

# **INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CRIMES COMMITTED IN NON-INTERNATIONAL ARMED CONFLICTS – THE HUNGARIAN JURISPRUDENCE ON THE 1956 VOLLEY CASES**

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## **I. INTRODUCTION**

The Hungarian criminal trials concerning the prosecution of people responsible for committing alleged breaches of Common Article 3 of the Geneva Conventions during the 1956 revolution have attracted surprisingly little international attention.<sup>1</sup> This lack of interest is all the more astonishing, given the fact that the Hungarian courts directly applied international law for prosecuting criminal offences and during this made statements concerning the definition of non-international armed conflict, individual criminal responsibility for violations of Common Article 3 and the application of the 1968 UN Convention on non-applicability of statutory limitations. In the following pages I will attempt to critically analyse these findings, concentrating on the period between 23 October and 4 November, and demonstrate that even though they do not meet the requirements of international law, some of the

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<sup>1</sup> For a notable but brief and only descriptive treatment of the topic see Ward N. Ferdinandusse, *Direct application of international criminal law in national courts*, T.M.C. Asser Press, 2006. pp. 76-81.

perpetrators could be brought to trial even without stretching beyond the confines of the law of nations.

## II. HISTORICAL BACKGROUND

On 23 October 1956 the general disappointment of the population against the oppressive Rákosi leadership manifested itself in peaceful demonstrations in different parts of the country. These peaceful demonstrations escalated into violence prompting the creation of insurgent groups fighting against government troops. While these hostilities remained localized, with their main centre in Budapest, they have seemingly reached their aim: the reformist Imre Nagy took the helm on 28 October. However, the intervention of the Soviet army on 4 November sealed the fate of the short-lived revolution and gave the power to János Kádár, who controlled the country until 1988.<sup>2</sup>

After reinstatement of democracy, the 'historical justice debate' began on the necessity of trying the responsible persons for crimes committed during the communist era. These debates had highly political overtones, as many wanted to exclude everybody significantly participating in maintaining the previous regime.<sup>3</sup> The first free elections brought about the victory of a right wing coalition, which made the persecution of the crimes committed during the 1956 revolution one of its priorities. The ensuing investigations focused primarily on the so-called 'volley cases.'

The term 'volley cases' refer to the prosecutions of barrages against unarmed civilians.<sup>4</sup> According to the Fact-finding Committee set up by the Ministry of Justice for the investigation of these atrocities, between 23 October and the end of December there were more than sixty volleys, demanding several hundred victims.<sup>5</sup> The circumstances of the commission of these gunfires varied significantly: while usually volleys were fired at peaceful protesters by army troops, sometimes it was the tragic consequence of an unsuccessful attempt to disarm the insurgents, and at Tiszakécske a volley from an airplane demanded the life of 17 people.<sup>6</sup>

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2 For a more detailed picture consult Csaba Békés, Malcolm Byrne, János M. Rainer (eds.) *The 1956 Hungarian revolution: A history in documents*, CEU Press, 2002.

3 For the background of the historical justice debate and the moral implications involved see János Kis, *Meditation on Time – Before Firing Squad Trials*, Kritika, Vol. 5., 1994.

4 In Hungarian common and legal parlance the term became used in connection with the prosecution of all criminal acts committed in the period of the 1956 revolution, thus including such crimes as extrajudicial executions.

5 *Volleys – 1956*, First Report of the Fact-finding Committee, Antológia, 1993.

6 Tamás Vince Ádány, *Individual criminal responsibility for the crimes committed in 1956*, *Miskolc Journal of International Law*, Vol. 3., 2006, p. 48.

However, the initiation of the criminal investigations was hindered by the fact, that substantive criminal provisions in force at the time of the commission of the acts, the Official Compilation of Penal Regulations in Force, and the following Criminal Codes<sup>7</sup> specified a rule of prescription of 20 years for voluntary manslaughter. In the first attempt to overcome this obstacle, the legislature adopted a new statute of limitations that stipulated that in case of treason, infliction of bodily harm resulting in death and murder committed between December 1944 and May 1990, prescription resumes "provided that the state's failure to prosecute the said offences was based on political reasons." The language was deliberately couched in general terms but was clearly designed to enable prosecution of serious crimes committed during the 1956 events. This law was subsequently found unconstitutional by the Constitutional Court, which interpreted the principle of legality as covering "every aspect of criminal liability", therefore the modification or reactivation of an already lapsed statute of limitation violates the principle of legality. The Court made it clear that "conviction and punishment can only proceed according to the law in force at the time of the commission of the crime."<sup>8</sup>

Nevertheless, the Parliament soon adopted a statute on 16 February 1993 entitled "*the procedure to follow in case of certain crimes committed during the 1956 war of independence and revolution.*" This law penalized a mixture of international and common crimes. While it declared that war crimes and crimes against humanity are exempt from the statute of limitation, it strangely reintroduced crimes such as kidnapping and terrorist acts, whose retroactive application had already been found unconstitutional by the Constitutional Court. Consequently, it did not come as a surprise when the Court reiterated its previous judgment regarding the effect of statutory limitations on common crimes and found that in that respect the statute of limitation has run out.<sup>9</sup> Yet, the Constitutional Court developed a line of argumentation that enabled the prosecution of international crimes relying on Art 7 (1) of the Hungarian Constitution, which states that "The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law."<sup>10</sup>

According to this interpretation, customary law, jus cogens and possibly general principles of law become part of the Hungarian legal system automatically, without

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7 Act V of 1961 and Act IV of 1978

8 Constitutional Court, Decision No. 11/1992, 5 March 1992.

9 Duc V. Trang, Beyond the historical justice debate: the incorporation of international law and the impact on constitutional structures and rights in Hungary, *Vanderbilt Journal of Transnational Law*, Vol. 28, 1995, pp. 1-43.

10 Act XX of 1949 The Constitution of Hungary.

any parliamentary act as that is carried out by the "general transformation" of Art. 7 (1) of the Hungarian Constitution.<sup>11</sup> On the other hand, international treaties are still have to be published upon ratification in the Official Gazette – Magyar Közlöny – to become Hungarian domestic legal rules.<sup>12</sup>

As crimes against humanity and war crimes have "undoubtedly part of customary international law; they are general principles recognized by the community of nations or, in the parlance of the Hungarian Constitution, they are among "the rules generally recognized by international law."<sup>13</sup>

As a result, the problem of statutory limitations is resolved, since

"International law applies the guarantee of *nullum crimen sine lege* to itself, and not to the domestic law. "Customary international law," "legal principles recognized by civilized nations," "the legal principles recognized by the community of nations," is such a lex, or a body of written and unwritten laws, which classifies certain behavior prosecutable and punishable according to the norms of the community of nations (via international organizations or membership in a given community of states), irrespective whether the domestic law contains a comparable criminal offense, and whether those offenses have been integrated into an internal legal system by that country's accession to the pertinent international agreements."

As Hungary has ratified the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity,<sup>14</sup> the perpetrators of crimes falling within the purview of the convention can be prosecuted by the authorities, moreover, the authorities are under an obligation to carry out investigations because "The international community prosecutes and punishes war crimes and crimes against humanity; it does so by international trials and, second, by insisting that those states which desire to be members of the international community prosecute such offenders."<sup>15</sup>

11 "The first sentence of article 7 § (1) of the Constitution, according to which the legal system of the Republic of Hungary accepts the generally recognized rules of international law, states that "the generally recognized rules" are part of Hungarian law, even without separate (further) transformations. Such an act of general transformation — one without a definition or enumeration of the rules — was performed by the Constitution itself. According to it, the generally recognized rules of international law are not part of the Constitution but they are "assumed obligations". Decision of the Constitutional Court No 53/1993. (X.13.), unofficial translation from [www.icrc.org](http://www.icrc.org)

12 See Pál Sonnevend, *Verjährung und völkerrechtliche Verbrechen in der Rechtsprechung des ungarischen Verfassungsgerichts*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 57/1 (1997)

13 *Supra* note 11, Section V. The Constitutional Court seemed to have confused here the separate sources of custom and general principles of law.

14 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 754 U.N.T.S. (1968)

15 *Supra* note 11, Section V. (2). This ostensibly means that the international community must have been composed of relatively few states at that time.

Even though this decision was not completely free of constitutional difficulties<sup>16</sup>, it gave a relatively simple answer to the problem of legal resolution of the historical justice debate: the Court found that the prosecution of crimes committed during the events of 1956 was constitutional if these acts qualified as crimes under international law, i.e. war crimes or crimes against humanity.<sup>17</sup> Nevertheless, the legislature still could not cope with the task of drafting a law meeting the above parameters. Although the Parliament made some changes to the text of the act and eliminated the unconstitutional first paragraph on ordinary crimes, the new law, Act XC. of 1993, still linked Art. 130 of Geneva Convention III. and Art. 147 of Geneva Convention IV. stipulating grave breaches of the Conventions, which can be committed in international armed conflict to Common Article 3 to the Geneva Conventions regulating the minimum rules applicable to non-international armed conflicts.<sup>18</sup>

Inevitably, the Constitutional Court was compelled to examine the constitutionality of the reenacted law and predictably nullified it for establishing these cross-references contrary to the clear language of the Conventions.<sup>19</sup> Still, the Court declared that

*"[w]ith the nullification of the law there is no obstacle preventing the state from pursuing the offender of war crimes and crimes against humanity as defined by the international law... It is the international law itself which defines the crimes to be persecuted and to be punished as well as all the conditions of their punishability".*<sup>20</sup>

The decisions of the Constitutional Court gave the opportunity to the Hungarian judiciary to accomplish the legal qualification of the events of 1956 and to directly apply the norms of customary international law.<sup>21</sup> The Prosecution initiated criminal

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16 See e.g. András Bragyova, *Ex post facto political justice and international law*, *Fundamentum*, Vol. 3-4., 1993.

17 Nobody seriously suggested that the events should be qualified as genocide.

18 Art. 1 of Act XC. of 1993 on the procedure applicable for certain criminal offences committed in the course of the revolution and war of independence of 1956

19 Constitutional Court, Decision No. 36/1996. Section II. (1). Róth suspects lack of political support behind the repeated failures to provide a legal basis for prosecution but I think that sheer incompetence could possibly be a better explanation. Miklós Róth, *Circus Juris Hungarici*, or justice à la Hongroise, *Kortárs*, Vol. 10., 2006.

20 *Ibid.* Unofficial translation by Péter Kovács, 1998 Yearbook of International Humanitarian Law, T.M. C. Asser, p. 454.

21 It is beyond the scope of this article to analyse in detail the rationality and desirability of direct application of customary rules in domestic criminal proceedings but it is worth mentioning that generally the vague content of a customary norm is difficult to reconcile with the requirements of foreseeability and concreteness of criminal law norms. In the present case, this inherent vagueness is exacerbated by the fact that the text of the Geneva Conventions was only officially published in 2000. Although it was officially promulgated by Law Decree 32 in 1954, that law only enumerated the titles of the 1949 Geneva Conventions, requesting the Ministry of Foreign Affairs to disseminate the text of the Conventions, which it duly did, circulating a few copies. In a recent Memorial to the European Court of

proceedings in 7 cases following the 1993 Constitution Court decision against 28 inditees.<sup>22</sup> However, the Hungarian courts were deeply divided, especially in the determination of the possible existence of a non-international armed conflict. While it became accepted, that the events following the Soviet intervention on 4 November 1956 constitute international armed conflict, there was disagreement between the courts in the question whether the activities in the period between 23 October and 4 November reached the threshold of non-international armed conflict. This problem seemed to have been resolved when the Supreme Court decided in 1996 that in the examined period the hostilities do not reach the level of non-international armed conflict, but on 28 June 1999, following a petition for review from the Prosecution, the Review Bench ultimately determined that Common Article 3 of the Geneva Conventions was applicable to the cases and quashed the previous contradictory judgments.<sup>23</sup> Following this decision, the courts convicted 3 persons but only one, János Korbély, had to serve a two-year jail term. Following his release, he submitted an application to the European Court of Human Rights requesting the Court to ascertain that his conviction was based on the application of retroactive law in contravention of the European Convention of Human Rights.<sup>24</sup>

### III. THE EXISTENCE OF A NON-INTERNATIONAL ARMED CONFLICT

Following the 1993 Constitutional Court Decision, the Hungarian courts determined that the crucial element in the judicial evaluation of the 1956 events is the ascertainment of the applicability of the 1949 Geneva Conventions.<sup>25</sup> A

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Human Rights, even the Hungarian government acknowledged that "[b]y present-day standards of the rule of law prevailing in Hungary, the Geneva Conventions were not properly made part of Hungarian domestic law until their publication in the Official Gazette in 2000." Memorial of the government of the Republic of Hungary on the admissibility and merits of application No. 9174/02 introduced by János Korbély, para. 29. (on file with author)

Under these circumstances, I tend to agree with Bragyova that "*The decision of the Constitutional Court demand – retroactively – from the Hungarian legal subjects to always be aware of the international legal obligations assumed by the Hungarian state, even if these are unknown by the norms of the Hungarian legal system... However, the best solution would be if they could predict for decades how the constitutional regulation on the relationship of international law and domestic law will change.*" Supra note 16, p. 237.

<sup>22</sup> Against the alleged perpetrators of the volleys in Mosonmagyaróvár, Berzence, Tatai, Tiszakécske, Kecskemét, Salgótarján and Eger.

<sup>23</sup> See Péter Kovács, 1999 Yearbook of International Humanitarian Law, T.M. C. Asser, pp. 375-377.

<sup>24</sup> Application no. 9174/02

<sup>25</sup> As I will attempt to demonstrate below, this was not the only possible conclusion, indeed, inasmuch it concerned the criminal responsibility for breaches of the norms of non-international armed conflicts, it even contradicted the dictum of the Constitutional Court itself.

1996 Supreme Court decision in the Salgótarján case definitively settled the doubts regarding the events following 4 November, proclaiming that the Soviet intervention transformed the conflict to an international armed conflict and consequently the whole gamut of international humanitarian law became applicable.<sup>26</sup> The determination of the applicability of Common Article 3 was not that simple.

Common Article 3 to the Geneva Conventions was adopted as a revolutionary new piece of international legislation.<sup>27</sup> Previously the treatment of rebels and insurgents fell exclusively within 'the domain réservé' of states and the rules of international humanitarian law only became applicable to an internal conflict if the state accorded belligerent status to the rebels, acknowledging them as equals.<sup>28</sup> The Article appears with identical text in all four of the Geneva Conventions and constitutes a completely separate entity, a 'Convention in miniature.'<sup>29</sup> Even though its text contains only a series of rudimentary provisions dealing with minimum rights and obligations,<sup>30</sup> it was hailed by the International Court of Justice as

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26 This was not the only possible interpretation, albeit undoubtedly the most pragmatic one. It has to be pointed out though, that the International Court of Justice in the Nicaragua case found that it was possible that an international and a non-international armed conflict could exist parallelly on the territory of a country, as it declared that the conflict between the contras and Nicaragua fell under Common Article 3 of the Geneva Conventions, constituting a non-international armed conflict, while the actions of the United States against Nicaragua qualified as international armed conflict. Military and Paramilitary Activities, ICJ Reports, 1986, para. 219. Similarly, the International Tribunal for the Former Yugoslavia held that "*To the extent that the conflicts had been limited to clashes between the Bosnian Government forces and Bosnian rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal...*" Prosecutor v. Tadic. (Jurisdiction) No. IT-94-1-AR72, Appeals Chamber. 2 October. 1995, para. 72.

27 See Lindsay Moir, *The law of internal armed conflict*, C.U.P., 2002, pp. 23-29.

28 Inevitably, such acknowledgement was exceptional even in the past and by the present day it basically fell into desuetude. See Eric David, *Principes de droit des conflits armés*, Bruylant, 2003, p. 138.

29 Jean Pictet (ed.) *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, ICRC, Geneva, 1958, p. 34.

30 Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

expressing "elementary considerations of humanity", which are applicable in all armed conflicts.<sup>31</sup> However, the definition of non-international armed conflict is conspicuously missing from the text.<sup>32</sup>

After contradictory judgments from district courts concerning the applicability of Common Article 3, on 6 December 1996, the Supreme Court quashed the 29 May 1995 decision of the Regional Court in the *Tata* case and remitted the case to the Prosecution, setting the following guidelines for the resumed proceedings:

*"In order to make a well-founded decision it is not dispensable to review the chronology of the military operations of the revolution and war of independence of October 1956 in the framework of the statement of facts in the judgment. Such a review will make it possible to reasonably establish whether the armed forces of the revolution*

- were under responsible command,*
- controlled part of the territory of the country,*
- carried out sustained and concerted operations".*

The Supreme Court obviously utilized Art. 1 of Additional Protocol II to the Geneva Conventions<sup>33</sup> as a means of interpretation for determining the conditions

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(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

31 "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity". *Nicaragua case*, *supra* note 26.

32 The ICRC Commentary finds this omission a positive attribute as it enables a wider scope of application. Jean Pictet (ed.) *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, ICRC, Geneva, 1958, p. 36.

33 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. 1125 U.N.T.S. 609

*Art 1. Material field of application*

*1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International*

of non-international armed conflict. This follows closely the influential study of Bragyova, who argued that Common Article 3 was meant to be applied in cases of classic civil wars. He interpreted the expression "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application" as meaning that Additional Protocol II has the same material scope of application as Common Article 3, only significantly broadens the range of rights protecting the participants in such conflicts.<sup>34</sup>

The district courts followed these guidelines in the process of legal qualification. After the testimony of an expert of military history, Miklós Horváth, the Military Bench of the Budapest Regional Court determined that

*"... several armed groups emerged spontaneously in Budapest and in the bigger towns outside Budapest which fought both against the Soviet military units invading Budapest and the armed forces of the government, namely with the forces of the ÁVH, the Police and the Hungarian Army.*

*During the first days, from 23 to 28 October, these groups came into being spontaneously, independently of each other and they carried out military operations without uniform command. They operated primarily in the districts of Budapest but later smaller groups were formed in other towns as well. These groups, however, were in a state of constant disintegration and reintegration. They were loosely connected, their nexus was confined primarily to information exchange. They did not carry out military operations in the period between 23 October and 4 November 1956. They selected their leaders from among themselves, on the basis of the results achieved in the course of the fights. The leaders quickly changed because of the actual situation, the successes or failures pushed the armed people to designate new leaders. It cannot be established that these armed groups were operating under responsible command; they were not instructed and their tasks were not determined by commands issued by a commander. Those who took part in the fights did not bear any signs distinguishing them from the civilians. The government did not recognise the anti-governmental forces as insurgents or as belligerent party. In Budapest the insurgent armed groups controlled 3 to 4 square kilometres in the period between 23 and 28 October 1956. Their control meant that they were able to block and disturb temporarily the operations of the government forces but they were not able*

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*Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*

<sup>34</sup> Bragyova, supra note 16, pp. 244-246.

*to close hermetically the controlled area or to make impossible the movement of the government forces.*

*The armed groups formed outside Budapest were operating independently of each other and did not control large, interconnected territories. Military operations were not carried out with the aim of gaining control over a region.*

*In sum, the anti-governmental forces operating in the different parts of the country did not strive to grasp or exercise power and to set up the institutions of the different powers on the 3-4 square kilometres they controlled. Their aim was merely to block and disturb the movement of the government forces.”*

As a consequence, the Military Bench found that the situation did not reach the threshold of non-international armed conflict laid down in Art. 1 of Additional Protocol II and discontinued the case. The Supreme Court upheld this decision and determined that this case and also the *Tisza-kécske* and *Kecskemét* cases concern national crimes and the statute of limitation applies to them.

The Review Bench of the Supreme Court completely reversed the argumentation although essentially did not contest the historical analysis. It declared that

*”The conditions of application set forth under Protocol II, however, relate exclusively to this protocol, as it is demonstrated by the wording: ‘This Protocol ... develops and supplements ... Article 3 common to the Geneva Conventions without modifying its existing conditions ...’*

*Article 3 common to the Geneva Conventions has had, from the beginning, definite material scope therefore the protocol cannot be endowed with retroactive effect narrowing the material scope of Article 3.*

*The community of nations sought to protect protected persons by Article 3 common to the Geneva Conventions in cases of civil war when the population of the state and the armed forces of the state are facing each other. No further criteria are specified in the text of the norm. Requiring further criteria might endanger the humanitarian character of the conventions. On the basis of a joint interpretation of the Conventions and the Protocol it could be concluded that if the opposition of the population attacked by the armed forces of the state does not attain the level of organisation required by the Protocol, then Article 3 common to the Geneva Conventions shall not be applicable even if the armed forces of the state exterminate a group or even the entirety of the population...*

*In addition to the facts established in the present case it is well-known that from 23 October 1956 the central power of the dictatorship used its armed forces against the unarmed, peacefully demonstrating population and against the emerging armed revolutionary groups. The armed forces of the state that were put into action used considerable military equipment e.g. tanks and aeroplanes, and they carried out military operations against the population confronting the state power all over the country. The armed forces were in fact fighting against the overwhelming majority*

*of the population. This is attested by the commands issued in the relevant period by the ministers of defence of the dictatorship.*

*Therefore it can be established that from 23 October until 4 November 1956, when the Soviet Army occupied the country as a result of which the conflict became international in character, the period in which the armed forces of the dictatorship fought against the population is to be characterised as an armed conflict of non-international character.”*

Upon closer scrutiny, it becomes clear that none of the above judgments meet the criteria set by international humanitarian law. The Review Bench rightly criticised the application of the requirements of Article 1 of Additional Protocol II to Common Article 3. The legal literature almost equivocally accepts that Article I (1) of Additional Protocol II has a much higher threshold, applicable only in a full-scale civil war,<sup>35</sup> and even the text of Article 1 of Additional Protocol II reveals that it has a narrower field of application, as it only applies to a conflict between the government of a State and a rebel movement, whereas Common Article 3 can cover conflicts where different rebel groups compete among themselves while the government is not involved as such or has ceased to exist.<sup>36</sup> Nevertheless, the decision of the Review Bench is far from flawless.

The Review Bench – basing its analysis on the ICRC Commentary – states that Common Article 3 is applicable every time *”when the population of the state and the armed forces of the state are facing each other.”* To buttress this view, it turns to a *reductio ad absurdum* argument by emphasizing that any different interpretation could lead to potential abuse, since *”if the opposition of the population attacked by the armed forces of the state does not attain the level of organisation required by the Protocol, then Article 3 common to the Geneva Conventions shall not be applicable even if the armed forces of the state exterminate a group or even the entirety of the population.”* However, this is not the case.

Bragyova rightly pointed it out that overt reliance on the Commentary might be misguided as the International Committee of the Red Cross in its capacity as a humanitarian organization vested with special rights under the Geneva Conventions, has obvious interest in the widest possible interpretation of these provisions.<sup>37</sup> State

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<sup>35</sup> See inter alia Dietrich Schindler, *The different types of armed conflicts according to the Geneva Conventions and Protocols*, Recueil des Cours, 1979, Vol. 163, pp. 153-156; Michael Bothe, *Article 3 and Protocol II: Case studies of Nigeria and El Salvador*, American University Law Review, Vol. 31/4, 1982., pp. 899-909; Eric David, *supra* note 28, pp. 117-121; Lindsay Moir, *supra* note 27, pp. 88-92; A. P. V. Rogers, *Law on the battlefield*, M.U.P., 2004, pp. 221; *The Manual of the law of armed conflict – UK Ministry of Defence*, O.U.P., 2004, p. 398.

<sup>36</sup> Christopher Greenwood, *Scope of application of humanitarian law*, in: Dieter Fleck (ed.) *The handbook of humanitarian law in armed conflicts*, O.U.P, 1999.

<sup>37</sup> Andrés Bragyova, *The error of the Supreme Court*, *Fundamentum*, Vol. 1, 2000, p. 105.

practice is of little help in determining the threshold of applicability of Common Article 3, since governments are notoriously reticent about acknowledging the existence of an internal armed conflict within their boundaries,<sup>38</sup> but the travaux préparatoires of the 1949 Diplomatic Conference make it clear that State did not wish to apply Common Article 3 to every possible confrontation with the population.<sup>39</sup> This view is widely supported by scholarly works and the recent jurisprudence of the ad hoc International Criminal Tribunals.

The most frequently mentioned criteria by legal writers are organization and intensity. Thus, Schindler suggests that hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces and that insurgents have to exhibit a minimum amount of organization, i. e. be under responsible command and be capable of meeting minimal humanitarian requirements.<sup>40</sup> While Pictet claims that Common Article 3 should be observed in every case of violence because "What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as acts of mere banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and take hostage?"<sup>41</sup> This reliance on *reductio ad absurdum* and indeed, the similar argument of the Hungarian Court is easy to refute: human rights law still applies in such situations and massive violations of human rights can amount to crimes against humanity, warranting international prosecution.<sup>42</sup> Ultimately, it simply stands to reason that a rebel group has to possess a minimum level of organisation to ensure compliance with the rules of humanitarian law.<sup>43</sup>

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38 See Lindsay Moir, *supra* note 27, pp. 83-88.

39 The Committee Report stated that, "It was clear that this referred to civil war, and not to mere riot or disturbances caused by bandits." Final Record II-B, 129.

40 Schindler, *supra* note 35, p. 47. Draper suggests that an Article 3 conflict take place whenever "sustained troop action is undertaken against rebels, even though the rebel organisation and control of any area is minimal, and the situation is such that the police are not able to enforce the criminal law in a particular area by reason of rebel action." G. I. A. D. Draper, *The Geneva Conventions of 1949, 1965. Recueil des Cours*, Vol. 114. pp. 89-90.

41 Commentary, *supra* note 32, p. 36.

42 See more in detail below.

43 As Moir aptly observes "The danger with Pictet's viewpoint is that, without sufficient organisation on the part of the insurgents, the net of application would be spread too wide, so that Article 3 would include those conflicts which are too limited or small-scale to have been intended... Pictet would appear to have lost sight of the fact that the provisions of common Article 3 are binding on both sides. Are we expect a disorganised group of rioters to observe even the most basic laws of war in their relations with State authority? The spontaneous nature of the situation and the lack of organisation or responsible control is bound to make this highly improbable." *Supra* note 27, p. 37.

The jurisprudence of the Criminal Tribunals concurs with this view. The International Criminal Tribunal for the Former Yugoslavia held that "[a]n armed conflict exists whenever there is... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>44</sup> This definition still requires a certain level of organization and the stipulation of 'protractedness' implies some intensity.<sup>45</sup>

Taking the above into account, it becomes obvious that the Review Bench followed an erroneous line of argumentation. Nonetheless, it is still clear that some of the events of 1956 could indeed reach the level of non-international armed conflict. Yet, there are two problems that remained unresolved: The first is the question of intertemporal law, the second is the geographical scope of non-international armed conflict.

The Hungarian judiciary failed to take into account the necessity that only such rules of international law can be applied that already existed at the time of the commission of the acts and with the contemporary interpretation (unless the modern interpretation is more favourable for the accuseds).<sup>46</sup> This requirement means that the Hungarian courts should have determined whether the norms of non-international armed conflict set out in Common Article 3 have become customary norms. As these rules were introduced as novelties, it is at least dubious whether they could become customary norms in mere 7 years.

Even if these rules existed as customary rules, it is still useful to examine whether they have applied to the whole territory of the country. The courts obviously assumed that the outbreak of a revolution automatically extends the application of Common Article 3 to entire Hungary. However, the term 'revolution' has no independent meaning under international humanitarian law, whereas 'armed conflict' has an objective existence.<sup>47</sup> Consequently, it has to be proven that the different armed hostilities during the scrutinized period can be deemed as one single non-international armed conflict. It is doctrinally accepted that parallel armed conflicts can exist on the

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44 Tadi, supra note 26, para.70.

45 The Tadi definition was accepted as a definition of non-international armed conflicts in the 1998 Rome Statute of the International Criminal Court. Art. 8 (f) "[a]pplies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, International Legal Materials, 1998, 999.

46 See Rosalyn Higgins, Some observations on the inter-temporal rule in international law, Jerzy Makarczyk (ed.) *Theory of international law at the threshold of the 21st century*, T.M.C. Asser, 1996, pp. 173-181.

47 For a thorough analysis of the place of revolution in international law see Société Française pour le Droit International, *Révolutions et droit international: colloque de Dijon*, Pedone, 1990.

territory of a single country, even separate non-international armed conflicts, e.g. different armed groups engaging in hostilities among each other.<sup>48</sup> It does not demand a big stretch of imagination to assume that if different armed groups fight against the government but completely separately from each other then they can be considered as parallel non-international armed conflicts. Since most revolutionaries fought with a lack of organization, in many cases – especially outside Budapest – reaching low-level intensity and mostly without any coordination with other groups, it could be reasonable to qualify the events separately and not as a single unit.

Nonetheless, the ICTY jurisprudence seems to be contradicting this view. In the Tadi case, the Tribunal declared that *”the fact that beneficiaries of Common Article 3 of the Geneva Conventions are those taking no active part (or no longer active part) in the hostilities... indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations.”*<sup>49</sup> In Delali it added that *”it is sufficient that alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”*<sup>50</sup>

Accepting that very broad understanding, the events of 1956 can be deemed as constituting non-international armed conflict (obviously only if the rules of Common Article 3 existed as customary norms).

#### **IV. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR BREACHES OF COMMON ARTICLE 3**

Even if Common Article 3 was applicable to the Hungarian revolution as custom and all the events qualified as non-international armed conflicts, there remains a crucial question that was not touched upon by the courts – whether breaches of the law of non-international armed conflict carried individual criminal responsibility under international law in 1956. Hungarian courts only concentrated on the first element of the equation and deemed it obvious that in case of the existence of a non-international armed conflict the perpetrator can be convicted for crimes against humanity.<sup>51</sup>

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48 Supra note 26.

49 Tadi , Jurisdiction, supra note 26, para. 69.

50 ICTY, Judgment, The Prosecutor v. Zejnil Delali and others, IT-94-1-T, para. 193.

51 Due to the strange structure of the Hungarian Criminal Code, Chapter XI. entitled ‘Crimes against humanity’ contains a section on Crimes against peace and War crimes, but crimes against humanity as the proper international crime established by the Nuremberg Tribunal does not exist in Hungarian criminal law.

The crimes in this chapter are the following

Chapter XI – Crimes against humanity

Until the 1990s, the prosecution of criminal acts violating the law of non-international armed conflict was not accepted.<sup>52</sup> The 1949 Geneva Conventions established a category of penalised acts, the grave breaches and ordered their prosecution, but that only included violations committed in international armed conflicts.<sup>53</sup> Although the military manuals of certain States, such as the US, UK, Germany and New Zealand stated that breaches of Common Article 3 are punishable, there had never been a conviction for any such act.<sup>54</sup> Even during the establishment of the ICTY the general conviction held that war crimes were limited to international armed conflicts. The International Committee of the Red Cross pronounced this opinion in its comments on the ICTY Statute<sup>55</sup> and Commission of Experts established by the General-Secretary wholeheartedly agreed.<sup>56</sup>

Accordingly, it was rather astonishing that the International Criminal Tribunal for the Former Yugoslavia found in the Tadić case that *"customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."*<sup>57</sup> Although the Chamber's methodology of

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Section I. Crimes against peace: Para. 153 War propaganda, Para. 154 Crime against the freedom of peoples, Para. 155 Genocide, Para. 156 Crime against national, racial or religious groups, Para. 157 Apartheid,

Section II. War crimes: Para. 158 Violence against civilian population, Para. 159 War Pillage, Para. 160 Criminal warfare, Para. 160/A Use of weapon banned by international convention, Para. 161 Battlefield pillage, Para. 162 Violation of armistice, Para. 163 Violence against parlementaire, Para. 164 Abuse of Red Cross symbol Para 165 Other war crimes (referring to post-Second World War legislation concerning prosecution of nazi war crimes).

In Hungary there is an ongoing debate between academics about the proper translation of the term 'crimes against humanity'. The title of Chapter XI. 'emberiség elleni bncselekmények' means 'crimes against mankind', while many international lawyers would prefer the employment of the term 'emberiség elleni bncselekmények' meaning 'crimes against morality'.

52 A member of the International Red Cross in 1990 remarked that "international humanitarian law applicable to non-international armed conflicts does not provide for individual penal responsibility". Denise Plattner, The penal repression of violations of international humanitarian law applicable in non-international armed conflicts, International Review of the Red Cross, 1990, p. 414.

53 Art. 50 of Geneva Convention I, Art. 51 of Geneva Convention II, Art. 130 of Geneva Convention III and Art. 147 of Geneva Convention IV.

54 Obviously, States have the right to penalise certain breaches of international law under their domestic legal system even if international law does not accord criminal consequences to that particular violation.

55 Christopher Greenwood, International humanitarian law and the Tadić case, European Journal of International Law, Vol. 7, 1996, p. 280.

56 UN Doc. S/1994/674, para. 52.

57 Tadić case, supra note 26, para. 134. It has to be emphasized that the ICTY has not found any evidence of the existence of this customary rule prior the 1960s.

proving custom was not entirely persuading, the principle of individual criminal responsibility has become a generally accepted rule of international law.<sup>58</sup>

This leads to the inevitable conclusion that if individual responsibility in non-international armed conflicts is indeed a new phenomenon, then it definitely cannot be applied to acts committed in 1956. Yet, even if this principle had been part of customary international law at that time, the courts still should not have proceeded with the cases as the statute of limitation applies to them.

The 1968 UN Convention clearly defines its material scope of application in Art. 1 and it applies only to war crimes committed in international armed conflicts and crimes against humanity<sup>59</sup> therefore it cannot be alluded to in cases of war crimes committed in non-international armed conflicts. The Constitution Court has recognised this potential problem and declared in 1993 that

*“the statute of limitation for the punishment of the activities enumerated in common article 3 of the Geneva Conventions does not expire... in case these offences do not fall within the category of war crimes defined by Article 1 (a) of the New York Convention – either with respect to the scope of protected persons or because of the manner of the commission of the act – they would be unavoidably covered by the non-applicability of statutory limitations requirement imposed by Article 1 (b) of the Convention.”*<sup>60</sup>

It is odd, that the Hungarian courts still relied on war crimes as crimes against humanity, which was probably due to the confusion of the Hungarian and the international law concept of crimes against humanity.

## V. CRIMES AGAINST HUMANITY – THE MISSING LINK?

The concept of crimes against humanity was introduced by the International Military Tribunal. Since crimes committed against a State’s own population traditionally fell within the domestic jurisdiction of that State, not covered by the category of war crimes, it became a haunting prospect that some of the Nazi leaders

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58 See Art. 8 (c)-(d) of the Rome Statute of the International Criminal Court

59 Article I. No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the “grave breaches” enumerated in the Geneva Convention of 12 August 1949 for the protection of war victims;

b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945

60 Act XC. of 1993, Section V (4) (b)

responsible for large-scale atrocities against the civilian population might remain unaccounted for their crimes.<sup>61</sup>

To remedy this situation, Art. 6 (c) of the Charter of the International Military Tribunal criminalized crimes against humanity

*”namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”*<sup>62</sup>

This notion aimed to ensure that inhumane acts in violation of general principles of the laws of all civilized nations committed in connection with war should be punished, served as an ‘accompanying’ or ‘accessory’ crime to either crimes against peace or war crimes.<sup>63</sup> In effect, the IMT treated this concept as simply an extension of war crimes.<sup>64</sup>

However, the subsequent practice of international courts and tribunals clearly proved that crimes against humanity constitute a category with a separate existence from war crimes, even though there is substantial overlap.<sup>65</sup> Consequently, contrary to the contention of the Hungarian Constitutional Court, not all violations of Common Article 3 constitute automatically a crime against humanity. The existence of the notion was reaffirmed in several international instruments<sup>66</sup> and elaborated in the jurisprudence of the ad hoc Tribunals.

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61 Antonio Cassese, *International criminal law*, OUP, 2003. pp. 68-69.

62 U.N.T. S. Vol. 82, 279.

63 Egon Schwelb, *Crimes against humanity*, *British Year Book of International Law*, Vol. 23, 1943, p. 181.

64 M. Cherif Bassiouni, *Crimes against humanity in international criminal law*, Kluwer, 1999. p. 10.

65 Fulvio Maria Palombino, *The overlapping between war crimes and crimes against humanity in international criminal law*, *The Italian Yearbook of International Law*, Vol. 12, 2002, p. 123-145.

66 See e.g. Art. 5 (c) of the Charter of the International Military Tribunal for the Far East, Special proclamation by the Supreme Commander for the Allied Powers as amended 26 April 1946, T.I.A.S. No. 1589.; Art. II (c) of Country Council Law No. 10, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946.; Principle 6 of the Nuremberg Principles, *Yearbook of International Law Commission*, 1950-II, 192.; Art. 11 of the Draft Code of Offences against the Peace and Security of Mankind, *Yearbook of International Law Commission*, 1954, 151; UN Doc. A/2693 (1954); Art. 5 of the Statute of the International Tribunal for the Former Yugoslavia, SC Res. 827 (1993); Art. 3 of the Statute of the International Tribunal for Rwanda, SC Res. 955 (1994); Art. 7 of the Rome Statute of the International Criminal Court.

Judicial practice and scholarly opinion agrees that the constitutive elements of crimes against humanity are a widespread or systematic attack against the civilian population. The notion of widespread attack implies a quantitative element.<sup>67</sup> According to the Akayesu judgment, "The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."<sup>68</sup>

The requirement of systematic attack involves some kind of closer cooperation between the perpetrators. Although the existence of a State or organizational policy is not an additional element of crimes against humanity, most authors agree that it is part of the definition of systematic attack.<sup>69</sup> According to Bassiouni: "The prevailing contemporary view is that "crimes against humanity" are those crimes which are committed as part of "state action or policy" for state actors... That view is evident in the use of such contemporary terms as "widespread" and "systematic" which are included in recent formulations of "crimes against humanity".<sup>70</sup>

Applying that standard it is possible to see that some of the volleys do meet the threshold of these requirements.<sup>71</sup> The existence of a central policy to commit crimes against humanity between 23 October and 4 November cannot be proven unequivocally,<sup>72</sup> however, the events in connection with the leadership of General Lajos Gyurkó meet this criterion. The General in his capacity as the military leader of Kecskemét ordered several volleys in the city starting from 26 October and sent fighter planes to shoot at peaceful demonstrators in Tiszakécske, Csongrád and Szeged. The repeated commissions of the attacks against the civilian population and their gravity clearly corroborate that the General and his subordinates have committed crimes against humanity.

In other volley cases it is more difficult to prove the systematic nature of the acts. Nevertheless, in some cases, such as in the Mosonmagyaróvár volley on 26 October demanding approximately 50 fatal casualties and 200 wounded, the sheer gravity of

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67 Gerhard Werle, *Principles of international criminal law*, T.M. C. Asser Press, 2005., p. 225.

68 *Prosecutor v. Akayesu*, ICTR (Trial Chamber), Judgment of 2 September 1998, para. 580.

69 Antonio Cassese, *International criminal law*, OUP, 2003. p. 66.

70 Bassiouni, *supra* note 64, pp. 86-87. Cassese concurs: "In sum, murder, extermination, torture, rape, political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights or, depending on the circumstances, war crimes, but fall short of meriting the stigma attaching to crimes against humanity.", *supra* note 69.

71 The requirement of intertemporal law could in theory cause some problems as it is uncertain whether in 1956 the concept of crimes against humanity extended to crimes committed outside the context of an international armed conflict, but the 1968 Convention applies to "crimes against humanity whether committed in time of war or in time of peace."

72 The Ministry of Justice Fact-finding Committee First Report supposed that a general firing order was issued on 24 October but found no conclusive proof. *Supra* note 5, p. 10.

the offence constitutes widespread commission of crime against humanity. Ironically, the only volley where a convict, János Korbély, had to serve a prison sentence, probably did not constitute a crime against humanity. Captain Korbély in defence of the Tata Police Station ordered fire on insurgents on 26 October after unsuccessful attempts to disarm a person who turned out to carry a gun. The ensuing volley demanded two lives. It is difficult to see how this event could qualify as a widespread or systematic attack on the civilian population, especially that the Captain previously successfully disarmed insurgents arriving with similar intentions. But the final verdict belongs to the European Court of Human Rights in that question<sup>73</sup>.

## **VI. CONCLUSION**

The Hungarian jurisprudence concerning the 1956 events give a clear example of the potential pitfalls of direct application of international customary law in criminal prosecution. The courts had difficulty in applying a legal system, which is completely different from Hungarian domestic law and that resulted in a series of flawed judgments. The inherent vagueness of customary crimes coupled with the deficiencies of the Hungarian Criminal Code formed a lethal mix. While today it might be too late to remedy the errors committed, this experience can serve as a useful demonstration of the extreme delicacy necessary in the application of customary rules in a domestic legal environment.

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<sup>73</sup> On 19 September 2008, the Grand Chamber of the European Court of Human Rights found that Hungary breached the European Convention on Human Rights by applying retroactive law. Nevertheless, the Hungarian Supreme Court refused to review its original judgment.

