,[8] the Court became the target of vicious attacks by others, particularly members of the centrist-right government, led by the

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1. According to Alajos Dornbach, the former Speaker of the House in the Hungarian Parliament, several hundred demonstrators were killed at demonstrations during the 1956 uprising. A fierce period of repression followed until 1963, when a law was adopted declaring amnesty for those who participated in the uprising against the Communist government. Jon Elster and Stephen Holmes, *Special Reports*, E. EUR. CONST. REV., 1992, at 7.

2. Decision No. 53/1993 (X.13.) AB, Alkotmánybíróság [Const. L. Ct.], (Docket No. 288/A/1993, Oct. 12, 1993) (Hung.) [hereinafter *Retroactivity Case II*].

3. *Id.* at 1.

4. Decision No. 11/1992 (III.5.) AB, Alkotmánybíróság [Const. L. Ct.], (Hung.), at 3 [hereinafter *Retroactivity Case I*].

5. *Id.* at 12.

6. *Id.* at 5.

7. *Id.* at 12-15.

8. *See generally* Stephen Schulhofer, et al., *Dilemmas of Justice*, 1 E. EUR. CONST. REV. 17-22, (1992), at 17.

Hungarian Democratic Forum Party.[9] The strong criticism partially reflected a perception that the Court—an institution of nine men—prevented the democratically-elected Parliament from carrying out its mandate. In *Retroactivity Case I,* the legitimacy of the Court itself and "the rule of law and judicial review of majoritarian decision-making" were compromised, at least in the government's view.[10]

The Court's decision in *Retroactivity Case I* thus prompted the government to draft a new law, which the Court reviewed in *Retroactivity Case II.*[11] This second draft law relied on international law as the basis upon which to prosecute crimes for which the statutes of limitations had lapsed. The draft law provided that acts which qualify as war crimes or crimes against humanity under international treaties to which Hungary is a party would be subject to prosecution under domestic law, even retroactively.[12] The draft law refers explicitly to the Geneva Convention Relative to the Protection of Civilians in the Time of War,[13] the 1949 Geneva Convention Relative to the Treatment of Prisoners,[14] and the 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (New York Convention).[15] The New York Convention declares that "no statutory limitation shall apply to [several categories of war crimes and crimes against humanity], irrespective of the date of their commission."[16] In contrast to *Retroactivity Case I,* the Court upheld a majority of the provisions in the draft law in *Retroactivity Case II.*[17]

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9. The Hungarian Democratic Forum Party lost heavily in national elections held in July 1994. The former Socialists, led by Gyula Horn, won the elections with an absolute majority of the votes. The Socialists then entered a coalition agreement with the Alliance of Free Democrats Party. This coalition now controls over two-thirds of the Parliament.

10. Krisztina Morvai, *Retroactive Justice Based on International Law,* 2 E. EUR. CONST. REV., 32, 33 (1993-1994).

11. Law of February 16, 1993, on the procedure connected with certain crimes committed in the course of the 1956 Revolution and Freedom Fight, § 3, *reprinted in Retroactivity Case II, supra* note 2, at 2-8.

12. *Id.* at 4.

13. Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

14. Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

15. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73 (1968) [hereinafter New York Convention].

16. *Id.* art. I.

17. The Court found unconstitutional a clause in the draft law that enumerated a set of crimes that were not based on international law, particularly those based on a domestic law from 1945 that imposed criminal liability on those acts that might jeopardize the peace or the cooperation between peoples after the

The Court's decision in *Retroactivity Case II* evoked the general reaction that the Court finally was doing its job properly; the public's opinion of the Court improved.[18] In making the decision that the second draft law was constitutional, the Court was undoubtedly aware of the public's belief that something needed to be done in response to the egregious acts committed during 1956. There have been few thoughtful discussions about the Court's reasoning in *Retroactivity Case II* and its implications,[19] due both to a widespread feeling of relief that the retroactive issue has finally been banished from the political arena (and into the prosecutor's office) and to a common feeling of satisfaction that the people who committed grave crimes in 1956 will finally be subject to punishment. In other words, the public response has focused mainly on the result itself rather than on how the Court reached its decision.

The focus of this Article is not on the substantive issues behind retroactive justice, but instead on how the Court, in delineating the role of international law in Hungary, expanded its already broad powers and changed the constitutional and political landscape. The Court's discussion of international law is extraordinary and has broad implications—reaching far beyond the retroactive justice issue—for Hungary's constitutional framework; it raises serious issues about the separation of powers and the hierarchy of legal norms. Moreover, the Court's jurisprudence in *Retroactivity Case II* increases opportunities for the development of substantive rights in Hungary and expands the access of individuals to the Constitutional Court to invoke these new substantive rights.[20]

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war or had the potential of causing international conflict. *Retroactivity Case II*, *supra* note 2, at 31-32. Prosecution under this law would have imposed criminal sanctions on those who requested the entry of the Russian troops into Hungary during 1956. This Article does not address this part of the draft law in any detail.

18. Professor Morvai, for example, praises the Court for resisting activism by upholding a political decision and the legislature's will, thus proving its political "neutrality." She adds that the Court's decision provides a "clearer understanding of the notions of the rule of law and of judicial review as valuable safeguards in a democratic society." Morvai, *supra* note 10, at 32.

19. An exception is Bragyova András, *Igazságtétel és Nemzetközi Jog—Glossza az Alkotmánybíróság Határozatához* (unpublished manuscript).

20. *See generally Retroactivity Case II*, *supra* note 2. For example, because the Court ruled that Article 7(1) of the Hungarian Constitution incorporates generally recognized rules of international law into Hungarian domestic law without modification, "[t]he national law may be applied only inasmuch as it is so decreed by international law. The national law cannot prevail against a different, explicit and preemptory rule of the international law." *Id.* at 27. *See also infra* notes 93-99 and accompanying text.

While this Article examines the Hungarian context, the discussion has implications for most states in East-Central Europe and in the former Soviet Union, particularly those that have recently adopted constitutions and established constitutional courts. In the early stages of state-building in this region, particularly in the process of drafting a constitution, the relationship between international law and domestic law often had been neglected. Moreover, the strong desire of East-Central European states to become part of the international community[21] is evidenced by the fact that most of these states have adopted almost boilerplate provisions that declare their adherence to generally recognized rules of international law.[22] As this Article will show—despite the clear language in some of the constitutional provisions—there are complex legal and political issues underlying the relationship between international and domestic law. Each individual state in this region will have to address these issues sooner or later.

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21. This is not unexpected. As with the former European communist countries, Italy and Germany emerged from totalitarian regimes after World War II with strong interests in adopting peaceful approaches toward international relations. As a result, both the Italian and German constitutions provide that international law shall be an integral part of the national legal system. *See* Antonio La Pergola & Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598, 599 (1985).

22. In Bulgaria, the Constitutional Court may review the consistency of domestic laws "with the universally accepted standards of international law." BULG. CONST. art. 149(1)(4). In Estonia, "universally recognized principles and norms of international law are an inseparate part" of domestic law. EESTI VABARIIGI PÕHISEADUS [Constitution] art. 3 (Est). In Macedonia, the "fundamental values of the constitutional order" include "respect for the generally accepted norms of international law," MACED. CONST. art. 8. In Romania, international relations are "based on principles and on the other generally accepted norms of international law." CONSTITUTIA ROMÂNIEI art. 10 (Rom.). In Slovenia, domestic law must be consistent with "generally valid principles of international law," USTAVO REPUBLIKE SLOVENISE [Constitution] art. 8 (Slovenia). In the Federal Republic of Yugoslavia, both treaties and "generally accepted rules of international law" are an integral part of the domestic legal system, YUGO. CONST. art. 16, para. 2. In Russia, "generally recognized principles and norms of international law" are part of the internal law. KONSTITUTSIIA (Rossiiskoy Federatsii) [Constitution] art. 15(4) (Russian Federation) [hereinafter RUSSIA CONST.]. Moreover, basic rights and liberties shall be in "conformity with the commonly recognized principles and norms of the international law." *Id.* art. 17, § 1.

As for treaties, states in East-Central Europe and the former Soviet Union take varying approaches to the issue of whether they are a part of international law.

II. CONSTITUTIONAL STRUCTURE: INTERNATIONAL LAW AND DOMESTIC INSTITUTIONS AND PROCESSES

A. *A Mere Jurisdictional Issue?*

The first hint of the Hungarian Constitutional Court's extension of its already broad powers came early in its opinion in *Retroactivity Case II.* Following the Parliament's enactment of the law on February 16, 1993, the President of Hungary, Árpád Göncz, refused to sign the law. President Göncz then petitioned the Court in *Retroactivity Case II* to examine, in part, the non-promulgated law's conformity with Article 15 of the International Covenant of Civil and Political Rights[23] and Section 7, Paragraph 1 of the European Convention for the Protection of Human Rights.[24] Thus, the Court confronted the question of whether it had been empowered to decide if a non-promulgated law conforms with Hungary's treaty obligations.[25]

The Act on the Constitutional Court (ACC), which delineates the Court's powers, obligations, and jurisdiction,[26] contains no provisions that expressly confer jurisdiction on the Court to scrutinize whether a draft law or other non-promulgated legal act is consistent with a ratified international treaty.[27] In fact, the Court's power to exercise *preliminary norm control*[28] appears to be limited to the review of a draft bill for its consistency with constitutional provisions.[29] This process may be referred to as

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23. "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed." International Covenant on Civil and Political Rights, Dec. 19, 1996, art. 15, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter International Covenant on Civil and Political Rights].

24. *Compare* International Covenant on Civil and Political Rights, *supra* note 23, art. 15 *with* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 7(1), 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention for the Protection of Human Rights](the provisions are the same). See also *Retroactivity Case II, supra* note 2, at 7.

25. In Hungary, a law or legal act does not have legal force, even after it is passed by the Parliament and countersigned by the President, until it is officially promulgated via publication in the official gazette, the *Magyar Közlöny.* MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 26(1) (Hung.) [hereinafter HUNG. CONST.]. In *Retroactivity Case II,* the President had not signed the enacted law and, obviously, the law had not been published in the *Magyar Közlöny.*

26. Act No. XXXII of 1989 on the Constitutional Court (hereinafter ACC).

27. *Id.*

28. The Court exercises preliminary norm control when it reviews a legal act's constitutionality prior to the act's promulgation or, in other words, prior to the act having legal force.

29. ACC, *supra* note 26, arts. 1(a), 33(1).

direct constitutional review, as the standard of constitutionality is the constitutional text itself. This limitation on the Court's power would be consistent with the fact that in most cases, the ACC explicitly grants the Court the power to review only whether a promulgated law is consistent with international agreements to which Hungary is a party.[30] By implication, the Court lacks jurisdiction to decide whether a draft law or non-promulgated legal act is consistent with Hungary's treaty obligations.[31]

Despite the lack of express authorization to decide whether a non-promulgated law is consistent with a treaty, the Court in *Retroactivity Case II* asserted its competence to decide the issue. The Court concluded that Article 7(1) of the Hungarian Constitution compels it to review even a non-promulgated law for consistency with international treaties.[32] Article 7(1) of the Hungarian Constitution states: "The legal system of the Republic of Hungary adopts the generally recognized rules of international law, and shall continue to ensure the accord between Hungary's international legal obligations and her domestic laws."[33] The Court reasoned that through this second clause of Article 7(1), the harmony between Hungarian domestic law and international commitments is a part of the "constitutionality of the norms" that the Court is obliged to uphold.[34] Therefore, any petition to review a legal act—whether promulgated or not—for its consistency with international treaties *necessarily implicates* the Constitution, and thus falls within the Court's jurisdiction.[35] This process may be referred to as *indirect constitutional review*, where the standards of constitutionality by which a law is reviewed are not found in the actual text of the Constitution itself, but rather in a source of law outside the Constitution, such as international treaties. The breadth of the Court's interpretation becomes clear later in the case when the Court concluded that the "international legal obligations" in the second clause of Article 7(1) include not only ratified treaties, but general international law as well.[36]

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30. "If the Constitutional Court establishes that a legislative provision, equal in hierarchy or subordinate to the enactment promulgating the international agreement, or another act of State organs is in conflict with the international agreement in question, it shall annul, wholly or in part, the legislative provision or other acts of State organs contrary to the international agreement." *Id.* art. 45(1).

31. See *Retroactivity Case II*, *supra* note 2, at 8-9.

32. *Id.* at 9.

33. HUNG. CONST. art. 7(1).

34. *Retroactivity Case II*, *supra* note 2, at 9.

35. *Id.*

36. The Court held: "Consequently, without any separate transformation or adaptation, the [generally recognized rules of international law] count among 'the undertaken international-law obligations,' the harmony of which with the

The Court's conclusion in *Retroactivity Case II* substantially expands the Court's jurisdiction over issues implicating international law. Under the reasoning of *Retroactivity Case II*, the Court now may review any petition claiming that a domestic legal act contradicts either a treaty to which Hungary is a party or customary international law.[37] Although the Court's reasoning is straightforward, it is not supported by the existing legislative scheme. First, the Court's interpretation finds no express support in the text of the ACC. Second, the Court's understanding of Article 7(1) is not consistent with the distinction made in the ACC between promulgated and non-promulgated laws. Had the legislature intended to confer jurisdiction on the Court when the claim is that a non-promulgated law violates international treaties, it would not have limited Article 45(1) to legal acts or regulations already in force. Finally, Articles 44 through 47 of the ACC specifically address cases of conflict with international agreements.[38] Nowhere do these articles provide or imply that the

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national law is provided for in the second clause of [Article 7 (1)]." *Id.* at 24. This statement would seem to include both general customary law and general principles of international law. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, § 1(c).

37. The Court stated that "national law cannot prevail against a different, explicit and preemptory rule of international law." *Retroactivity Case II*, *supra* note 2, at 27.

38. Articles 44 to 47 are grouped under the heading "Procedures in cases of conflict with international agreements":

Art. 44 The Constitutional Court shall, *ex officio* or on a motion by the organs or persons specified in Article 21(3) [Parliament, any of its standing committees, or any MP; the President of the Republic; the Council of Ministers or any of its members; the President of the State Audit Office; the President of the Supreme Court; the Chief Prosecutor], decide whether a legislative provision or other act of State organs is in conflict with an international agreement.

Art. 45 (1) If the Constitutional Court establishes that a legislative provision, equal in hierarchy or subordinate to the enactment promulgating the international agreement, or another act of State organs is in conflict with the international agreement in question, it shall annul, wholly or in part, the legislative provision or other acts of State organs contrary to the international agreement.

(2) The publication on the decision or annulment and legal effects of annulment shall be governed by the provisions of Article 41 to 43.

Art. 46 (1) If the Constitutional Court establishes that the legislative provision in conflict with an international agreement is superior to that promulgating the latter, it shall, in view of the circumstances present and by setting a time-limit, invite the organ or person or law-making body

Court may review a non-promulgated legal act for its consistency with an international treaty.

In its haste to exercise jurisdiction in *Retroactivity Case II*, the Court failed to heed the ACC's clear dictates. It is still too early to evaluate the implications of the Court's overreach of its jurisdiction,[39] particularly because *Retroactivity Case II* did not attract much negative publicity from the general public or from other political actors. However, given that the international system and its legal structures inevitably are intertwined with the transition process in Eastern Europe, it is an appropriate time to examine the implications of *Retroactivity Case II* with respect to its treatment of international law and the effects on the national legal system.

B. *The Relationship Between International Law and Domestic Law*

As part of the Court's discussion of jurisdiction in *Retroactivity Case II*, the Court examined the relationship between domestic and international law, including treaties and general international law.[40] In doing so, the Court delineated some far-reaching principles that will have major implications for 1) separation of powers, 2) the development of Hungarian domestic law, and 3) the development of rights in Hungary.

1. Treaties and Domestic Laws

The Court in *Retroactivity Case II* makes the status of treaties, the ACC, and the Constitution legally incompatible. Hungary maintains strict adherence to the dualist model for treaties by

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having concluded the international agreement to remove the conflict.
(2) The organ or person to remove the conflict covered by para. (1) shall comply with its/his duty within the time-limit set.

Art. 47 (1) If the Constitutional Court establishes that the law-making body failed to perform its law-making duty under the international agreement concerned, it shall, by setting a time-limit, invite the body in default to comply with its duty.
(2) The body in default shall comply with its law-making duty within the time-limit set.

ACC, *supra* note 26.

39. *See supra* notes 18-19 and accompanying text (citing scholars that have commented on the ruling).

40. *See generally, Retroactivity Case II, supra* note 2. Incidentally, during a conference held in 1992, one of the Hungarian Constitutional Court judges stated that it was not appropriate for the Court to interpret Article 7 before the political branches have had a chance to legislate on it.

requiring that a treaty be incorporated into the domestic legal system—either through a parliamentary statute or some other legal act, including an executive decree or even an agency regulation—before it acquires legal force.[41] These acts of "transformation" or "incorporation" transfer treaty terms into domestic law and, ostensibly, can be applied in the same manner as other legal regulations.

Unlike other states in the region, Hungary's Constitution contains no provisions regulating the relationship between international treaties and legislative acts.[42] The hierarchy of these two norms, however, can be partially inferred from the ACC, which provides that treaties generally prevail over inconsistent domestic laws, unless the transformation act that incorporated the treaty into domestic law is lower in the hierarchy than the inconsistent domestic law.[43] For example, if a treaty was

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41. 1982-évi.11.tvr. tövény a jogalkotârôl, art. 16 (Law on Legislation). ("Those international treaties which contain general mandatory norms must be announced in a Hungarian law corresponding to the level of that treaty.") (author's translation). The "tvr" stands for "törvényerejû rendelet" and, although different from an act of the Hungarian Parliament, carries the same legal force.

42. *Cf.* EESTI VABARIIGI PÕHISEADUS [Constitution] art. 123 (Est.) ("If Estonian laws or other acts contradict foreign treaties ratified by the Riigikogu, the provision of the foreign treaty shall be applied"); ÚSTAVA CESKÉ REPUBLIKY [CONSTITUTION] art. 10 (Czech. Rep.) [hereinafter CZECH. CONST.] ("Ratified and promulgated international treaties on human rights and fundamental freedoms to which the Czech Republic is obligated are directly binding and take precedence over the law."); MACED. CONST. art. 118 ("The international agreements . . . are part of the internal legal order and cannot be changed by law."); CONSTITUTIA ROMÂNIEI [Constitution] art. 11(1) (Rom.) ("The Romanian state pledges to fulfill, to the letter and in good faith, its commitments under the treaties to which it is a party."); ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] art. 11 (Slovak Rep.), ("The international agreements on human rights and basic freedoms ratified by the Slovak Republic . . . take precedence over its laws whenever they guarantee a wider scope of constitutional rights and freedoms."); RUSSIA CONST. art. 15(4) ("If an international treaty of the Russian Federation stipulates other rules than those stipulated by law, the rules of the international treaty shall apply.").

43. See *supra* note 38 (setting forth text of art. 45(1)). Many states, such as Italy, adopt the principle that treaties are of the same rank as ordinary national laws, and the law that is later in time prevails. La Pergola and Del Duca, *supra* note 21, at 607. Accordingly, an incorporated treaty prevails over inconsistent prior law, and treaties may be superseded by subsequently enacted legislation. *Id.* There are some special treaties that prevail over all domestic law, such as the Italian Lateran Pacts and the European Community treaties. *Id.* at 607-21. Similarly, the United States has a "last-in-time" rule, which also allows federal laws to modify treaties. In the United States, the Constitution assures that treaties, like federal laws, are supreme over state laws. *See* Whitney v. Robertson, 124 U.S. 190 (1888).

Other states provide for the supremacy of treaties over even subsequently promulgated laws. *See* CONSTITUCION [Constitution] art. 96 (Spain); FR. CONST. art. 55; GREEK CONST. art. 28(1)).

incorporated by an agency regulation and a parliamentary statute was inconsistent with the treaty, the parliamentary statute would prevail because the agency regulation that transformed the treaty into domestic law ranks lower than a parliamentary statute. Although not expressly provided, some domestic norms may prevail over inconsistent treaty norms because a domestic legal act may be higher in rank than the act incorporating the treaty.

The Court in *Retroactivity Case II* vitiates this scheme by adopting the indirect constitutional review approach, which applies international law, including treaties, as standards of constitutionality by which domestic statutes may be judged.[44] This approach plainly suggests that treaties are superior to all legal acts, even when the challenged legal regulation is higher in rank than the act promulgating the treaty. The Court's conclusions in *Retroactivity Case II* also suggest that treaties even prevail over legislative acts adopted and promulgated *subsequent* to the incorporation of the relevant treaty.

2. General International Law: Direct Incorporation

In *Retroactivity Case II*, the Court stated, without offering any explanation, that under Article 7(1) "generally recognized rules of international law" are "integral parts of Hungarian law without any further transformation."[45] The Constitution, the Court asserted, transformed international law into domestic law.[46]

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44. *See supra* notes 32-36 and accompanying text (describing the meaning of indirect constitutional review).

45. *Retroactivity Case II*, *supra* note 2, at 10.

46. *Id.* at 10-12. The transformation or incorporation of international law into a state's domestic law invokes the long-running debate between monism and dualism. However, it is not helpful to use this debate to evaluate the Court's findings because the *consequences* of each school of thought are not necessarily different. Both a dualist and a monist may adhere to the principle of immediate application and supremacy of international law in the domestic sphere. Notwithstanding the debate between the monists and the dualists, international law will not be operative on the domestic level unless the national constitution or some other basic rule of domestic law provides that it is applicable. For discussions of monism and dualism, see L. OPPENHEIM, INTERNATIONAL LAW 35-44 (Hersch Lauterpacht 8th ed. 1955); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936). The traditional distinction between monism and dualism has been criticized. *See, e.g.*, Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25 (1959); J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 68-90 (6th ed. 1967). Even a monist system, such as the Dutch system, contains provisions in its Constitution establishing that it is a monist country. The dualist, however, would maintain that the domestic law is independent of and is in no way subordinate to international law; instead, it is the will of domestic law itself that may elect, in some or in all cases, that international law is supreme and directly applicable on the domestic level.

The language of Article 7(1) of the Hungarian Constitution does not compel the Court's conclusion that "generally recognized rules of international law" automatically become part of the domestic legal system.[47] Many constitutions contain provisions similar to Article 7(1). However, these provisions often merely manifest the general intention to be part of the community of states. The Macedonian Constitution, for example, provides that one of the fundamental values of the constitutional order of the Republic of Macedonia is to respect the generally accepted norms of international law.[48] The legitimacy of the Constitutional Court's conclusion would be enhanced if it were based on a clearer justification. For example, the German Basic Law, unlike Article 7(1) of the Hungarian Constitution, is explicit about the status of international law; it states that "[t]he general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."[49] The Greek Constitution is similarly precise.[50]

The Italian Constitution, on the other hand, resembles the Hungarian Constitution. It states: "Italy's legal system conforms with the generally recognized principles of international law."[51] Although the language of the Italian Constitution is less explicit than Article 7(1) of the Hungarian Constitution concerning the consistency between international and domestic law, the Italian Constitutional Court ruled that international law is incorporated automatically into the domestic legal system and prevails over

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47. *Retroactivity Case II*, *supra* note 2, at 11.

48. MACED. CONST. art. 8. *See also* FR. CONST. pmbl. (France) ("The French Republic, faithful to its traditions, shall observe the rules of public international law." CONST. STATUUT NED [Constitution] art. 90 (the Netherlands) ("The Government shall promote the development of the international rule of law."). For additional examples in East-Central Europe, see *supra* note 22.

49. GRUNDGESETZ [Constitution] art. 25 (F.R.G.).

50. "The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law." GREEK CONST. art. 28(1).

For treaties, see CZECH CONST. art. 10, "Ratified and promulgated international treaties on human rights and fundamental freedoms to which the Czech Republic is obligated are directly binding and take precedence over the law." For a case study of the Czech Republic's treatment of international law in its Constitution, see Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT'L L. 427 (1994).

51. COST. [Constitution] art. 10 (Italy).

conflicting domestic legislation.[52] However, the Italian Court added two important caveats—no rules of customary international law may violate Italy's highest and most basic constitutional principles, and the Court, as the protector of the Constitution, has the authority to ascertain what these basic constitutional principles are and to determine when these principles conflict with international law and thus prevail over it.[53]

Much like the Italian Court, the Hungarian Constitutional Court in *Retroactivity Case II* determined through constitutional interpretation that generally recognized rules of international law are automatically transformed into the domestic legal system.[54] Notably, the Hungarian Constitution, unlike the German and Greek Constitutions, does not expressly provide that general principles of international law automatically become part of the domestic law. Therefore, the legitimacy of the Hungarian Constitutional Court's decision in *Retroactivity Case II* stands on equivocal ground.

3. Separation of Powers Concerns

Of course, the Court is vested with the power to interpret the Constitution, including Article 7(1). The Court's interpretation of Article 7(1) in *Retroactivity Case II*, however, fundamentally redefines Hungary's constitutional boundaries. Indeed, like the Italian Constitutional Court, the Hungarian Constitutional Court has substituted the Constitution for the legislature and the government as the mediator between international and domestic law. Under the Court's reasoning in *Retroactivity Case II*, legislative or executive actions unilaterally modifying Hungary's treaty or customary law obligations may be challenged for their constitutionality. Such actions may be found unconstitutional for violating the second clause of Article 7(1), which requires consistency between domestic law and Hungary's international legal obligations. The Court effectively has taken away the political branches' power to raise an objection to international practice or to violate international law.

One substantive advantage of the Court's findings in *Retroactivity Case II* is that international norms, which presumably provide greater protection of human rights than

52. *See generally* La Pergola and Del Duca, *supra* note 21, for a discussion of the Italian Constitutional Court's 1984 ruling that European Community law is supreme to domestic law.

53. Judgment No. 170 of June 8, 1984 (S.p.A. Granital v. Amministrazione finanziaria), 1984 Giur. It. 1098, 1116 (Italy).

54. *Retroactivity Case II*, *supra* note 2, at 11-12.

domestic norms,[55] automatically become a part of domestic law. Nonetheless, as an institutional matter, it is disturbing to see the Court single-handedly relinquish a part of Hungary's sovereignty, particularly when the constitutional text is not as explicit as that of the German or Greek Constitutions. By replacing the legislature with the Constitution as the gatekeeper between international and domestic law, the Court has imposed severe, if not absolute, limitations on the ability of the Parliament or the Government to refrain from giving effect, for example, to certain provisions of a treaty. While disagreements over the proper interpretation of treaty provisions in practice tend to be resolved by negotiations between states or by payment of compensation, the inability of a state, as a matter of domestic law, to break its international treaty commitments deprives it of a significant bargaining tool with other states. The lack of this bargaining leverage is particularly significant when there is a good faith disagreement about the respective state parties' obligations under a treaty.

While few would challenge the Hungarian Constitutional Court's general power to interpret the Constitution, the Court has stretched this interpretive power too far by acting without input from the other branches of government and establishing principles that impose broad restraints on the political branches' ability to conduct international policy.

4. Rules of Interpretation and the Status of International Law

Principles or rules of interpretation can be used to structure the legal relationship between international law and domestic law. The Spanish Constitution, for example, provides that the norms related to "basic rights and liberties . . . recognized by the Constitution, *shall be interpreted in conformity* with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain."[56] This interpretive principle assures that international law is much more closely intertwined with the development of Spanish domestic law than if such a principle did not exist.

The Hungarian Constitutional Court in *Retroactivity Case II* sets out a broad rule of statutory *and* constitutional interpretation. After declaring that "the generally recognized rules

55. An obvious example would be those norms contained in the Universal Declaration of Human Rights, many of which do not appear in national constitutions.

56. CONSTITUCION [Constitution] tit. I, art. 10(2) (Spain) (emphasis added).

of international law are not parts of the Constitution, but are 'obligations undertaken,'"[57] the Court states the opposite proposition in forceful language—that Article 7(1) requires that "the Constitution *and* domestic law . . . be interpreted in such a manner that generally accepted rules of international law *shall be effective.*"[58]

At the very least, the Court established Hungary's version of the United States *Charming Betsy* rule, which states that federal statutes should be construed, "where fairly possible," in a manner consistent with international law.[59] The Court in *Retroactivity Case II* went further than the *Charming Betsy* rule, however, by requiring not only Hungarian laws, but also constitutional provisions to be interpreted consistently with international law.[60] The obligatory language in *Retroactivity Case II* suggests that the Court established the supremacy of international law over the Hungarian Constitution by insisting that constitutional provisions be consistent with the dictates of international law. This reading of *Retroactivity Case II* is consistent with a later section of the opinion in which the Court considered the effects of a conflict between a constitutional provision and international law.[61] The Court stated that Article 7(1) articulates a "condition of being a member of the commonwealth of nations," and that the "norms of another legal system, international law, are prevailing . . . . [In fact,] a rejection of the international law would be unconstitutional," contrary to Article 7(1) of the Constitution.[62]

This unequivocal language takes the Hungarian Court beyond the United States *Charming Betsy* rule and the Italian Constitutional Court's position, which tempers the supremacy of international law by subordinating it to the most basic principles underlying the Italian Constitution.[63] It is unclear whether the Hungarian Court will adopt a similar limitation on the effect of international law should it face the same issue in a different case. In *Retroactivity Case II*, however, the Hungarian Court painted

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57. *Retroactivity Case II, supra* note 2, at 11.

58. *Id.* at 11 (italics added).

59. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

60. "[T]he harmony [with international law, including treaties and generally recognized rules] must be ensured with the entire domestic law, including the Constitution." *Retroactivity Case II, supra* note 2, at 11-12.

61. *See infra* notes 139-43 and accompanying text.

62. *Retroactivity Case II, supra* note 2, at 26.

63. *See supra* notes 51-53 and accompanying text..

with very broad strokes, suggesting that any constitutional provision that contradicts international law is invalid.

C. *The Constitutionalization of International Law*

Prior to *Retroactivity Case II*, the ACC conferred jurisdiction on the Court over cases in which the issue was whether promulgated laws were consistent with international treaties.[64] In order to justify its exercise of jurisdiction in *Retroactivity Case II*, the Court had to consider fully the relationship between international law—both treaty and customary—and domestic law.[65] In *Retroactivity Case II*, the Court established that Article 7(1) of the Hungarian Constitution requires the Court to consider questions of international law when ruling on the constitutionality of a domestic law. The Court's broad interpretation of Article 7(1) ostensibly gave it power not only to judge whether a law—promulgated or otherwise—is inconsistent with an international treaty, but also to determine whether the law is unconstitutional because it is inconsistent with either international treaties or customary international law.[66] By adopting indirect constitutional review,[67] the Court "constitutionalized" international law by effectively assigning constitutional status or effect to both customary international law and international treaties.[68]

1. Amendment of International Law on the National Level

The constitutionalization of international law has broad implications for Hungary's constitutional structure. If customary international law is given constitutional status, as *Retroactivity Case II* strongly suggests, it automatically becomes valid on the domestic level without any legislative or executive action. Moreover, by virtue of its constitutional rank, amendment of customary international law would require constitutional amendment, rather than mere statutory enactment.

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64. ACC, *supra* note 26, art. 1(c).

65. *See supra* note 32 and accompanying text..

66. *See supra* note 36 and accompanying text.

67. *See supra* notes 35-36 and accompanying text.

68. The constitutionalization of international law is not unprecedented. In Peru, for example, "[p]rinciples contained in treaties relative to human rights have constitutional priority. They cannot be modified except by the procedure regulating amendments to the Constitution." CONSTITUCION [Constitution] art. 105 (Peru).

Some commentators have criticized raising international law to constitutional status on the basis that it is extremely undemocratic to require domestic political actors to go through the more difficult process of amending the constitution in order to define the relationship between international law and domestic law.[69] Although this argument may be forceful in the United States, where it is extremely difficult to amend the Constitution, it does not carry much weight in Hungary, where the Constitution can be amended by a mere two-thirds vote of the Parliament.[70] While the two-thirds vote requirement is more difficult to achieve than a majority vote, it is not a significant hurdle depriving Hungarians of democratic expression. The two-thirds requirement is a sufficiently low threshold and therefore permits democratic exercises, while at the same time prevents the governing party or coalition from renouncing Hungary's commitments under customary international law too quickly. The two-thirds vote requirement should come as a comfort to those who believe that international law exerts a positive influence on the establishment of the rule of law in Hungary. It should also reassure Hungary's neighbors, such as Romania and Slovakia, which may view Hungary as a threat due to the presence of a substantial number of Hungarians in these states.[71]

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69. *See, e.g.,* Phillip R. Trimble, *A Revisionist View of Customary International Law,* 33 UCLA L. REV. 665 (1986) (arguing that federal law is superior to customary international law); Covey T. Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in U.S. Courts,* 4 HOUS. J. INT'L L. 59 (1981); Jack M. Goldklang, *Back on Board* The Paquete Habana,: *Resolving the Conflict Between Statutes and Customary International Law,* 25 VA. J. INT'L L. 143, 148 n. 26, 151 (1984).

For cogent criticisms of Trimble, see Lea Brilmayer, *International Law in American Courts: A Modest Proposal,* 100 YALE L.J. 2277, 2309-11 (1991). *See also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny,"* 100 HARV. L. REV. 853, 875-78 (1987).

70. HUNG. CONST. art. 24 (3). Should Parliament feel that a particular rule of international law is undesirable, it need not amend the text of Article 7 itself. Parliament can amend the application of a "generally recognized rule of international law" by passing an act or statute that has "constitutional force," which requires a two-thirds vote in Parliament. By passing such legislation, the Parliament may alter an undesirable rule of international law from the domestic point of view, while preserving Hungary's commitment to remain a peaceful member of the international community through its obligation to ensure "the accord between the obligations assumed under international law and domestic law." *Id.* art. 7 (1).

71. "The Republic of Hungary recognizes its responsibilities towards the fate of Hungarians living outside the borders of the country and shall assist them in cultivating their relations with Hungary." *Id.* art. 6(3). The fact that Hungary's relationship with and responsibility for its minorities has been raised to constitutional status has not been a comfort to its neighbors.

The former Hungarian Minister of the Interior and Prime Minister, Peter Boross, once stated that Hungary "can improve [its] security and the peace of the

Notwithstanding the details of Hungary's constitutional amendment process, states in this region would be well-served to explore issues related to international law as constitutional standards and the implications for the legislative or amendment process.

2. Increasing Monopolization of the Power of Constitutional Review

The Hungarian Constitutional Court expanded the scope of its constitutional review power in *Retroactivity Case II.* Initially, a judicial or quasi-judicial body, such as a constitutional court, seems an appropriate forum to entrust with tasks such as interpreting or expounding the meaning of international law norms or reviewing for consistency between apparently conflicting norms. These tasks involve reviewing evidentiary questions, such as how much state practice is required, how much consistency is required, what evidence is required to establish *opinio juris*, and whether treaties may be invoked as evidence of customary international law.[72] Nonetheless, unless there is a specific provision in the constitution or in a basic law requiring the Court to interpret international law, the exercise arguably might be carried out by other branches of government. The Hungarian Ministry of Foreign Affairs, for example, might apply different standards from those used by the Constitutional Court to determine which norm has achieved the status of a generally recognized rule of international law.

Indeed, the Polish Constitutional Tribunal (Tribunal) was invited to incorporate international law into domestic law through the broad language in Article 1 of the Polish Constitution,[73] but refused to do so. Like the Hungarian Constitution, the Polish Constitution does not expressly define the relationship between international law and domestic law, and the Act on the Polish Constitutional Tribunal does not confer upon the Tribunal the power to review domestic legal acts for conformity with

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Hungarians outside the borders with a show and organization of force." Lucy Hooker, *From Caterer to Nation's Leader*, BUDAPEST WEEK, Sept. 30-Oct. 6, 1993, at 3.

72. For additional examples of relevant questions facing constitutional tribunals, see LOUIS H. HENKIN, ET AL., INTERNATIONAL LAW 37-40 (2d ed. 1987).

73. "The Republic of Poland is a democratic State ruled by law and implementing the principles of social justice." KONSTYUCYJNA [Constitution] art. 1 (Poland).

international conventions ratified by Poland.[74] In at least three cases, the Tribunal referred to international norms to interpret the Polish Constitution.[75] The Tribunal, however, has not been willing to go as far as the Hungarian Constitutional Court, for it "does not consider itself competent to verify the compatibility of Polish domestic law with international law"[76] without a more explicit basis upon which to justify asserting jurisdiction. In Poland, therefore, the legislature maintains its role as a mediator between international and national law.

In Hungary, as in other states that have a system of centralized constitutional review, the Constitutional Court is generally the only body that has jurisdiction in cases that implicate constitutional issues at an abstract level.[77] By asserting its jurisdiction to review either a draft law or a promulgated act for indirect unconstitutionality—whether it conflicts with international law—the Hungarian Court effectively assigned constitutional status or rank to customary international law and treaties.[78] With this jurisprudential move, the Court solidified its power to review legislation when international law is implicated. The fact that the Court has held that international law is a constitutional issue, coupled with the fact that the Constitutional Court is the only institution vested with the power of constitutional review, means that the Court is the only branch of government that has jurisdiction to determine both the existence of a generally recognized rule of international law and the content of such a rule. The Court has established a virtual monopoly over the power not only to declare the existence of certain customary international norms, but also to define the contours and scope of these norms. There currently is no Hungarian law nor any legal act upon which the Court may explicitly or implicitly rely to justify this aspect of its decision in

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74. Thomas Dybowski, *Report on the Role of the Constitutional Tribunal in the Interpretation of International Law in Poland, in* THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW (Council of Europe, 1993) 53-56.

75. *See* Case K 8/91 (dealing with the conditions of service of frontier guards); Case K 11/90 (concerning religious education in state schools), and Case K 1/89 (concerning claims to pension and requirements of proof) (Poland) *cited in* Dybowski, *supra* note 74, at 56.

76. *The Implementation of International Human Rights Agreements, in* THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW (Council of Europe, 1993) at 35.

77. *See generally* MAURO CAPPELLETTI, 4 THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (Oxford 1991); *see also* EDWARD MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW (1986); Louis Favoreu, *Constitutional Review in Europe, in* CONSTITUTIONALISM & RIGHTS (Louis Henkin & Albert Rosenthal, eds., 1990).

78. *See supra* notes 32-36 and accompanying text.

Retroactivity Case II. It appears to be the exercise of raw judicial power.

Rather than relying upon the general function of constitutional review to derive a constitutional court's power to review and interpret international law, a more legitimate basis for this power could be provided by the adoption of a constitutional provision similar to Article 100, Clause 2 of the German Basic Law. This provision states:

> If, in the course of litigation, doubts arise as to whether a rule of public international law is an integral part of federal law and whether such a rule directly creates rights and duties for the individual, the court shall obtain a decision from the Federal Constitutional Court.[79]

This type of provision would resolve the issue of jurisdiction over issues of incorporation or transformation of international law into domestic law, as well as the issue of whether an international norm, once incorporated, provides individuals with the right to invoke that norm.[80] Moreover, a provision similar to Article 100, Clause 2 of the German Basic Law would minimize the possibility of embarrassment that may arise if two or more branches of government publicly disagree about the status of a particular international norm on the national level.

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79. GRUNDGESETZ [Constitution] [GG] art. 100, cl. 2 (F.R.G.). The draft Czechoslovakia Federal Constitution, before the "Velvet Divorce," contained a similar clause. *See* Stein, *supra* note 50, at 434. Although a fascinating jurisprudential exercise, this Article will not discuss the epistemological problems of norms that remain valid and enforceable until declared otherwise. For an enjoyable bit of philosophical "freewheeling" on these issues, *see* Carlos S. Nino, *A Philosophical Reconstruction of Judicial Review,* 14 CARDOZO L. REV. 799 (1993).

80. The principles of "invocability" and "direct applicability" are distinct and separate, despite scholarly treatment that collapses the two into one. Invocability is somewhat related to the United States concept of standing to sue. Thus, the determination of whether a treaty is directly applicable on the domestic level does not necessarily establish, in a particular dispute, that certain parties may invoke treaty norms to resolve that dispute. *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis,* 86 AM. J. INT'L L. 310, 317 (1992).

In the United States context, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 131, cmt. h: ("[W]hether a treaty is self-executing is not to be confused with whether the treaty creates private rights or remedies."). United States courts sometimes confuse the issue of whether a treaty is self-executing with the issue of whether the plaintiff has a "cause" or "right of action." *See, e.g.,* Frolova v. U.S.S.R., 761 F.2d 370, 373-76 (7th Cir. 1985); Tel-Oren v. Libyan Arab Republic 726 F.2d 774, 808-10 (D.C. Cir 1984) (Bork, J., concurring), *cert. denied,* 470 U.S. 1354 (1985); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979).

III. INTERNATIONAL LAW, THE HUNGARIAN CONSTITUTIONAL COURT, AND THE DEVELOPMENT OF RIGHTS IN HUNGARY

A. *Access of Individuals to the Constitutional Court*

On a more practical level, the constitutionalization of treaties arguably provides a mechanism for individuals to petition the Constitutional Court directly to vindicate their treaty-based rights. This option previously did not exist under Hungary's legal scheme. To understand how the constitutionalization of treaties provides individual access to the Constitutional Court, it will be helpful to review the situation in Hungary prior to the decision in *Retroactivity Case II.*

1. The Act on the Constitutional Court

The Act on the Constitutional Court (ACC) permits anyone, including individuals, to submit petitions for alleged violations of constitutional rights[81] or to challenge the constitutionality of an existing legal rule.[82] However, when the claim is that a legal rule contradicts a treaty to which Hungary is a party, the ACC permits only high-ranking government officials to petition the Court.[83] Thus, while the ACC allows individuals to petition the Court to review the consistency of laws currently in force with the Constitution, individuals other than those specified under the ACC are precluded from invoking the Court's jurisdiction to challenge legislative or governmental acts for violating an international treaty to which Hungary is a party.

This limitation is neither arbitrary nor irrational. Several reasons may justify restricting to certain government officials the right to invoke treaties to challenge governmental acts or parliamentary acts, and thus policy, in the Constitutional Court. For example, it may be undesirable to hamper unnecessarily the Government's ability to conduct foreign policy.[84] Because of this

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81. ACC, *supra* note 26, arts. 1(d), 21(4), 48(1).

82. *Id.* arts. 1(b), 21(2).

83. The Parliament (any of its standing committees) or any member of Parliament; the President of the Republic; the Council of Ministers or any of its members; the President of the State Audit Office; the President of the Supreme Court; and the Chief Prosecutor may all challenge a legal rule as contradictory to Hungary's treaty obligations. *Id.* art. 21(3). *See also* ACC, *supra* note 26, art. 1(c).

84. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1001 (1979) (Rehnquist, J., concurring) ("I am of the view that the basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign

concern, judges in the United States have held that the executive branch should not be embarrassed by judicial intervention in "political" questions.[85] Judges in the United States have designed other doctrines, such as the different requirements of justiciability, to provide the President, and occasionally Congress, with the freedom and leverage necessary to conduct United States foreign relations effectively.[86]

In Hungary, the structure of the ACC explicitly preserves the Government's and the Parliament's control over foreign affairs by preventing individuals from challenging the actions of either institution if the challenge involves Hungary's treaty obligations.[87] Accordingly, individual citizens could not hamper the ability of the Parliament to conduct foreign relations within its sphere of competence; the ACC scheme allows Parliament to adopt legislative decisions or acts that may place Hungary in violation of its treaty obligations without fear that an individual will sue the Parliament. The same limitation applies to governmental actions.

2. The ACC and the Protection of Rights Before *Retroactivity Case II*

Unfortunately, by precluding individuals from claiming that a statute or other legal act violates an international treaty, the ACC does not offer a strong, structural framework for the protection of human rights in the Hungarian legal system. Prior to *Retroactivity Case II*, individuals could not invoke the Court's jurisdiction to challenge acts by either the Parliament or the Government that infringed upon internationally recognized

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relations and the extent to which the Senate or the Congress is authorized to negate the action of the President").

85. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979); Baker v. Carr, 369 U.S. 186 (1962); Raminez v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), *remanded for consideration on other grounds*, 105 S. Ct. 2353 (1985). The political question doctrine has been subject to much criticism. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine*, 85 YALE L.J. 597 (1976).

86. The first limitation, of course, is whether the international agreements create private rights or provide private causes of action in domestic courts. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 907 cmt. a. There may be jurisdictional limitations as well. Finally, suits against the United States are subject to the sovereign immunity defense, unless the United States government has consented. *See* United States v. Lee, 106 U.S. 196, 207 (1886); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. 2.

87. *See supra* note 83 and accompanying text.

human rights even though the acts conflicted with Hungarian treaty obligations.[88]

Hungary's failure to provide an effective tribunal to vindicate treaty-based human rights arguably violates both the Hungarian Constitution's mandate and Hungary's obligations as a party to the International Covenant for Civil and Political Rights. First, Article 57(5) of the Hungarian Constitution requires that "everyone shall have the right to legal recourse against a decision of a court, state administration, or other authority, which infringed his rights or lawful interests."[89] The "rights and lawful interests" provided under Article 57(5) are not limited to those in or derived from the Hungarian Constitution; neither the Hungarian constitutional nor legislative scheme excludes "rights and lawful interests" derived from international treaties to which Hungary is a party from the protection provided in Article 57(5). Therefore, the lack of any mechanism by which individuals may claim protection of those "rights or lawful interests" that can be gleaned from Hungary's treaty obligations may entitle a person to challenge this structural infirmity as a constitutional violation. In *Retroactivity Case II*, the Constitutional Court gave full meaning to the language of Article 7(1) of the Hungarian Constitution, holding that the Constitution requires the Republic of Hungary not only to respect the universally accepted rules of international law, but also to ensure the accord between the obligations assumed under international law and domestic law.[90] Read together with Article 57(5) of the Constitution, the Court's holding in *Retroactivity Case II* means that if the application of a domestic rule violates Hungary's international obligations—and the relevant treaty provides rights and duties for the individuals—the failure to provide a mechanism to ensure the consistency between domestic laws and international law violates Article 57(5) of the Hungarian Constitution. If individuals are excluded from petitioning the Court on the basis that a government action violates a treaty (and the eligible parties[91] refuse to petition on their behalf), they are effectively left without a remedy. This exclusion places Hungary in violation of the Constitution's dictates.

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88. Such rights include those in the International Covenant on Civil and Political Rights, *supra* note 23, which has been properly transformed into a domestic statute. 1976-évi.8.tvr. (Hung.). Another set of internationally recognized human rights is found in the International Covenant on Social, Economic and Cultural Rights, which Hungary has ratified and promulgated. 1976-évi.9.tvr. (Hung.)

89. HUNG. CONST. art. 57(5) (emphasis added).

90. *Retroactivity Case II*, *supra* note 2, at 23-28.

91. These are high government officials. For a list of these parties, see *supra* note 83.

Second, the International Covenant on Civil and Political Rights (Covenant) obliges parties to provide an effective domestic mechanism for individuals to invoke the protection of rights conferred under the Covenant.[92] While it is generally agreed that each signatory may determine which kind of mechanism—judicial or otherwise—will fulfill its obligations under the Covenant, the failure to provide an independent body to evaluate claims or the failure to provide a remedy arguably places the state in violation of its obligations under the Covenant.

By failing to provide a tribunal to vindicate treaty-based human rights, the Hungarian legal system does not fully protect the rights enumerated in Hungary's treaty obligations. Neither the ACC nor any other legal regulation addresses this structural problem.

3. *Retroactivity Case II* and a New Mechanism of Access for Treaty-Based Rights

In *Retroactivity Case II* the Hungarian Constitutional Court attempted to fill these holes in the area of rights protection through constitutional interpretation. The Court unwittingly created an avenue through which individuals may petition the Court directly to vindicate treaty-based rights, such as those afforded by the International Covenant for Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights,[93] or the European Convention for the Protection of Human Rights. Even though the ACC does not explicitly confer a right to petition the Court,[94] the Court's interpretation of the second clause of Article 7(1) of the Hungarian Constitution in

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92. The states parties to the Covenant have undertaken:

> (a) To ensure that any person whose rights and freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming that such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

International Covenant on Civil and Political Rights, *supra* note 23, art. 2(3).

93. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967).

94. The analogous term in United States jurisprudence is "standing" to sue.

Retroactivity Case II provides a strong basis upon which to assert that right.

An individual could argue that the Constitutional Court has jurisdiction over constitutional issues and that, under its interpretation of Article 7(1) of the Constitution, international agreements to which Hungary is a party are accorded constitutional status.[95] Because the consistency between a domestic legal rule and an international treaty is now a constitutional issue,[96] individuals may petition the Court alleging that a provision of law is unconstitutional.[97] Therefore, individuals may invoke the jurisdiction of the Court by claiming that a domestic rule of law is inconsistent with an international treaty.

The ACC itself provides independent support for this conclusion. Article 48 of the ACC provides that anyone who has exhausted all other legal remedies *or has no other remedy available,* may submit a constitutional complaint to the Constitutional Court because of the violation of his or her constitutional rights.[98] Under the broad reading of Article 7(1) articulated by the Court in *Retroactivity Case II,* the failure to ensure the consistency between domestic law and Hungary's international obligations is a constitutional violation. Additionally, the ACC scheme, at least prior to *Retroactivity Case II,* effectively deprived individuals of any remedy by precluding them from asserting claims in any forum that a Hungarian legal norm is inconsistent with Hungary's treaty obligations.[99] Article 48 of the ACC is thus implicated and individuals arguably may invoke the jurisdiction of the Court.

4. Vindication of Customary International Law-Based Rights

What are the implications of the Court's constitutionalization of customary international norms? The ACC ostensibly precludes individuals from invoking the Court's jurisdiction to vindicate their treaty-based rights.[100] The ACC, however, does not mention

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95. *See supra* notes 60-63 and accompanying text.

96. *See supra* notes 32-36 and accompanying text.

97. "The Constitutional Court shall be competent to decide constitutional complaints lodged in cases of violations of constitutional rights." ACC, *supra* note 26, art. 1(d). "Any person may lodge a constitutional complaint with the Constitutional Court alleging that he/she has been injured by the application of an unconstitutional provision of law in respect of his/her rights and that no other remedy is available or the remedy has been exhausted." *Id.* art. 48(1); *see also id.* arts. 1(b), 21(2).

98. *Id.* art. 48 (emphasis added).

99. *See supra* notes 26-31 and accompanying text.

100. *See supra* notes 81-87 and accompanying text.

whether individuals have the right to petition the Court when their "rights or lawful interests"[101] derived from other sources of international law—customary international law, general rules of international law, and peremptory norms—are violated. For example, some rights may be protected by the Universal Declaration of Human Rights[102] that, while not affirmed in binding treaties, have characteristics of customary international law.

Individuals can argue that the basis of their right to petition the Court directly to protect rights under customary international law stems from the constitutionalization of customary international law in *Retroactivity Case II.* Because the Court is required to hear individual complaints of unconstitutionality,[103] and because a legal act's consistency with international law is now a constitutional issue via indirect constitutional review,[104] individuals arguably may rely upon customary international law to petition the Court.

B. *The Indirect Method of Incorporation: Interstitial Development of Fundamental Rights*

In addition to expanding the right of an individual to bring a human rights claim, *Retroactivity Case II* also may have an indirect, but extraordinary, impact on the Court's jurisprudence in the area of fundamental rights. Constitutional courts are vested with the general power of abstract norm control, which inevitably involves construing the "open-ended" provisions in a constitution; fundamental rights are often based upon or derived from these general constitutional provisions.[105] Constitutional courts often have the opportunity to declare the existence of these

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101. HUNG. CONST. ch. XII, art. 57(5).

102. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948).

103. *See supra* note 97 and accompanying text.

104. *See supra* notes 32-36 and accompanying text. Recall, under the Court's reasoning in *Retroactivity Case II*, international law, when applicable, shall be used as standards by which the constitutionality of domestic legal norms will be judged.

105. Professor Ely defines "open-ended" provisions as those phrases in the Constitution "that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it." JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980). Prominent examples of such provisions are in the First, Fifth, Ninth and Fourteenth Amendments of the United States Constitution. Of course, the import of considerations outside the explicit text does not necessarily render the decision-making process illegitimate.

fundamental rights and, in doing so, to delineate the scope of these rights.[106] Some of the established constitutional courts in Europe refer to a state's customs, history, or certain documents to assist them in interpreting these broad constitutional provisions.[107] Given the broad language in *Retroactivity Case II* about Hungary's obligation to ensure the accord of domestic law and international law, the Court, in reviewing the constitutionality of a law, should refer to, or incorporate by reference, the norms in international treaties or customary rules.

This "indirect" or "weak" method of incorporation of international law involves the domestic tribunal using such norms to guide its jurisprudence, particularly in grappling with the concept of deriving unenumerated rights from "open-ended" provisions.[108] Under this approach, international norms comprise only one facet in the difficult task of constitutional interpretation. One possible use of international law under this method is to fashion a remedy not explicitly granted under a constitution or in a law in response to a violation of international law. In *Fernandez v. Wilkinson*,[109] for example, a United States district court created a remedy under international human rights norms to grant relief to aliens from arbitrary detention.[110]

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106. *E.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1991) (discussing the limits on the right to privacy). Cappelletti notes three reasons for the expansion of the role of constitutional courts: (1) the growth of statutory law, where even "the best of draftsmanship leaves both gaps to be judicially filled and hidden ambiguities and uncertainties to be judicially resolved"; (2) the trend in many countries "towards the adoption and judiciary enforcement of declarations of fundamental rights"; and (3) the view that the judicial role in modern societies is necessary to develop and preserve a democratic system of checks and balances. CAPPELLETTI, *supra* note 77, chs. 3-5 (1991).

107. CAPPELLETTI, *supra* note 77, at ch. 53 (1991). For examples of constitutional courts using extra-constitutional sources to shape the development of rights, see Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TULANE L. REV. 265, 280 (1988) (the Conseil Constitutionnel relied upon the 1789 Declaration of Man); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 349-50, 355 (1989) (the Constitutional Court relied on non-textual sources and considerations to interpret clause "the dignity of man").

108. The problem of unenumerated rights has been formulated as follows: "Short of a natural law theory of how 'to find' and give protection to those unenumerated rights, however, we are left with only textually enumerated rights as positive limits on power." Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 U. CIN. L. REV. 3, 7-8 (1983) [hereinafter Christenson, *Using Human Rights Law*]. In the case of the United States, the latter approach, of course, contradicts the plain meaning of the Ninth Amendment of the United States Constitution.

109. Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980).

110. "Our review of sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary

Aside from using international norms to fill in the cracks or gaps in constitutional protection, a less "bravely creative" option, which may be more suited to continental judges,[111] would be to use international norms to assist constitutional courts in the interpretation of constitutional text, particularly the inherently ambiguous open-ended provisions. In the subsequent appeal of *Fernandez*, for example, the United States Court of Appeals for the Tenth Circuit did not adopt the district court's approach of using international law to create a remedy. Instead, the Tenth Circuit relied on the same positive sources of customary international law to interpret and expand the notion of "due process"[112] to extend the same protection to aliens from arbitrary detention.[113]

Significantly, neither the district court nor the court of appeals in *Fernandez* relied on natural law to provide protection to the aliens. Rather, both courts used positive sources of international law (evidence of state practice, conventions and covenants), either to fill in the gaps among, or to help inform the interpretation of constitutional "open-ended" provisions. Under the two approaches used in *Fernandez*, international law does not provide an independent or binding source of law or rule of decision; rather, international law supplements and enriches the meaning of rights rooted in the constitutional text itself.[114]

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law. Even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is *judicially remediable as a violation of international law.*" *Id.* at 800 (emphasis added).

111. For discussion of some relevant differences between civil law judges and common law judges, see CAPPELLETTI, *supra* note 77, at 143-44.

112. U.S. CONST. amend. XIV.

113. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1390 (10th Cir. 1981). The court felt it was appropriate to rely on "international law principles for notions of fairness as to propriety of holding aliens in detention." *Id.* at 1388.

114. The civil rights movement in the United States also relied upon international law in its efforts to eliminate discrimination in various spheres, including education, housing, property ownership, and employment. *See generally* Howard Tolley, *Interest Group Litigation to Enforce Human Rights: Confronting Judicial Restraint*, in WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 123-47 (M. Gibney ed. 1991) (discussing the efforts of special interest lobbying groups to persuade United States courts that they are bound by international human rights laws); Bert. B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

Recently, the International Human Rights Law Group has submitted an amicus brief to the Romanian Constitutional Court, urging the application of international human rights standards to review the constitutionality of legislation criminalizing homosexual relations. International Human Rights Law Group, Legal Memorandum Submitted to the Romanian Constitutional Court, On the

This approach has several advantages. First, by allowing domestic tribunals to infuse the constitution with standards adopted by the international community, the approach may enhance domestic protection of human rights as it mutually reinforces the two sources of rights.[115] Moreover, because international norms generally provide broader protection of human rights than national law, the promotion of international norms will facilitate the infusion of the substantive content of transnational norms into the domestic legal system.[116] The advantage of using international law to define constitutional rights has special significance in East-Central Europe. Historically and culturally, the protection of rights in this region cannot be framed simply as the philosophy of a state's limited power to intrude on individual liberty. Instead, expectations of entitlements from the state may well be more important than limited government in the popular perception of rights. In East-Central Europe, human rights cannot be defined by negative restraints on state power; one must also consider the "entitlements of human need that are ultimately guaranteed by the state" in order for individuals to be "judicially autonomous" entities.[117] As international norms contain many more positive rights than, for example, the United States Constitution, the relevance and effect of international norms on the constitutional development of rights in the states of East-Central Europe are significant.

Second, the proposed method of indirect incorporation of international law allows states to avoid the theoretical debate between monism and dualism, which fundamentally attempts to resolve the question of when and where international law provides the rule of decision in domestic courts. Some argue that the use of international norms is illegitimate. These commentators criticize the fact that customary international norms are established by a subjective determination of *opinio juris*,[118] rather than by representative politics.[119] For treaties, which are less vulnerable to claims of illegitimacy because of the participation of

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Application of the International Human Rights Standards to the Constitutionality of Article 200 of the Romanian Criminal Code (May 2, 1994) (on file with author).

115. Lori F. Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 YALE L. REV. 2315, 2327 (1991).

116. *Id.* at 2327-28.

117. Christenson, *Using Human Rights Law*, *supra* note 108, at 10.

118. Two elements constitute customary international law: *opinio juris sive necessitatis*—a "sense of obligation"—and reasonably consistent state practice. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmts. b-c. *See generally* North Sea Continental Shelf Cases, (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 4.

119. *See, e.g.*, Trimble, *supra* note 69; Oliver, *supra* note 69.

governments, a court's very act of interpretation "gives rise to law, a quasi-legislative function. . . ."[120] In contrast, other commentators argue that the level of participation of the elected, political branches is sufficient for both treaty and customary international law to rebut countermajoritarian charges.[121]

The weak theory of incorporation offers a judicial tool that sidesteps perhaps unresolvable theoretical conflicts. This approach does not address the issue of using international law either as the rule of decision or to "define respective spheres for the dominant operation of international and domestic law."[122] Instead, using international norms as guidelines provides an accommodating interpretative tool by which ambiguous or open-ended constitutional text is infused with norms and aspirations arising from transnational consensus.[123] Thus, unlike the direct incorporation method of international norms,[124] the indirect incorporation approach, which this Article recommends, is rooted in the constitutional text, but gains additional depth through a context that is universally recognized.

The weak or indirect method of incorporation, which has taken on more significance following the decision in *Retroactivity Case II*, also augments the Hungarian Constitutional Court's position in the Hungarian constitutional scheme. A constitutional

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120. Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1108 (1990).

121. *See generally* Brilmayer, *supra* note 69.

122. *See* Steinhardt, *supra* note 120, at 1109. Indeed, "[u]seful as that . . . debate may be, it is a pathology." *Id.*

123. United States jurisprudence has developed similarly. United States courts to date have not hesitated to refer and rely upon informal sources or standards that do not qualify as the "law of nations," which would transform international norms into federal common law analogues. Much of this use of external sources has occurred in cases involving human rights issues. *See, e.g.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged, arbitrary detention); Filartiga v. Pena-Irala, 630 F.2d 876, 883-85 (2d. Cir. 1980) (referring to the American Convention on Human Rights and the International Covenant on Civil and Political Rights, among other treaties, to determine the customary prohibition on torture); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1542 (N.D. Cal 1987) (noting the Universal Declaration of Human Rights, American Convention on Human Rights, and the Covenant on Civil and Political rights as evidence of a customary norm against summary execution), *reh'g granted in part and denied in part*, 694 F. Supp. 707 (N.D. Cal. 1988). United States courts have thus relied on principles in treaties that the United States has never ratified to determine the content of domestic law.

124. The direct method of incorporating international norms has been advocated for international human rights law in the United States domestic legal system. For an example of such advocacy, see 1 THE LAW GROUP DOCKET (International Human Rights Law Group, 1981).

court does not employ force to enforce its decisions. Its power depends upon the goodwill of the other political branches, which in turn is dependent upon the perception of whether the court is exercising its power legitimately. An often-noted example is that of the Russian Constitutional Court and the conflict between President Yeltsin and the Parliament.[125]

Using different sources from which customary law is derived (such as concrete state practices, treaties, conventions, judicial opinions, and work of jurists)[126] to assist constitutional courts in interpreting the national constitution provides an additional layer of legitimacy to the courts' work product. This approach grounds the judicial exercise of constitutional review in specific sources and at the same time minimizes the judges' tendency to rely on their own subjective beliefs, thus deflecting some countermajoritarian objections.[127]

While the indirect method of incorporation is essentially non-interpretive and is not explicitly grounded in the constitutional text, it is more objective and offers more judicial accountability than evolving standards, the Hungarian Constitutional Court's

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125. The Russian Constitutional Court played an active role in what ultimately became a violent conflict between President Yeltsin and Parliament in Fall 1993. The Court, under the chairmanship of Judge Zorkin, made several public statements against Yeltsin in the conflict, accusing him of perpetrating a coup. On October 7, 1993, Yeltsin accused the Court, particularly Zorkin, of participating in political activities—which is a violation of the Law on the Court—and closed the Court until after new elections. *See generally* Dwight Semler, *The End of the First Russian Republic*, 2 E. EUR. CONST. REV. 107 (1993).

126. *See, e.g., Filartiga*, 630 F. 2d at 884. Sources of customary law may also include general expectations created by democratic states, domestic laws common to all civilized states, decisions of both domestic and international tribunals, states foreign relations practices, the writings of distinguished jurists, and the practices of international organizations.

127. The fact that judges use extra-constitutional sources, especially universal norms, to guide their decision-making process is not necessarily illegitimate. Even Hans Kelsen, a strong proponent of positivism, conceded that judges should have the power and discretion to apply universal principles as one element in decision-making when gaps are present in positive law. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 553-54 (Robert W. Tucker ed., 2d ed. 1966). *See also* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 145-49 (Anders Wedberg, trans. 1961).

Moreover, an overemphasis on positivism, warns Bodenheimer, may lead to "interpretive nihilism." Because the positive system as established today by the state is "inescapably incomplete, fragmentary, and full of ambiguities . . . [t]he defects must be overcome by resorting to ideas, principles, and standards which are presumably not as well articulated as formalized sources of the law, but which nevertheless give some degree of normative discretion to the findings of the courts. In the absence of a theory of non-formal source, nothing remains outside the boundaries of fixed, positive precepts but the arbitrariness of the individual judge." EDGAR BODENHEIMER, JURISPRUDENCE, THE PHILOSOPHY AND METHOD OF THE LAW 295 (1962).

concept of the "invisible Constitution,"[128] or the often muddled realm of natural law.[129] Using the indirect approach, judges rely upon objective sources rather than individual values to guide the conflict resolution process, especially when dealing with unenumerated rights.[130] This jurisprudential technique also provides judges on constitutional courts with a mechanism through which they can be sensitive to separation of powers concerns; it offers a palatable middle ground between the two polar choices of applying, or completely disregarding, international norms.

Some critics may raise the issue of whether it is feasible to use external sources as a tool of judicial interpretation in East-Central Europe, particularly in the task of constitutional interpretation. The United States, for example, has a relatively strong tradition of employing external sources. This tradition evolved from a mix of the democratic ideal of positivism—the concept that judicial review should be derived from the constitutional text—and certain aspects of natural law, such as custom, universal principles, experience, and reasonableness.[131]

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128. In his concurrence in Decision No. 23/1990 (x.31) AB, Alkotmánybíróság [Const. L. Ct.] (Docket No. 89/B/1990/7, Oct. 24, 1990) (Hung.) [hereinafter *Death Penalty Case*], Chief Justice Sólyom, one of the most influential judges on the Hungarian Constitutional Court, recognized that constitution interpretation is necessarily a subjective exercise because even though the limitation of each right "may be established with a high degree of consensus, . . . its content may be filled with many different value conceptions." *Id.* at 17. He urged the Court to give substance to constitutional provisions according to "a reliable standard of constitutionalism—an 'invisible Constitution'—beyond the written Constitution, which often is amended presently by current political interests; and because this 'invisible Constitution' probably will not conflict with the new Constitution to be established or with future Constitutions." *Id.* at 16. The Hungarian Constitutional Court indeed has been particularly aggressive in deriving unenumerated rights, particularly from the clause "human dignity." As Chief Justice Sólyom stated, the right to "human dignity" "is a 'maternal right'—i.e., the source of still unnamed fundamental freedoms." *Id.* at 15 (Sólyom, J., concurring).

129. Notions of natural law in international law, as embodied in the principle of *opinio juris*, differ from natural law exercised by judges. The former signifies the establishment, through international consensus, of "principles about the morally proper conduct of human affairs which are either self-evident or discoverable by the exercise of practical reason." Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 674 (1983). As exercised by judges, natural law is merely disassociated or isolated instances of natural reason—rather than evolving, mutual moral consciousness—exercised by one judge or a group of judges.

130. *See supra* note 107 and accompanying text.

131. Christenson, *Using Human Rights Law*, *supra* note 108, at 35.

Traditions of using external sources as an aid to judicial interpretation in East-Central Europe are not dissimilar. Given the civil law background of the region, there is a strong emphasis on positivism.[132] At the same time, there is also a strong European tradition of imputing significance to customs and universal principles. For example, the French *Conseil Constitutionnel* and the German Constitutional Court have not hesitated to rely on unwritten or historical principles and values in their jurisprudence.[133] The experience of continental courts to date suggests that these courts espouse a judicial review model that ventures beyond "the language of the Constitution as illuminated by the intent of its framers."[134] In other words, the reliance of new constitutional courts in East-Central Europe on external sources would not be foreign. Adopting a theory of judicial interpretation that uses international law as one of many external sources reflective of fundamental values will not only be familiar to this region, but it will also not be perceived initially as an illegitimate exercise of power. This approach would allow time for the theory and practice to be refined and to gain legitimacy.[135]

By using concrete and specific sources underlying international law, the judicial interpretation process is more transparent than a mere positivist approach.[136] This technique of judicial interpretation therefore reduces the possibility that there will be a public or political backlash because the people perceive the court as engaging in judicial activism. The reference to norms formed in a universally recognized context to shape the substantive content of open-ended provisions in the Hungarian Constitution allows the Court to preserve its legitimacy, while strengthening its role in resolving constitutional disputes.[137] This

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132. *See* Robert F. Utter and David C. Lundsguard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts From a Comparative Perspective*, 54 OHIO ST. L.J. 559, 569-72 (1993).

133. See *supra* note 107.

134. Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741, 745 n.17 (1992) (*quoting* CAPPELLETTI, *supra* note 77). European states, in contrast to the United States, are more sensitive and aware of international forces, due partly to the evolution of the European Union (EU) and the myriad of regulations from the EU. This heightened sensitivity is significant as it may evolve into shared moral norms vis-á-vis particular region, which in turn could provide the basic support for emerging international customary law.

135. The familiarity of the proposed approach can only be strengthened because the approach enables constitutional court judges to carry out their mandates within a familiar context; they are merely using international norms to inform the interpretation of actual constitutional text, and not as the sole basis for the rule of decision.

136. See *supra* notes 108-14.

137. Constitutional courts, however, should standardize the process of using external sources, such as international law. Courts in this region,

method of "interstitial growth" in "constitutional interpretation"[138] through international norms fosters greater protection of human rights by safeguarding the Court's legitimacy as it continues to define the contours of rights that arguably belong in the Hungarian constitutional scheme, but are not explicitly enumerated.

IV. CONFLICTS BETWEEN INTERNATIONAL NORMS AND CONSTITUTIONAL RIGHTS

A. *Conflict of Customary International Norms and Constitutional Rights*

In *Retroactivity Case II*, the Hungarian Constitutional Court for the first time faced the issue of how to resolve the inconsistency between a rule of customary international law and a specific constitutional right. The Court faced a clear conflict. On the one hand, Article 57(4) of the Hungarian Constitution contains an absolute prohibition against retroactive punishment. It states: "No one can be held guilty and penalized on account of any act, which did not constitute a penal offense under the laws of Hungary at the time when it was committed."[139] On the other hand, it was clear, at least in the Court's view, that international

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including the Hungarian Court, have referred to international norms in cases generally in an ad hoc and unsystematic manner. *See, e.g.*, Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 462 n. 78 (1994). First, an effective application of the weak theory of incorporation suggests that the constitutional courts move beyond comparative law materials, useful as they are. To date, the judges have merely referred to what other states do in a particular case and then come to conclusions without meaningful or complete analysis. A constitutional court instead should probe the validity of the analysis and bases of other states practices, including analytical and cultural differences.

When relying on or referring to international instruments, a constitutional court, as a general practice, should note the textual history surrounding and leading up to the final text. If customary norms are relevant, the constitutional court should ascertain, to the best of its ability, the meaning and status of potential international norms vis-à-vis particular issues, perhaps using traditional, domestic standards or evidentiary rules for determining customs and their scope. If international norms are determinable, and nothing in the state's constitution prohibits using customary international norms—or the inconsistency of the norms, if any, is resolvable—the court should formulate an interpretation that promotes the scope of both international law and the domestic constitution.

138. Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39, 56 (1981).

139. HUNG. CONST. art. 57(4).

criminal principles on war crimes and crimes against humanity required states to punish, even retroactively, the crimes committed during the 1956 uprising. Because abiding by these customary norms is part of the "international law obligations" undertaken by Hungary through the second clause of Article 7(1) of the Hungarian Constitution, there is a direct conflict with Article 57(4) on the domestic level.

In *Retroactivity Case II*, the Court stated in unequivocal language that the strength of Article 7(1) compels the conclusion that international law, although it is part of a separate legal system, should generally prevail.[140] Indeed, the Court concluded that domestic law must be harmonized with international law because that is a "condition of being a member of the commonwealth of nations."[141] Despite this initial broad statement, the Court paused momentarily and noted that if a state fails to bring its domestic law in line with international law, it would be subject to liability on the international level.[142] This formulation is classic dualism; a state may consciously decide to violate its international obligations by passing a valid domestic law or by failing to harmonize domestic law with its international treaty obligations.

Immediately after making this statement, however, the Court declared that any "rejection of the international law would be unconstitutional, contrary to Article 7(1) of the Constitution."[143] Under this line of reasoning, a decision by the legislature to violate international law would be unconstitutional. Moreover, a state's failure to harmonize international and domestic norms could be challenged as unconstitutional. Accordingly, it appears that at least with respect to customary international law, the Court has characterized Hungary as a variant of a monist state, in which international law is automatically superior to all laws and even to constitutional values. Under *Retroactivity Case II*, then, international law trumps the constitutional protection from retroactive criminal punishment.

Until World War II, this theoretical problem had few practical effects in other jurisdictions because international law rarely conflicted with constitutional principles. Moreover, customary international law inconsistent with constitutional values was unlikely to relate to a national law, particularly one—like the draft

140. *Retroactivity Case II*, *supra* note 2, at 26.
141. *Id.*
142. *Id.*
143. *Id.*

law in *Retroactivity Case II*—that concerned the rights of individuals.[144]

However, the rapid development of international human rights over the last few decades has increased the importance of this issue. The human rights "revolution" after World War II has rendered the individual a subject of international law. The explosion of statutory law in all areas, even in a common law jurisdiction like the United States, has greatly increased the possibility of conflict between domestic legislation, the constitution, and international law. This trend will only increase because states in East-Central Europe and the former Soviet Union are passing a large number of statutory laws.[145]

B. *The Conflict Between Treaty-Based Norms and Constitutional Rights*

Retroactivity Case II provided the first glimpse of how the Hungarian Constitutional Court reconciles a conflict between a treaty-based norm and a constitutional provision. The Court considered the effect of international documents relating to war crimes and crimes against humanity, including the 1968 New York Convention[146] and the European Human Rights Convention

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144. In comparison, the United States Supreme Court has yet to consider the question of whether the Constitution is supreme over the law of nations or principles of customary law. Although there is no case on point on this issue, there is dictum suggesting that the United States Constitution would prevail domestically over the law of nations. *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (rejecting defendant's argument that international law "is a self-executing code that trumps domestic law whenever the two conflict").

145. There is a slight possibility that the Hungarian Constitutional Court will bring Hungary back in conformance with the dualist model. If faced with the same issue in a different case, the Hungarian Constitutional Court may adopt a similar approach to that of the Italian Constitutional Court—that basic values underlying a constitution—which may or may not be enumerated—ultimately prevail over international law in case of conflict. *See supra* note 53 and accompanying text. The Hungarian Constitutional Court, for example, could distinguish *Retroactivity Case II* by noting that the norms embodied in Article 57(4) of the Hungarian Constitution do not constitute a basic constitutional value of the Hungarian Constitution. This development appears unlikely, however, as the prohibition against retroactive criminal punishment seems to be as basic as any other value necessary to preserve a democratic state where citizens are not arbitrarily punished. If this norm is not assigned the status of a basic constitutional right, as in *Retroactivity Case II*, it would be difficult to imagine what would be.

146. The New York Convention states that the war crimes and crimes against humanity listed in the Convention shall not be subject to statutory limitation, regardless of the date of their commission. New York Convention, *supra* note 15, art. I.

of 1974,[147] which provide that the statutes of limitations for these crimes are not applicable.[148] The Court stated that these international covenants "cannot be deemed as integral parts of the international customary law or as the generally recognized rules of international law."[149] The Court thus had to deal with the conflict between the Hungarian Constitution's strict prohibition against retroactive criminal liability in Article 57(4) and Hungary's obligation under the two treaties to prosecute war crimes and crimes against humanity, retroactively if necessary. In other words, the Court had to consider whether to treat the conflict between the Constitution and international treaties in the same manner as it resolved the conflict between the Constitution and general rules of international law.[150]

The Court held that Hungary's obligations under the two relevant international conventions override the protection from retroactive criminal liability afforded by Article 57(4).[151] It noted that the two conventions bind parties to prosecute war crimes or crimes against humanity regardless of the statutes of limitations for these crimes, and that this obligation reflects a "clear trend" in the development of customary international law.[152] Whereas customary international law does not establish an explicit rule on the validity of statutes of limitations on war crimes or crimes against humanity, the norms in the two treaties—including the norms regarding the statutes of limitations for these crimes—reflect and supplement the customary international law rule that states have the obligation to prosecute war crimes and crimes against humanity.[153]

The Court relied on its broad interpretation of Article 7(1) of the Hungarian Constitution to conclude that Hungary's treaty obligations prevail over the absolute domestic guarantee of *nullum crimen sine lege*. The Court's language, however, suggests that it would not find that a treaty norm prevails over a constitutional

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147. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

148. *Retroactivity Case II*, *supra* note 2, at 29.

149. *Id.* This Article does not address the Court's approach to determine which norms have reached the status of customary international law or "generally recognized rules." However, it should be noted that the Court has not been particularly thorough in delineating the elements that it considers relevant and persuasive in determining whether a rule has reached this status.

150. *Id.* at 30.

151. "But those states which ratified either of the two conventions assumed the international obligation that they will treat war crimes against humanity defined in the conventions, even with retroactive effect, as not subject to statutes of limitation." *Id.* at 29.

152. *Id.* at 30.

153. *Id.* at 30-31.

provision in every case. The Court based its reasoning on the strength it assigned to a particular international norm—the obligation to prosecute war crimes or crimes against humanity. This is unlikely to happen in every conflict between a treaty provision and a constitutional right because many treaties protect and supplement, rather than conflict, with fundamental domestic rights.

Nonetheless, the Court's approach potentially permits the development of a broader scheme of rights in Hungary. If treaty norms prevail over constitutional norms under some circumstances, one could envision the Court declaring that the national government has violated Article 7(1) of the Hungarian Constitution because certain constitutional provisions do not conform to treaties that create more expansive rights, such as those contained in the International Covenant on Social, Economic and Cultural Rights.[154]

Curiously, the Court's decision in *Retroactivity Case II* failed to recognize other relevant sources of international law, including the International Covenant of Civil and Political Rights and the European Convention for the Protection of Human Rights.[155] Like the Hungarian Constitution, these treaties generally prohibit retroactive criminal punishment.[156] Indeed, in *Case I*, which also concerned retroactive justice, the Court reviewed the practice of many states and forcefully suggested that the rule prohibiting retroactive criminal punishment is internationally recognized as fundamental to a state whose basis is the rule of law.[157] In *Retroactivity Case II*, the Court did not provide an explanation of why, and under what circumstances, one norm of customary international law (the obligation to prosecute war crimes and crimes against humanity) should prevail over another (no retroactive criminal liability).

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154. *See generally* International Covenant on Social, Economic and Cultural Rights, *supra* note 93.

155. "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." *Id.* art. 15(l); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 24, art. 7(1).

156. *Id.*

157. *Retroactivity Case I, supra* note 4.

V. CONCLUSION

A full understanding of how international norms operate to affect domestic legal systems requires an examination of the institutions in which "the claims of the international and national legal orders frequently converge"[158]—generally, domestic tribunals. In the context of East-Central Europe and the former Soviet Union, the focus appears to be on the newly-created constitutional courts. In the present international order in which transnational relations and effects are fluid, transnational norms have increasingly greater relevance for domestic courts. At the same time, an inherent tension emerges when courts examine international issues, for courts may act as unofficial agents of the international legal order, but concurrently are subject to the national legal order from which they receive their jurisdictional competence. This tension is enhanced because the history of international law in the twentieth century has witnessed an "incremental exclusion of issues and behaviors from the protective ambit of exclusive domestic jurisdiction . . . "[159]

Domestic tribunals have often functioned as crucial intermediaries in the relationship between the international and domestic legal systems, particularly in the decades following World War II. With the rapid development of international human rights law after the war, the state sovereignty paradigm of international relations established by the Peace of Westphalia[160] ineluctably changed. After World War II, international law no longer was perceived as a mere horizontal system of norms between sovereign states. International law increasingly was created and enforced vertically, with the individual occupying a more prominent role, including that of a rights-holder.[161] With the ebb of the legal and political importance of the Westphalian notion of sovereignty, there has not only been more consensus about desired practices, but also more codification of international norms. The change in paradigms—from one of strong state sovereignty to one in which fundamental rights place limits on such sovereignty—has pressured domestic courts to

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158. Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 12 (1970).

159. Steinhardt, *supra* note 120, at 1177.

160. *See generally* Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948)

161. *See generally* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW (1988); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982); Rosalyn Higgins, *Conceptual Thinking about the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978).

change the scope of their traditional roles and to become more active when international elements are involved.[162] This change in paradigms is reflected, perhaps even to a greater extent than in other states, in the new constitutional courts in Eastern Europe and in the former Soviet Union.

The Hungarian Constitutional Court and its decision in *Retroactivity Case II* provide a clear example of the significant issues and dangers involved in attempts to clarify the exact relationship between international and domestic law. These dangers are magnified because the relationship between international and domestic law was usually not given much thought or attention in the recent and numerous attempts at constitutional drafting in the region, either by the states themselves or by the foreign lawyers providing "expert" advice. Beyond the immediate effect of sanctioning the prosecution of a few egregious acts committed in Hungary in 1956, *Retroactivity Case II* has both positive and troubling implications. The case has had and may continue to have enormous impact on: (1) the allocation of powers among the Court, the Parliament and the Government, and (2) the development of substantive rights in Hungary and individual access to the Constitutional Court to vindicate those rights.

The Court, in delineating its vision of the relationship between international and domestic law, imposed broad rules and constraints on the other branches of government. These constraints are not compelled by the Hungarian Constitution or by other legal norms. In *Retroactivity Case II*, the Court single-handedly changed some constitutional boundaries and opened gaps in others. It remains to be seen, however, whether these constraints will be implicated and, if so, what the reactions will be from the other political branches.

Aside from the perhaps esoteric theoretical debate between monism and dualism provoked by the case, *Retroactivity Case II* also has a practical impact on the development of rights in Hungary. The Court arguably established a mechanism for individuals to petition the Court directly to vindicate their treaty-based rights. Thus, even if international law is determined not to be applicable, the Court has opened the door to individuals to participate in the interplay between international and domestic law. Regardless of whether Hungarian citizens prevail on their claims, they now have the opportunity to "provoke . . . [the] articulation of a *norm* of transnational law, with an eye toward

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162. Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 423 (1988).

using that declaration to promote a political settlement in which both governmental and non-governmental entities will participate."[163]

The ability to force a pronouncement that a transnational[164] norm has been violated has at least two implications for the states in East-Central Europe. First, transnational law offers citizens a source of law or standard from which they may challenge or review state action in a particular case. Transnational law thus provides an additional, and potentially powerful, tool with which citizens can ensure that the rights granted in newly written or revised constitutions will be more than merely aspirational.[165]

Second, the structure of the relationship between international and domestic law affects both the nature and shape of political debates and the development of the polity. A successful political transition requires not only the creation and maintenance of appropriate structures and institutions, but also the development of a polity that is willing to engage in formalized processes to resolve disputes. This task is particularly difficult in East-Central Europe, where formal barriers to political participation erected by the Communist Party over the last few decades and the lack of civil society spheres have fostered the belief that a republican style of dispute settlement is inaccessible. If international law provides an additional mechanism that allows citizens to engage formal institutions in these debates—perhaps in a forum such as a constitutional court—the polity will slowly be socialized into patterns of behavior that facilitate republican debate. This development can only increase the legitimacy of newly-created democratic institutions over time.

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163. Harold H. Koh, *Transnational Public Law Litigation,* 100 YALE L.J. 2347, 2349 (1991).

164. "Transnational law" conceptually is broader than "international law." Judge Jessup defined transnational law as "all law which regulates actions or events that transcend national frontiers" and includes "both public and private international law . . . [plus] other rules which do not wholly fit into such standard categories." PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

165. Professor Martin Shapiro's view of courts—as providing individuals or groups access to political debates to which they would otherwise would not have—has resonance in the transition process in Eastern Europe. It is those groups who "find it impossible to gain access to the 'political' branches, which the court can best serve . . . . The Court's proceedings are judicial; that is, [the parties] are viewed as equal individuals. Therefore, marginal groups can expect a much more favourable hearing from the Court than from bodies which, quite correctly, look beyond the individual to the political strength he can bring into the arena. The Court's *powers* are essentially political. Therefore marginal groups can expect of the Court the political support which they cannot find elsewhere." MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 28-9 (1966).

Finally, by adopting a broad and straightforward interpretation of Article 7(1) of the Hungarian Constitution, the Court opened the door for further use of international law to fill the gaps in the Hungarian Constitution. *Retroactivity Case II* strongly suggests, if not obligates, the Court to refer to international norms to ensure that domestic norms are consistent with the norms of the international legal system. This pressure of harmonization will have a positive effect on the development and protection of rights in Hungary, and will aid the assertive and fiercely independent Hungarian Constitutional Court in maintaining and augmenting its legitimacy in the Hungarian constitutional scheme.