

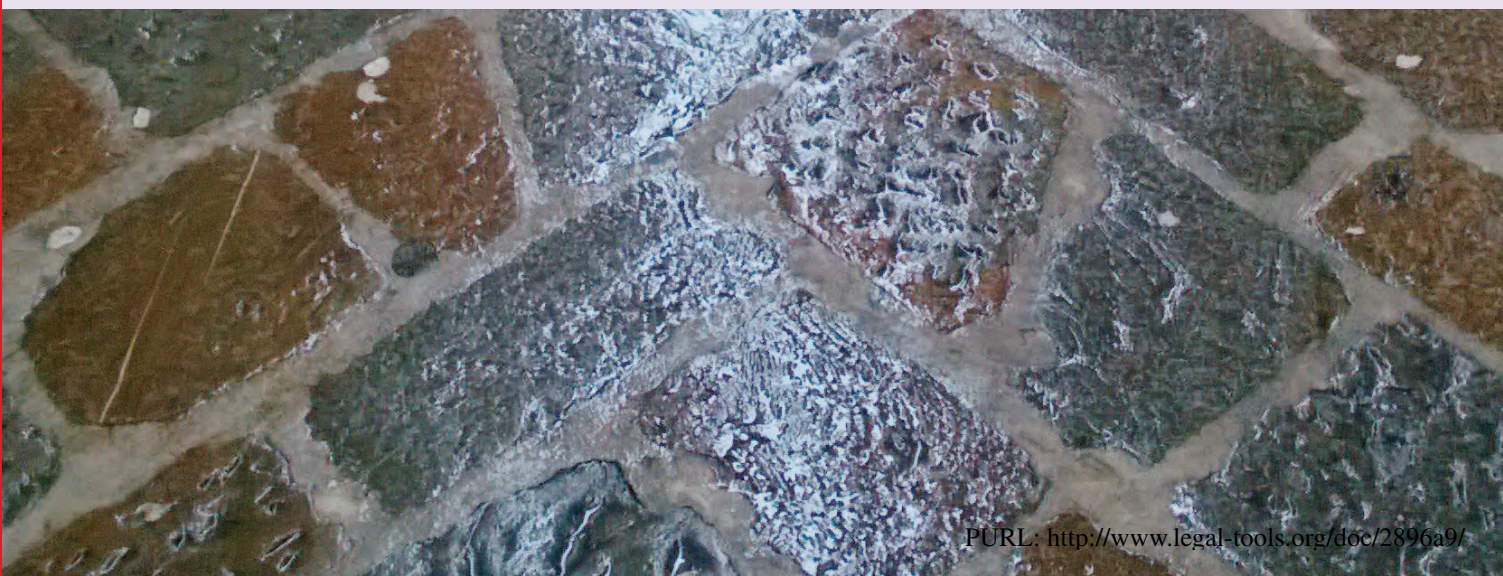
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Post-Second World War Hungarian Criminal Justice and International Law: The Legacy of the People's Tribunals

Tamás Hoffmann*

42.1. Introduction

Ákos Major, the Presiding Judge of the first Hungarian People's Tribunal recounts in his memoirs the emotional scenes of the very first trial in February 1945. It was a case of two guards at a forced labour battalion, who were accused of participating in the killing, torturing and looting of more than 100 Jewish persons. The relatives of the victims did not remain silent throughout the proceedings. Some were calling for retribution, others were weeping and on their knees begging the defendants to reveal what happened to their loved ones. When witnesses' testimonies graphically described inhumane acts of torture and murder many spectators lost consciousness. Yet, the President did not attempt to maintain order in the courtroom. He readily admitted letting "free flow of passion, so grief, despair and hatred could freely mingle at the people's court – that's why we were a people's tribunal".¹

Maybe Judge Major was right. When a war-torn Hungary was just about to come to terms with the shock of hundreds of thousands dying on the battlefield or as a result of mass aerial bombardments, other hundreds of thousands had been deported and exterminated in concentration camps and forced labour battalions with the active support or tacit approval of a significant part of the population. All this happened in the midst of a

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¹ Ákos Major, *Népbíráskodás: Forradalmi Törvényesség* [People's Judging: Revolutionary Legality], Minerva, Budapest, 1988, p. 123.

fundamental change of the political system, with the supervision of a hitherto feared and despised power, the Soviet Union, and it would have been hypocritical to pretend a return to normality in abnormal times.

However, this is exactly what the establishment of the People's Tribunals attempted to achieve. In Hungary, unlike in many other European countries where widespread lynchings and other forms of summary justice followed the end of Nazi rule,² the purge of those responsible for the war and the crimes committed against the population was to be administered by the courts. Similar to Bulgaria and Romania, the Soviet leadership regarded public war crimes trials in special courts as a powerful demonstration of justice as opposed to the spirit of lawlessness of the previous regime, thus contributing to the consolidation of Soviet control.³

The application of war crimes law was not completely alien to Hungarian criminal law since the extant Military Criminal Code had already codified certain violations of the laws and customs of war.⁴ The newly emerging norms of crime of aggression and crimes against humanity were, on the other hand, completely unknown in the Hungarian legal system. Therefore this chapter aims to examine whether these new international offences found their way into Hungarian domestic law and whether the People's Tribunals were directly or indirectly influenced by them.

42.2. Historical Background and Legal Regulation of the People's Tribunals

The operation of the People's Tribunals cannot be fully grasped divorced from their historical context. The defeat in the First World War led to cataclysmic changes in Hungary. In 1919 the Hungarian People's Republic was declared, only to be taken over shortly after by the Hungarian Soviet Republic that attempted to violently introduce communism to Hungary. The widespread atrocities of the "red terror" of the communist regime were followed by the "white terror" of the new

² István Deák, "Post-World War II Political Justice in a Historical Perspective", in *Military Law Review*, 1995, vol. 149, pp. 140–41.

³ Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, p. 52.

⁴ Act II of 1930 on the Hungarian Military Criminal Code.

counter-revolutionary regime led by Governor István Horthy, who later granted a general amnesty to those who committed crimes out of “patriotic fervor”.⁵ The regime’s ideology was based on fervent anti-communism and territorial revisionism, since the Trianon Peace Treaty caused Hungary to lose two-thirds of its territory and more than three million ethnic Hungarians became minorities in neighbouring countries. Consequently, Horthy strove to build strong ties with Germany and Italy during the 1930s, and entered Second World War as an ally of the Axis Powers in 1941, joining the military operation against the Soviet Union.⁶

On 19 March 1944, following a botched attempt by Horthy to withdraw from the Axis side, the German Army occupied Hungary. The Hungarian Jewish population, which at the time was the largest Jewish population remaining in a Central European country, had until then been subjected to discriminatory racial laws based on German legislation, but they were not physically threatened. After the occupation, however, the small German contingent led by Adolf Eichmann, which enjoyed the enthusiastic support of the Döme Sztójay government and thus the co-operation of the Hungarian public administration, deported more than 400,000 people to extermination camps in a matter of a few months. The last chapter of the Holocaust was predominantly written in the blood of Hungarian Jews.⁷

On 2 December 1944 five Hungarian opposition parties formed a coalition in the town of Szeged and created the National Independence Front with the aim of shepherding the country to a democratic transition.⁸ Already at this time the creation of a special court system was envisaged. The programme of the National Independence Front pronounced that “traitors and war criminals shall be arrested and transferred for prosecution to people’s tribunals created for this purpose”.⁹ The coalition

⁵ István Rév, *Retroactive Justice: Prehistory of Post-Communism*, Stanford University Press, Stanford, 2005, p. 203.

⁶ Deborah S. Cornelius, *Hungary in World War II: Caught in the Cauldron*, Fordham University Press, New York, 2011.

⁷ Randolph L. Braham, *The Politics of Genocide: The Holocaust in Hungary*, Wayne State University Press, Detroit, 2000.

⁸ The five parties were the Bourgeois Democratic Party, the Independent Smallholders Party, the Communist Party, the National Peasant Party and the Social Democratic Party.

⁹ Kálmán Kovács, “A Magyarországi Népbíróságok Történetének Egyes Kérdései” [Certain Questions of the History of Hungarian People’s Tribunals], in Andor Csizmadia (ed.), *Jogtörténeti Tanulmányok I.* [Studies in Legal History I.], KJK, Budapest, 1966, p. 152.

parties, on 22 December 1944, established a Provisional National Government led by Miklós Béla Dálnoki that issued a declaration on the very day of its establishment emphasising the need to prosecute or extradite those who committed war crimes or crimes against the people.¹⁰ This resolution became an international obligation by the signing of the Moscow Armistice Agreement on 20 January 1945. Article 14 stipulated that “Hungary will cooperate in arresting the persons charged with having committed war crimes. It will either extradite them to the governments concerned or will pass judgment on them”.¹¹ The agreement created an international legal obligation for the government of Hungary to create the material conditions for the prosecution of the perpetrators of international crimes.¹²

Henceforth, the establishment of the system of people’s courts gained considerable momentum. On 25 January 1945 Prime Minister Miklós Béla Dálnoki issued the Premier’s Decree (*Miniszterelnöki rendelet*, ‘MER’) No. 81/1945 On People’s Judiciary, with the stated goal that “all those, who caused the historic catastrophe of the Hungarian people or participated in it should be punished as soon as possible”. This Decree and other subsequent laws¹³ created a system of People’s Tribunals, defined their organisational structure and scope of jurisdiction.

People’s Tribunals were created as two-tier extraordinary courts representing the desire of the Hungarian people to punish the perpetrators of crimes committed against the people. The five parties of the National Independence Front nominated its members. The People’s Tribunals

¹⁰ Attila Papp, “Néptörvényszék, Népbíróság és Népbíróági Jog Magyarországon” [People’s Tribunal, People’s Court and People’s Tribunals’ Law in Hungary], in *E-Tudomány*, 2011, vol. 4, p. 10. The Szeged National Committee had already made a decision on 13 December 1944 concerning the creation of a people’s tribunal but eventually it did not become operational. Tibor Lukács, *A Magyar Népbíróági Jog és a Népbíróságok (1945–50)* [The Hungarian People’s Tribunals’ Law and the People’s Tribunals (1945–1950)], KJK, Budapest, 1979, p. 76.

¹¹ The Armistice Agreement was implemented in Hungarian Law Act V of 1945 on 13 September 1945 with retroactive effect to the date of the signature.

¹² A Magyar Köztársaság Alkotmánybírósága [Constitutional Court of the Republic of Hungary], No. 2/1994, Section II. B, 14 January 1994.

¹³ Three further Premier’s Decrees – MER No. 1440/1945 (27 April 1945), MER No. 5900/1945 (1 August 1945) and MER No. 6750/1945 (16 August 1945) amended the original Decree. Finally, Act VII of 1945 (16 September 1945) subsumed these Decrees into a consolidated text. The legal regulation was further amended by Act XXXIV of 1947 (31 December 1947).

made their decisions based on the majority principle, thus appeals were possible only if the majority of the people's judges found the defendant worthy of mercy. If the appeal was turned down, the prisoner was executed within two hours. If the accused was sentenced to imprisonment of less than five years, neither the condemned person nor his/her counsel had the right of appeal – only the prosecutor. The National Council of People's Tribunals (Népbíróságok Országos Tanácsa) with a similarly partisan composition served as the court of appeals.¹⁴ The importance attributed to the prosecution of war criminals and perpetrators of crimes against the Hungarian people is highlighted by the fact that such proceedings had already started before the official establishment of the People's Tribunals.¹⁵

After February 1945 more than 50 People's Tribunals were established within a short time frame.¹⁶ However, these exceptional courts were not simply tasked to prosecute perpetrators of horrendous crimes but also to demonstrate that the governmental policies of the past quarter century ineluctably led to disaster¹⁷ and thus helped to eliminate potential opposition to the new order.¹⁸ Justice Minister István Ries, in the official commentary of MER No. 81/1945, emphasised that:

¹⁴ László Karsai, "Crime and Punishment: People's Courts, Revolutionary Legality, and the Hungarian Holocaust", in *Intermarium*, 2000–2001, vol. 4, no. 1, p. 3.

¹⁵ On 28 January 1945, the Budapest National Committee issued a decree setting up the Budapest People's Tribunal that already on 3 February conducted its first trial and sentenced to death two defendants for murder based on existing Hungarian criminal law. The convicted persons were publicly executed the following day.

¹⁶ The exact number is uncertain but the most reliable estimate is between 50 and 60 courts. Papp, 2011, p. 33, see *supra* note 10.

¹⁷ Péter Sipos, "Imrédy Béla Pere a Népbíróság Előtt" [Béla Imrédy's Trial in Front of the People's Tribunal], in Péter Sipos (ed.), *Imrédy Béla a Vádlottak Padján* [Béla Imrédy on the Defendants' Bench], Osiris/Budapest Főváros Levéltára, Budapest, 1999, p. 68.

¹⁸ Andrea Pető points out that a decisive step in the direction to use courts as instruments in the elimination of anti-communist opposition was the adoption of Act VII of 1946 on the Criminal Law Protection of the Democratic Order of the State and the Republic, which included a rather broad definition of "anti-democratic statements and actions" as major crimes. Andrea Pető, "Historicizing Hate: Testimonies and Photos about the Holocaust Trauma during the Hungarian Post-WWII Trials", in Nanci Adler and Selma Leydesdorff (eds.), *Tapestry of Memory: Evidence and Testimony in Life-Story Narratives*, Transaction Publishers, New Brunswick, NJ, 2013, pp. 3–18, 9. On the Application of Act VII of 1946 see Frigyes Kahler, *Joghalál Magyarországon 1945–1989* [*The Death of Justice in Hungary 1945–1989*], Zrínyi, Budapest, 1993, p. 197–201.

The victorious Red Army has liberated Hungary. This has realised the first stage of the Allied Power's programme to build a democratic people's state in place of a feudal, fascist Hungary [...] Grave crimes were committed against the Hungarian people but a part of the people is also infected [...] Therefore the retribution of crimes and punishment of the guilty is an instrument of the cure as well.¹⁹

Consequently, the judgments of the People's Tribunals – especially in the cases of major war criminals – strove to make a direct link between the Horthy regime and Nazism. One ruling in this vein emphasised that

[i]t is a commonly known historical fact that following the fall of the Dictatorship of the Proletariat of 1919 [...] which made a heroic, revolutionary attempt to liberate Hungary's oppressed working classes and other social strata and to establish a Socialist economic and political system, our homeland fell into a dark age of counterrevolution and white terror, followed by the Horthy-type reactionary system of consolidation, that logically – that is, with unavoidable consistency and as if by law – led to the servile affiliation with Italian-Germanic policies, which eventually led to the evil and insane intervention in World War II, and finally, in 1944 poured the filthy, murderous flood of Arrow-Cross rule onto our people and our nation, a rule whose terrible acts and destruction of human lives and material goods were in proportion, scale, and methods beyond human comprehension.²⁰

Accordingly, it is hardly surprising that from the very first moments of the establishment of the tribunals, it was deemed paramount to prosecute members of the former elite. A list containing the names of 106 major war

¹⁹ István Ries, *A Népbíráskodásról Szóló 81/1945. M.E. számú és az ezt Kiegészítő 1440/1945. M.E. számú Rendelet Szövege és Magyarázata* [Text and Commentary of Premier's Decree No. 81/1945 and MER No. 1440/1945], Politzer Zsigmond és Fia Könyvkereskedés, Budapest, 1945, p. 5.

²⁰ National Council of People's Tribunals ('NOT') II. 727/1949/9, 4, cited in Rév, 2005, p. 203, see *supra* note 5. The Szálasi Trial judgment, in a similarly straightforward manner pronounced: "The fall of the right is over, the future belongs to the left [...] the ruins left behind by the right have to be rebuilt [...] but on the road to progress we go once and for all towards socialism". Ferenc Ábrahám and Endre Kussinszky (eds.), *Íté a Történelem: A Szálasi-per* [History is in Session: The Szálasi Trial], Híradó Könyvtár, Budapest, 1945, p. 32.

criminals was compiled²¹ that included almost every former Prime Minister as well as government officials. In the following years, five former Prime Ministers and dozens of wartime cabinet members and generals were executed.²²

To further highlight the historical and political context of the cases, MER No. 81/1945 introduced the institution of the political prosecutors. Political prosecutors were laypersons without legal education who assisted the professional people's prosecutors. The exact role of the people's prosecutor was somewhat uncertain. He represented the "universal victim", the Hungarian people, during the legal proceedings hence his status was equal to the victims. Nevertheless, he had the right to cross-examine the witnesses and the accused and make a closing speech, though he could not raise or drop charges or appeal a verdict.²³ As the National Council of People's Tribunals explained, his task was "to uncover those historical, societal, strategic, legal, political, individual and psychological reasons that caused the death of hundreds of thousands of Hungarians, the misery of millions, destruction of our homeland and its shame. Finally, based on the morale of these historical trials, he has to show a way to the future".²⁴

Trial proceedings were not the sole instruments for purging those allegedly responsible for the miseries of the Hungarian people. In line with the infamous declaration of the Potsdam Agreement²⁵ in Hungary, just as in Poland and Czechoslovakia,²⁶ ethnic Germans were deemed collectively responsible for the war and almost 200,000 were deported to Germany.²⁷ Moreover, about 40,000 people were interned by 1949 for

²¹ Prime Minister Miklós Béla Dálnoki signed the document on 16 February 1945. László Karsai and Judit Molnár (eds.), *A Magyar Quisling-kormány: Sztójay Döme és Társai a Népbírószág Előtt* [The Hungarian Quisling Government: Döme Sztójay and Company in Front of the People's Tribunal], 1956, os Kht., Budapest, 2004, p. 13.

²² Deák, 1995, pp. 140–41, see *supra* note 2.

²³ Even though some of the political prosecutors apparently attempted to effectively take over the functions of the people's prosecutors. Papp, 2011, p. 57, see *supra* note 10.

²⁴ NOT. I. 365/6/1946 (1 February 1946).

²⁵ The agreement called for "the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken".

²⁶ Alfred-Maurice de Zayas, *A Terrible Revenge: The Ethnic Cleansing of the East European Germans, 1944–1950*, St. Martin's Press, New York, 1993.

²⁷ Frey Dóra, "Büntetés Bűn Nélkül? A Kollektív Bűnösség Konceptiója a Jogforrásokban a Mai Németek Vonatkozásában a Második Világháború után" [Punishment without Crime?

suspected affiliation with the previous regime²⁸ and 103,000 people were placed on the so-called B List that contained the names of unreliable state employees whose earlier conduct could result in their dismissal.²⁹

Nevertheless, the trials of war criminals remained the centre of public attention. Newspapers regularly reported on the proceedings of major war criminals and there was an often expressed hope that the victorious powers might display a more lenient attitude towards Hungary if justice was duly served.³⁰ Members of the Allied Control Commission and prominent politicians frequently attended the trials and sometimes even tried to intimidate the judges.³¹ Yet, even under such circumstances, recourse to the apparently neutral rules of international law could serve as a potent tool for legitimising the introduction and application of new substantive criminal law norms thus camouflaging the resort to political justice. In the subsequent sections, I will attempt to analyse whether the newly emerging norms of international criminal justice – the crime of aggression and crimes against humanity – found their way into the jurisprudence of the People’s Tribunals.

42.3. Crimes Against Peace

42.3.1. The International Regulation of the Criminality of War

Until the twentieth century, the right to wage war was a sovereign prerogative and the notion of war played a central role in the doctrine of international law. Classical international law was based on a strict

The Concept of Collective Guilt in Legal Sources concerning Contemporary Germans after the Second World War], in Máthé Gábor, Révész T. Mihály and Gosztonyi Gergely (eds.), *Jogtörténeti Parerga: Ünnepi Tanulmányok Mezey Barna 60. Születésnapja Tiszteletére* [Legal History Parerga: Festschrift in Celebration of the 60th Birthday of Barna Mezey], Eötvös, Budapest, 2013.

²⁸ Tibor Zinner, “Háborús Bűnösök Perei. Internálások, Kitelepítések és Igazoló Eljárások 1945–1949” [Trials of War Criminals. Internments, Deportations and Justificatory Proceedings between 1945–1949], in *Történelmi Szemle*, 1985, vol. 28, p. 125. The Secret Security Department of the Ministry of Interior oversaw this investigation.

²⁹ Karsai, 2000, p. 5, see *supra* note 14.

³⁰ Karsai and Molnár, 2004, p. 31, see *supra* note 21.

³¹ Judge Ákos Major recalls that during the first major war crimes trial, the trial of former Prime Minister László Bárdossy, he was reprimanded by Mátyás Rákosi, the leader of the Communist Party, and also by a British colonel. Major, 1988, pp. 215–24, see *supra* note 1.

distinction between the law of peace and the law of war, the realm of war pertaining only to armed hostilities between nations. However, the cornerstone of the legal framework of war was the application of formalistic criteria, such as issuing a declaration of war³² or ultimatum expressing the requisite *animus belligerendi*,³³ and the conclusion of a peace treaty signalling the end of the state of war between the belligerent states. As a result, actual hostilities and the existence of a state of war could be separated.³⁴ Nevertheless, apart from the beginning and termination of war in a technical sense, a state of war could also be acknowledged with the commencement of actual hostilities between states troops acting under the authority of their respective state³⁵ – termed as

³² Grotius already stated that for a just war “it is not enough to that it be made between Sovereigns, but it must be undertaken by public Declaration, and so that one of the Parties declare it to the other”. Hugo Grotius, *De Jure Belli ac Pacis*, printed for W. Innys and R. Manby, J. and P. Knapton, D. Brown, T. Osborn, and E. Wicksteed, London, 1738. Formally, however, it became obligatory only by the adoption of Article 1 of the Hague Convention (III) Relative to the Opening of Hostilities which stipulates that: “The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war”. Clyde Eagleton explained that “[D]eclarations of war have usually served to notify non-participating powers of the status of the issuing sovereign, prepare the political structure and the populace for war, and place blame upon the other party by appropriate wording of the declaration”. Clyde Eagleton, “The Form and Function of the Declaration of War”, in *American Journal of International Law*, 1938, vol. 32, pp. 32–34.

³³ Arnold McNair summarised this doctrine by stating that “[w]hether a state of war in a legal sense exists between nations is largely a question of intent”. Arnold D. McNair, “The Legal Meaning of War and the Relation of War to Reprisals”, in *Transactions of the Grotius Society*, 1926, vol. 11, p. 45. Accordingly, the essential function of the declaration of war was to furnish conclusive evidence that the declarant intended a state of war to exist between the nations specified.

³⁴ For instance, President Harry S. Truman proclaimed on 31 December 1946 that “although a state of war still exists [...] hostilities have terminated”; cited in Fred K. Green, “The Concept of ‘War’ and the Concept of ‘Combatant’ in Modern Conflicts”, in *Military Law and Law of War Review*, 1971, vol. 10, p. 270.

³⁵ See the statement of the British Prime Minister in June 1900, acknowledging that the clashes between Chinese troops and international forces in Taku only brought about the existence of a state of war between China and Britain if the Chinese troops acted with state authority. Fritz Grob, *The Relativity of War and Peace*, Yale University Press, New Haven, 1949, p. 202. The Kansas Federal District Court held that the Boxer Rebellion did not amount to a state of war. *Hamilton v. McClaughry*, 136 F. 445, 450 (C.C.D. Kan. 1900). Similarly, the US Supreme Court defined war as “every contention by force between two nations in external matters under the authority of their respective government”, in *Bas v. Tingy*, 4 U.S. 37, 1800. (4 Dall., 1800).

war in the material sense or *de facto* state of war³⁶ – unless all the belligerent states denied its existence.³⁷

After the First World War, however, the victorious Allied Powers attempted to introduce the concept of criminality of waging war. The Commission on the Responsibility of the Authors of the War and on Enforcement concluded that Germany, Austria-Hungary, Turkey and Bulgaria had declared war “in pursuance of a policy of aggression, the concealment of which gives to the origin of this war the character of a dark conspiracy against the peace of Europe”.³⁸ Subsequently, Article 227 of the 1919 Treaty of Versailles provided for the establishment of a special tribunal to try Kaiser Wilhelm II for “a supreme offence against international morality and the sanctity of treaties”, a somewhat cryptic but still recognisable allusion to the crime of aggression. Nevertheless, this article was never operationalised and the ex-Emperor was never extradited from the Netherlands where he took refuge.

In the interwar period, codification in the framework of the League of Nations attempted to outlaw aggressive war. Article 1 of the Draft Treaty of Mutual Assistance of 1923 stipulated that “aggressive war is an

³⁶ See, for example, the *Teutonia* case, where the Privy Council pronounced “a war may exist *de facto* without a declaration of war, yet it appears [...] that this can only be affected by an actual commencement of hostilities”. (1872) LR, 4 PC, 179.

³⁷ Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge, 2001, pp. 29–32. Typically, not even the extensive naval operations between the USA and France between 1798 and 1801 were regarded to have constituted war even though the Secretary of State, Timothy Pickering, openly declared on 16 October 1799 that: “This conduct of the French Republic would well have justified an immediate declaration of war on the part of the United States, but desirous of maintaining peace, and still willing to leave open the door of reconciliation with France, the United States contented themselves with preparations for defense, and measures calculated to protect their commerce”. Quoted in Grob, 1949, p. 51, see *supra* note 35. Another example was the 1827 naval battle between Britain and Turkey at Navarino, in which 60 Turkish ships were sunk and 4,000 men perished. That was officially termed by the British as an “accident”. See Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, p. 151. The doctrinal uncertainty is evident in Quincy Wright’s argument, who submitted: “Suppose, however, that a state commits acts of war on a large scale, but with repeated assertions that it is not intending to make war, is it possible for its acts to speak louder than its words? It is believed that such a situation *may become* a state of war, but only if recognized as such by the victim or by third states”. Quincy Wright, “When Does War Exist”, in *American Journal of International Law*, 1932, vol. 26, p. 365 (emphasis by the author).

³⁸ Carnegie Endowment, *German White Book Concerning the Responsibility of the Authors of the War*, Oxford University Press, New York, 1924, p. 18.

international crime” and that no party could be “guilty of its commission”.³⁹ Similarly, the Preamble of the Geneva Protocol for the Pacific Settlement of International Disputes of 1924 asserted that “a war of aggression constitutes [...] an international crime”.⁴⁰ The Assembly of the League of Nations also unanimously adopted a Declaration Concerning Aggressive Wars on 24 September 1927 that emphasised that “a war of aggression can never serve as a means of settling disputes and is, in consequence, an international crime”. The use of criminal law terms such as “crime” and “guilty” could possibly suggest that these and other similar instruments⁴¹ envisaged individual criminal responsibility in cases of aggressive war. However, given the general context of adoption of these documents and the absence of definition of the crime of aggression, it can be concluded that these labels were used to emphasise the gravity of aggressive war as opposed to its criminal law ramifications.⁴²

The campaign to outlaw war reached a crucial milestone in 1928 when the General Treaty for the Renunciation of War as an Instrument of National Policy, commonly referred to as the Kellogg-Briand Pact, was adopted.⁴³ However, the Pact that was ratified by the overwhelming majority of the international community and renounced war as an instrument of national policy failed to establish any responsibility – state or individual – in case of the breach of its provisions.⁴⁴

³⁹ Records of the Fourth Assembly, Minutes of the Third Committee, *League of Nations Official Journal, Special Supplement*, 1923, vol. 16, p. 203.

⁴⁰ Geneva Protocol on the Pacific Settlement of International Disputes, adopted by the Fifth Assembly on October 2, 1924. Records of the Fifth Assembly (1924), Meetings of Committees, Minutes of the First Committee, *League of Nations Official Journal, Special Supplement*, 1924, vol. 17, pp. 136–140.

⁴¹ For a thorough overview of the legal documents of the interwar period concerning aggression see Benjamin B. Ferencz, *Defining Aggression: The Search for World Peace. A Documentary History and Analysis*, vol. I, Oceania Publications, New York, 1975, pp. 4–36 and 61–284.

⁴² Carl Schmitt, *Writings on War*, Polity Press, Cambridge, 2011, p. 146. The contemporary legal view was generally reluctant to accept individual criminal responsibility for involvement in aggressive war. See Sellars, 2013, pp. 1–46, *supra* note 3.

⁴³ General Treaty for Renunciation of War as an Instrument of National Policy, signed in Paris, 27 August 1928, No. 796, 94 LNTS 57 (entered into force on 24 July 1929).

⁴⁴ Interwar Hungarian international law literature agreed that the breach of the Kellogg-Briand Pact did not incur any sanctions. László Búza, *A Nemzetközi Jog Tankönyve* [Textbook of International Law], Politzer Zsigmond és Fia, Budapest, 1935, p. 357; Ferenc Faluhelyi, *Államközi Jog* [Interstate Law], vol. I, Karl Könyvesbolt, Pécs, 1935, p. 42.

Somewhat surprisingly, the international criminalisation of aggressive war found its staunchest supporters in Soviet jurisprudence. By the late 1930s Andrei Vishinsky, who became the foremost Soviet jurist after the demise of Evgeny Pashukanis, came to the conclusion that criminal law could defend the interests of the Soviet state even from imperialist powers. In 1937 he declared that “criminal law must be put on guard over the cause of peace and must be mobilized against war and against those who incite war”.⁴⁵ In the same year, together with Vishinsky’s support, another Soviet lawyer Aron Trainin published a book-length treatment of the topic entitled *Zashchita mira i ugodovnyi zakon* [Defence of Peace and Criminal Law], which advanced the proposition that individuals should be held liable for the initiation of aggressive war.⁴⁶ However, these views did not have much influence on the Western legal debates until the end of the war, when another of Trainin’s books was translated into English and widely disseminated in diplomatic circles.⁴⁷ Embryonic forms of the crimes against peace charge were already beginning to emerge in Western Europe in mid-1943.⁴⁸

Despite its contested nature, with the adoption of the London Charter of the International Military Tribunal (‘IMT’), it became clear that the United Nations regarded aggressive war not simply as an international crime that incurs individual criminal responsibility but the supreme international crime, “the crime which comprehends all lesser crimes”.⁴⁹ Article 6(a) of the London Charter defined “aggressive warfare” under the heading of “crimes against peace” as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of

⁴⁵ Aron Naumovich Trainin, *Hitlerite Responsibility under Criminal Law*, Hutchinson, London, 1945, p. 12.

⁴⁶ George Ginsburgs, *Moscow’s Road to Nuremberg: The Soviet Background to the Trial*, Martinus Nijhoff, Leiden, 1996, p. 19.

⁴⁷ Trainin, 1945, see *supra* note 45.

⁴⁸ Sellars, 2013, pp. 49–50, see *supra* note 3. Dan Plesch and Shanti Sattler point out that the United Nations War Crimes Commission debated the issue of the crime of aggression since the beginning of its operation. See Dan Plesch and Shanti Sattler, “A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and Its Associated Courts and Tribunals”, in *Criminal Law Forum*, 2014, vol. 25, p. 32.

⁴⁹ Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, 6 June 1945, US Government Printing Office, Washington, DC, 1949.

international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.⁵⁰ The fact that the commission of the other two crimes within the jurisdiction of the Nuremberg Tribunal, war crimes and crimes against humanity, was tied to the context of war highlights the fundamental importance of the aggression charge for the drafters.

The IMT's judgment sought to dispel any doubts concerning the retrospective nature of the crime of aggression by attempting to prove that it had customary law status by 1939. It cited the various documents in the interwar period addressing the issue and placed special emphasis on the Kellogg-Briand Pact. The IMT concluded that “the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing”.⁵¹ The International Military Tribunal for the Far East (‘IMTFE’) in Tokyo unsurprisingly concurred with this reasoning.⁵²

The London Charter and the IMTFE Charter failed to define the concept of aggressive war and left it to the judges to define this. However, since the Third Reich clearly engaged in a policy of territorial expansion, the judges did not need to precisely draw the contours of this crime. Nevertheless, a close study of the factual findings of the respective judgments reveals that the term “war of aggression” includes:

- i) war with the object of the occupation or conquest of the territory of another State or part thereof;
- ii) war declared in support of a third party's war of aggression; and
- iii) war with the object of disabling another State's capacity to provide assistance to (a) third State(s)

⁵⁰ Almost identical definitions were adopted in the Charter for the IMTFE and in Article II(a) of Council Control Law No. 10.

⁵¹ International Military Tribunal, Judgment and Sentences, reprinted in *American Journal of International Law*, 1947, vol. 41, p. 218 (“Nuremberg Judgment”).

⁵² See Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, p. 527.

victim of a war of aggression initiated by the aggressor.⁵³

The personal scope of application of crimes against peace was similarly uncertain. While it obviously included the political and military leadership of Germany, it did not specify the level of involvement of an individual that gives rise to criminal responsibility. The IMT accepted that crimes against peace were committed with the assistance of individuals who were not formally part of the state⁵⁴ and “assumed that anyone who either participated in the Nazi conspiracy to commit aggression or knew about the conspiracy and intentionally furthered it was guilty of the crime”.⁵⁵ Accordingly, Hjalmar Schacht, a prominent figure in the rearmament of Germany as President of the Reichsbank from 1933 to 1939, Minister of Economics from 1934 to 1937 and Plenipotentiary General for War Economy from 1935 to 1937, was acquitted of the charge of participating in a common plan to wage aggressive war since the Prosecution could not prove beyond a reasonable doubt that he had knowledge about the plan.⁵⁶ Kevin Heller convincingly argues that a perusal of the post-Second World War jurisprudence of the subsequent Nuremberg military trials and the IMTFE demonstrates that beyond mere knowledge of planned aggression, the accused had to be in a position to shape and influence the policy of aggressive war and then act in furtherance of that policy.⁵⁷ Thus, irrespective of formal rank or

⁵³ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2013, p. 139.

⁵⁴ The IMT judgment emphasises that “Hitler could not make aggressive war by himself. He had to have co-operation of statesmen, military leaders, diplomats, and business men”. Nuremberg Judgment, p. 223, see *supra* note 51.

⁵⁵ Kevin J. Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”, in *European Journal of International Law*, 2007, vol. 18, no. 3, p. 482.

⁵⁶ Nuremberg Judgment, pp. 309–10, see *supra* note 51.

⁵⁷ Heller, 2007, pp. 482–88, see *supra* note 56. See, for example, the High Command case where the IMT asserted that “mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition, that the possessor of such knowledge, after he acquires it, shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy”. *United States v. von Leeb et al.*, Military Tribunal XII, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. 11, United States Government Printing Office, Washington, DC, 1950, p. 488.

position, active participation in the planning or waging of an aggressive war with the possibility to influence the war effort established criminal responsibility.

42.3.2. Hungarian Application of the Crime of Aggression

The notion of criminal proceedings in relation to participation in a war was not completely foreign to Hungarian legal tradition. After the First World War the revolutionary government promulgated on 2 March 1919 People's Act XXIII on the Preparation of Legal Proceedings concerning Persons Responsible for the War. Even though quite possibly this law was the first ever normative formulation of the criminality of the initiation of war,⁵⁸ the takeover of Horthy prevented any actual criminal trials.

The crime of aggression only returned with the adoption of MER No. 81/1945. Article 11 of the Decree stipulated that a war criminal is one:

- 1) who contributed to the involvement of Hungary in the 1939 war in a leadership position or failed to prevent it even though he could have had the opportunity due to prominent position in public administration, or political, economic or intellectual position.
- 2) who, as a the member of the cabinet or the parliament, or as a prominent public official, initiated, or even though he could have foreseen the consequences, participated in adopting a resolution that led the Hungarian people to war.
- 3) who attempted to prevent the conclusion of the armistice agreement by violence or by using his influence.

Even though the Decree preceded the London Charter by eight months, its content is remarkably close to the London Charter's definition of crimes against peace and in many respects presages the jurisprudence of post-Second World War criminal fora. It makes clear that any conduct that contributed to Hungary's participation in the war or a potential failure to prevent it could be deemed a criminal act. However, it might be argued that even though the notion of criminalising participation in the war was based on the pressure of the victorious Allied Powers, its actual implementation took the form of a *sui generis* Hungarian domestic regulation that was independent from the emerging international criminal

⁵⁸ Lukács, 1979, p. 42, see *supra* note 10.

law regulation pertaining to aggressive war. Yet, an overview of the first major war crimes trial, the trial of Prime Minister László Bárdossy, proves that the People's Tribunals were aware of the international legal developments and made efforts to apply the Hungarian legislation in the spirit of international law.

Bárdossy was a distinguished diplomat in the 1930s and was appointed as Foreign Minister in February 1941 and shortly afterwards – after the suicide of Prime Minister Pál Teleki – on 3 April 1941 he became Prime Minister, a position that he held for only 11 months. Still, even in this short time frame, he oversaw the Hungarian military's participation in the attack against Yugoslavia, in the military operation against the Soviet Union and the recognition of a state of war with the US.⁵⁹ During the trial, the Prosecution sought to prove that the accused was aware of the illegality of aggressive war under international law and knowingly engaged in illegal actions, while the accused chose a sophisticated defence that was mainly based on international legal arguments.

On the very first day of the trial, the Prosecution asked Bárdossy whether he knew that “aggressive war is deemed as an international crime due to developments since the last world war”. Bárdossy retorted that such a determination was conspicuously missing in numerous conflicts following the conclusion of the Kellogg-Briand Pact and the reservations attached to the treaty clearly proved that the States Parties reserved the right to wage war under their own terms.⁶⁰ Bárdossy claimed that all the Hungarian actions were in conformity with international law. Hungary had not attacked Yugoslavia in breach of the Hungarian-Yugoslav Treaty of Eternal Amity and Friendship since the German military action started on 6 April 1941. Hungarian troops did not cross the border until 10 April 1941, when Croatia declared its independence. In the Hungarian view, the independence of Croatia resulted in the dissolution of the Yugoslav

⁵⁹ For a thorough – and overwhelmingly sympathetic – description of the life and trial of Bárdossy see Pál Pritz, *The War Crimes Trial of Hungarian Prime Minister László Bárdossy*, Center for Hungarian Studies and Publications, Boulder, 2004, pp. 3–74.

⁶⁰ Bárdossy underlined that “reservations made by the English government to the Kellogg Pact convinced me that England reserved the right to initiate a war anytime according to its interests”. Pál Pritz (ed.), *Bárdossy László a Népbírószág Előtt* [László Bárdossy in Front of the People's Tribunal], Maecenas, Budapest, 1991, p. 147.

Kingdom and thus Hungary had the right to occupy and annex Voivodina, where a substantial Hungarian minority lived.⁶¹

As for the attack against the Soviet Union, Bárdossy stressed that Hungary has not joined the German forces on 22 June 1941 when Operation Barbarossa was launched but simply severed diplomatic relations with the Soviet Union. Contrary to the charges, no declaration of war was issued against the Soviet Union, but on 26 June 1941 three Soviet fighter planes fired machine guns at an express train on its way to Budapest between Tiszaborkút and Rahó, and one hour later unidentified planes dropped 29 bombs on Kassa (Košice).⁶² The next day Bárdossy announced in the Lower House of the Parliament that “due to the inexcusable attack of the Soviet Union, completely contrary to the Law of Nations, the royal Hungarian government states that consequent to the attack a state of war exists between Hungary and the Soviet Union”.⁶³ Bárdossy was keen to point out the difference between a declaration of war and recognition of an existing state of war that was the consequence of an unlawful armed attack.⁶⁴ However, this distinction seems to have been lost for the Prosecution and the Tribunal.

The 2 November 1945 judgment of the Budapest People's Tribunal rejected the defence arguments. It stated that “in the case of war crimes the collective legal object is the peaceful coexistence of humankind, that is fundamentally shattered and destroyed by the horrible destruction of aggressive war. Aggressive war amounts to an international crime due to certain international treaties created since the First World War”.⁶⁵ It expressly referred to the Kellogg-Briand Pact, the 1924 Geneva Protocol for the Pacific Settlement of International Disputes and the 1927 League of Nation's Assembly Declaration Concerning Aggressive Wars as evidence of the criminal nature of aggression. It concluded that:

⁶¹ *Ibid.*, pp. 123–26.

⁶² It is still subject to debate whether the airplanes were indeed Soviet fighters or German – maybe even Hungarian – airplanes that wanted to create an appropriate *casus belli*. See Loránd Dombrády, *Katonapolitika és Hadsereg 1938–1944* [Military Policy and Army 1938–1944], Ister, Budapest, 2000, p. 144.

⁶³ Hungary, Parliament, House of Representatives, *Napló* [Minutes], vol. 10, Athenaeum, 1941, p. 305.

⁶⁴ Pritz, 1991, p. 135, see *supra* note 60.

⁶⁵ *Ibid.*, p. 287.

According to the position of international law already before the Second World War aggressive war amounted to an international crime. The aggressor nation is guilty in front of the community of nations. Therefore the accused, who was a diplomat with knowledge of international law, cannot claim that he, who directly caused the involvement of Hungary in an aggressive war as a prime minister and a foreign minister, is simply responsible but not guilty, as in countries guilty of the initiation of aggressive war the politician or politicians are also guilty that led their country to aggressive war without its will.⁶⁶

While the judgment did not address the distinction between a declaration of war and recognition of state of war with the Soviet Union, it did reject the argument concerning the dissolution of Yugoslavia. The Tribunal pointed out that the Croatian government was just a German proxy and the Yugoslav Army was still fighting at the time of the commencement of the Hungarian military operations. Consequently, the military operation participated in an aggressive war.⁶⁷

This judgment authoritatively affirmed that the Hungarian criminalisation of involvement in the Second World War was a reflection of the international crime of aggressive war. It followed exactly the same logic as the later IMT judgment, which is hardly surprising since it refers to the report of Justice Robert H. Jackson that was available for the Hungarian authorities too.⁶⁸ This approach was shared by a considerable part of the Hungarian lawyers as well. On the day of the judgment the Criminal Law Committee of the Free Cooperative of Hungarian Jurists issued a resolution declaring that:

The people's tribunal is the delegated forum of international criminal jurisdiction. With reference to the agreements of the Crimean and Potsdam conferences and the Moscow Armistice Agreement, it can be concluded that even though the people's tribunal is obviously a Hungarian court, in discharging its international obligations it acts as the delegated forum of interstate criminal jurisdiction [...] War crimes are crimes of international character, whose collective legal object is the

⁶⁶ *Ibid.*, pp. 288–89.

⁶⁷ *Ibid.*, p. 301.

⁶⁸ *Ibid.*, p. 290.

order of the peaceful coexistence of humankind that is fundamentally shattered by aggressive war.⁶⁹

In a similar vein, the Budapest People's Tribunal in the judgment of Béla Imrédy, another former Prime Minister, held that "[p]erpetrators of war crimes and crimes against the people don't simply attack and endanger their own country's constitution and political system but the international legal order, the peace of culture and humanism".⁷⁰ Just like in Nuremberg, aggressive war was regarded as the root of all evil. The Tribunal in the case of former Prime Minister Sztójay and his cabinet members accordingly found that

[t]he accused were part of the government established in 22 March 1944 that aimed at increased engagement of Hungary in the war. Every other act, the suppression of the left, the extermination of the Jews, making of public speeches that significantly influenced the public opinion, support to the Arrow-Cross movement, hindering the conclusion of an armistice agreement, support of crimes against the people were part of this common goal.⁷¹

Yet, even though the content of the crime of aggressive war could be identified to a high degree of certainty, the personal scope of application of the crime – not unlike in the international proceedings – remained vague. The reference to "intellectual position" in Article 11(1) could have covered a large number of people not wielding real influence over the planning and waging of war. Indeed, in 1945 the President of the National Council of People's Tribunals, István Ries, stated that he would even "include those eminent publicists that supported these measures instead of criticising them".⁷² Fortunately, the crime of aggression was not applied in such a sweeping manner although certain contentious issues remained to be solved in the jurisprudence of the People's Tribunals, especially with regard to the criminal responsibility of Members of Parliament.

In the first major trial of a legislator, Zoltán Meskó was found guilty of failure to prevent Hungarian participation in the war. The National Council of People's Tribunals explained that

⁶⁹ *Népbírószági Közlöny*, vol. I. no. 1, 8 November 1945, pp. 13–15.

⁷⁰ *Népbírószági rendelet* [Decree on People's Judiciary] Nbr. 3953/1945-11, Judgment of 23 November 1945.

⁷¹ NOT. I. 3846/1946, 1 July 1946.

⁷² Ries, 1945, p. 28, see *supra* note 19.

the role of the legislator obliges the representative to attempt to prevent every action that offends the Hungarian people's interests, sentiments or moral. The accused failed to do so [...] and it is indifferent whether accused could have possibly prevented the increased engagement of Hungary in the war. He cannot rely on the fact that his fellow MPs also failed to do something or that he was hindered by the depressing atmosphere of government terror.⁷³

This decision implied that theoretically every single Member of Parliament who did not vote against legislation that contributed to the war effort was guilty of aggressive war. However, it must be added that Meskó was not an ordinary MP but an enthusiastic supporter of Nazism who – among others – founded the National Socialist Agricultural Labourers' and Workers' Party (Magyar Nemzeti Szocialista Földmunkás és Munkáspárt) in 1932.⁷⁴ This might help to explain the arguably excessive approach of the Council. In a later judgment, the National Council of People's Tribunals came to a much more nuanced conclusion. In a judgment exonerating a former Member of Parliament for not voting against the determination of the state of war against the Soviet Union it emphasised that

in the given circumstances it would have been the patriotic and moral duty of every legislator to valiantly fight for the idea of liberty and humanity. However, such a heroic conduct in everyday life is only a moral duty and those who did not choose captivity instead of individual freedom or death instead of life cannot be found criminally liable.⁷⁵

Thus, the People's Tribunals, just like their international counterparts, focused on the question of the extent the accused was able to influence the war policy as opposed to his formal position. László Temesváry, the President of the Hungarian National Bank, for instance, was found guilty in October 1944 since he approved of the transfer of the

⁷³ Cited by Major, 1988, p. 178, see *supra* note 1.

⁷⁴ On Meskó's role in the organisation of Hungarian far-right movements see Randolph L. Braham, *A Népiértés Politikája: A Holokauszt Magyarországon* [The Politics of Genocide: The Holocaust in Hungary], Belvárosi Könyvkiadó, Budapest, 1997, pp. 57–59.

⁷⁵ NOT. I. 175/1945, Judgment of 8 December 1945.

National Bank's gold and currency reserve to Germany which "contributed to the increased engagement of Hungary in the war".⁷⁶

42.4. Crimes Against Humanity

42.4.1. The International Regulation of Crimes Against Humanity

The first attempt to introduce a category of international crimes that could cover atrocities committed against the civilian population was in 1915, when a joint declaration was issued by the British, French and Russian governments, condemning the massive and widespread deportation and extermination of hundreds of thousands of Armenians by the Ottoman government, stating:

In view of these new crimes of Turkey against humanity and civilisation, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.⁷⁷

The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties reported to the 1919 Preliminary Peace Conference that Germany and its Allies had committed numerous acts in violation of established laws and customs of war "and the elementary laws of humanity", the latter reference being identified as offences committed by the Central Powers against their own nationals.⁷⁸ However, the Versailles and the Lausanne Peace Treaties eventually did not include reference to criminal proceedings for crimes committed against a country's own civilian population.⁷⁹

⁷⁶ *Népbírószág* [People's Tribunals], Nb. XII. 4832/1945/4, Judgment of 8 February 1946.

⁷⁷ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948 ("History of the UNWCC"), p. 35.

⁷⁸ Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, Antwerp, 2002, p. 458.

⁷⁹ Article 230 of the Sèvres Peace Treaty between Turkey and the Allied Powers stipulated that "The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on the territory which formed part of the Turkish Empire on August 1, 1914". However, the Treaty of Sèvres was not ratified, and the final Peace Treaty between Turkey and the Allied Powers omitted any reference

The tragic events of the Second World War resurrected the notion of accountability for such crimes. On 17 December 1942 the United Nations issued a declaration about the German intention to exterminate Jews and emphasised that those responsible will not escape retribution. The United Nations War Crimes Commission ('UNWCC') also at an early time suggested the extension of punishment beyond war crimes.⁸⁰ The actual formulation of the crime, however, remained undetermined until the adoption of the London Charter.⁸¹ The modern usage of the words "crimes against humanity" dates from the Nuremberg Charter, Article 6(c) of which reads as follows:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation or 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.

This new category of crimes against humanity was introduced to ensure that inhumane acts committed against the civilian population in connection with war are punished; hence, it served as an "accompanying" or "accessory" crime to either crimes against peace or war crimes.⁸² In effect, the Nuremberg IMT treated the concept as an extension of war crimes.⁸³

There is general agreement that crimes against humanity require "widespread or systematic" commission in which "the hallmark of

criminal prosecution. Still, an Ottoman State Special Military Tribunal did initiate criminal proceedings against some of the perpetrators. Jennifer Balint, "The Ottoman State Special Military Tribunal for the Genocide of the Armenians: 'Doing Government Business'", in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, pp. 77–100.

⁸⁰ Egon Schwelb, "Crimes against Humanity", in *British Yearbook of International Law*, 1946, vol. 23, pp. 183–85.

⁸¹ Roger S. Clark, "Crimes against Humanity at Nuremberg", in George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Martinus Nijhoff, Dordrecht, 1990, pp. 189–90.

⁸² Schwelb, 1946, p. 181, see *supra* note 80.

⁸³ Cherif M. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, Cambridge, 2011, pp. 136–44.

‘systematic’ is the high degree of organization, and that features such as patterns, continuous commission, use of resources, planning, and political objectives are important factors”.⁸⁴ Widespread commission, on the other hand, is the quantitative aspect of crimes against humanity which typically denotes numerous inhumane acts⁸⁵ but might also be satisfied by a singular massive act of extraordinary magnitude.⁸⁶ In the Alstötter case, the US Military Tribunal thus pronounced that “crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority”.⁸⁷ The UNWCC similarly concluded that:

Isolated offences did not fall within the notion of crimes against humanity. As a rule, systematic mass action, particularly if it was authoritative, was necessary to transfer a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by states other than that on whose territory the crimes had been committed, or whose subjects had become their victims.⁸⁸

⁸⁴ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010, p. 237.

⁸⁵ Cassese points out that “[c]rimes against humanity have always been conceived, from the beginning, as crimes on an enormous scale. While early codifications of CAH did not explicitly contain a requirement that the attack on the civilian population be on a large scale, it was understood that this law was intended to address massive attacks”. Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases & Commentary*, Oxford University Press, Oxford, 2011, p. 180.

⁸⁶ International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), *Prosecutor v. Tohomir Blaškić*, IT-94-15-T, Trial Chamber, Judgment, 3 March 2000, para. 206 (<https://www.legal-tools.org/doc/e1ae55/>); *Prosecutor v. Dario Kordić and Mario Cerkez*, IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 176 (<https://www.legal-tools.org/doc/d4fedd/>).

⁸⁷ *USA v. Alstötter et al.*, Military Tribunal III, Judgment, 3–4 December 1947, in *International Law Reporter*, 1948, vol. 14, p. 320.

⁸⁸ History of the UNWCC, p. 178, see *supra* note 77.

42.4.2. Crimes Against Humanity: Crimes Against the People in Hungarian Jurisprudence

The creation of the category of crimes against the people was based on the same rationale as the drafting of crimes against humanity – to criminalise certain acts committed against the civilian population. However, as we have already seen, since the category of crimes against humanity was still just an emerging concept on 5 February 1945, the time of the adoption of MER No. 81/1945, the category of crimes against people applies to a much broader scope of conducts. Article 15 establishes the criminal responsibility of

- 1) public officials in ministries, Members of the Parliament or high ranking state officials that initiated a law seriously infringing the interests of the people, or knowingly participated in its adoption,
- 2) public officials that after 1 September 1939 engaged in activities going beyond the confines of the execution of laws and decrees aimed against certain groups of the people that threatened or infringed personal liberty or causes bodily harm or resulted in financial loss,
- 3) public officials with jurisdiction, whose activities were categorically hostile to the people and fascist-friendly,
- 4) anybody who in print, in public or through radio transmission for a longer period of time engaged in permanent and continuous activity that was capable of significantly influencing the public opinion and distort it in a manner harmful to the country in order to spread fascist or anti-democratic views or incite and maintain racial and religious hatred,
- 5) anybody who served as an informant for official organs, parties, or societies with fascist and anti-democratic proclivities or persecuting certain groups of the society,
- 6) anybody who using the fascist and anti-democratic regime's powers for their own goals committed sexual assault or crime against personal freedom.

Article 17 complemented these prohibited acts with the crime of voluntarily joining the ethnic German organisation, the Volksbund, or holding a position or being an active member in a fascist or anti-democratic party, organisation or movement and support or failure to prevent acts enumerated in Article 15.

One of the fundamental elements of crimes against the people was the violation of human dignity, the inhumane nature of the prohibited conduct. This is very similar to crimes against humanity where the natural law concept of “laws of humanity” provided a convenient starting point for those seeking to justify punishing the perpetrators of large-scale human rights violations within state borders. It was a short step from “laws of humanity” to “crimes against humanity”.⁸⁹ Indeed, in the judgment of István Antal, who was Minister of Justice and Secretary of State in numerous Hungarian governments, and in his position participated in the adoption of legal regulations seriously restricting the fundamental rights of Hungarian citizens, the National Council of People's Tribunals highlighted the moral core of crimes against the people. The Council claimed that “the legislature cannot pass a law that infringes our fundamental laws, the basic human rights” and “the responsibility of the accused can be determined based on both divine and human laws”.⁹⁰

Similarly, the Bárdossy judgment emphasised the inhuman nature of the deportation of about 20,000 Jewish persons in the summer of 1941 to Kamenets-Podolski where they were executed by German troops. The National Council of People's Tribunals stated: “The expulsion of innocent people to certain and horrible destruction was the first procedure that created a precedent for future procedures that resulted in the killing of hundreds of thousands of Hungarians in gas chambers and other torture chambers. The accused had the obligation to prevent this procedure that debased all European culture and human feelings”.⁹¹

Another corresponding element to crimes against humanity was the existence of a targeted group. Mistreatment of soldiers⁹² or youth squad members⁹³ by their commanders did not amount to crimes against the people since the subordinates did not belong to a persecuted group.

⁸⁹ Margaret M. deGuzman, “Crimes against Humanity”, in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, New York, 2011, p. 122.

⁹⁰ NOT. I. 3678/1946/11, Judgment of 31 August 1946.

⁹¹ Pritz, 1991, p. 369, see *supra* note 60.

⁹² NOT. 764/1947.

⁹³ NOT. VII. 7177/1946.

Finally, just like crimes against humanity, crimes against the people also constituted an ancillary category to other crimes. Thus, the accused were charged for acts that fundamentally contravened the interests of the people without directly contributing to the war effort or infringing the laws of war.⁹⁴ Still, in spite of the undeniable similarities between the two categories, it would be mistaken to regard crimes against the people as essentially identical to crimes against humanity.⁹⁵

The commission of crimes against the people did not necessarily require, as a result, any actual harmful consequence against the targeted group. Miklós Serényi, a Member of Parliament, for instance, was convicted of crimes against the people for his speeches in Parliament in which he proposed, among other things, the summary execution of Jewish people in cases of aerial bombardments and further restrictions of the medical work of Jewish doctors even though his rants never resulted in any actual legislation.⁹⁶ The idiosyncratic feature of crimes against the people was a focus on the entirety of the Hungarian people as victim. The National Council of People's Tribunals underlined that "the victim is the Hungarian people itself, even if the aggression was directed against a certain group or certain individuals. Consequently the crime is committed even if it was not directed against an individual persecuted on ethnic, racial or political grounds [...] but against any Hungarian citizen".⁹⁷

This explains why any involvement in the activities of "fascist or anti-democratic parties, organisations or movements" was generally judged as a crime against the people even without any causal link between the accused's conduct and any violent or discriminatory action. Mrs. József Trenkula, for instance, was indicted on charges that she had been involved in the distribution of clothes taken from Jews, and she had seen people shot dead on the streets, and "thus, by her activity, which was not of a leading character, she aided the Arrow-Cross movement in gaining and remaining in power".⁹⁸ Membership in such groups was generally regarded as a crime against the people even if the accused's activities were

⁹⁴ Lukács, 1979, p. 258, see *supra* note 11.

⁹⁵ A view submitted in contemporary literature. Szűcs János, "Politikai bűntett" [Political Crime], in *Ítélt a Népi!*, 4 May 1945.

⁹⁶ *Népbíróóság* [People's Tribunals], Nb. VII. 488/1946/6, Judgment of 13 March 1946.

⁹⁷ NOT. I. 2859/1946/9, Judgment of 29 May 1946.

⁹⁸ *Népbíróóság* [People's Tribunals], BFL-Nb. 2.450/1945, Budapesti Fővárosi Levéltár (Budapest Metropolitan Archive).

restricted to genuine law enforcement.⁹⁹ Nevertheless, the jurisprudence of the National Council of People's Tribunals was far from settled on this point as in other cases non-active membership was a ground for acquittal.¹⁰⁰

42.5. Conclusion

The creation and operation of the system of People's Tribunals was obviously inspired by the Allied determination to punish people responsible for the war. Yet, in the absence of any access to preparatory materials which could have guided the codifiers about the particular details of this newly emerging field of international law, the drafters of the Decree on the establishment of the People's Tribunals were essentially left on their own.¹⁰¹

The operation of the People's Tribunals was affected by political expectations to quickly and harshly punish the perpetrators and show the Hungarian people the continuity between the Horthy regime and Nazism and uphold "revolutionary legality" without unnecessary "legalistic entangledness".¹⁰² Justice Minister István Ries encapsulated this anticipation when he pronounced that "[a]djudication in these cases is primarily not a legal but a political question".¹⁰³

Yet, even though there was a clear demand for the People's Tribunals to become the instruments of a "quick and thorough purge" since "the defendants of these trials are not human criminals but beasts concerning whom the public cannot understand humanism",¹⁰⁴ the revisionist approach¹⁰⁵ that views the People's Tribunals as simple political tools used

⁹⁹ NOT. III. 384/1945.

¹⁰⁰ NOT. IV. 330/11/1945, Judgment of 19 June 1946.

¹⁰¹ Imre Szabó, *A Nürnbergi Per és a Nemzetközi Büntetőjog* [The Nuremberg Trial and International Criminal Law], Officina, Budapest, 1946, p. 54. Kálmán Kovács, who participated in the drafting, emphasises that only the illegal Allied radio broadcast gave them any guidance concerning the prosecution of war criminals. Kovács, 1966, p. 155, see *supra* note 9.

¹⁰² Karsai, 2000, p. 12, see *supra* note 14.

¹⁰³ István Ries, "A Népbíróságok Védelmében" [In Defence of the People's Tribunals], in *Népbírószági Közlöny*, 1945, vol. I, no. 1, p. 2.

¹⁰⁴ *Ibid.*, pp. 8–9.

¹⁰⁵ Mária Schmidt, "Politikai Igazságszolgáltatás a Háború Utáni Európában" [Political Justice in Post-War Europe], in Mária Schmidt, *Diktatúrák Ördögsekerén* [On the

to legitimise the communist political takeover and to eliminate anybody who might obstruct the hegemonic aspirations of the Communist Party is hardly adequate. It is certainly true

that a great number of minor Arrow-Cross members and minor *Volksbundists* fell victim to prejudiced investigations and showcase trials. A great many political detectives, people's prosecutors and people's judges behaved like the Jacobins of old, who had regarded the country as divided in three parts: policemen, denouncers, and suspects.¹⁰⁶

The judges of the People's Tribunals generally endeavoured to observe due process standards. "Defendants had their say in court, and even though judicial irregularities were legion, no one was forced to plead guilty and none begged to be executed as had been customary during the Stalinist Great Terror and would again become customary in Eastern Europe in the late 1940s and early 1950s".¹⁰⁷ The purely ideological trials where defendants were charged with "conduct endangering the work of the democratic government" based on Act VII of 1946 were less than 20 per cent of the total number until 1949.¹⁰⁸

The jurisprudence of the People's Tribunals was often contradictory and failed to establish a single standard, and its judges were "divided by ideology stemming from the conflicts between the political parties".¹⁰⁹ However, that is hardly surprising from an essentially transitional justice mechanism. As Andrea Pető reminds us, "it is difficult to imagine in that extraordinary, apocalyptic situation charged with all kinds of aspirations and emotions that any court could have worked 'efficiently'".¹¹⁰ Nonetheless, as I

Tumbleweed of Dictatorships], Magvető, Budapest, 1998, pp. 11–53; and Mária Schmidt, "Az Első Kirakatper" [The First Show Trial] in Schmidt, *ibid.*, pp. 217–30.

¹⁰⁶ Karsai, 2000, p. 13, see *supra* note 14.

¹⁰⁷ István Deák, Jan T. Gross and Tony Judt (eds.), *The Politics of Retribution in Europe: World War II and Its Aftermath*, Princeton University Press, Princeton, 2000, p. 10.

¹⁰⁸ Ildikó Barna and Andrea Pető, *A Politikai Igazságszolgáltatás a II. Világháború Utáni Budapestben* [Political Justice in Post-World War II. Budapest], Gondolat, Budapest, 2012, p. 58.

¹⁰⁹ Pető points out that "[i]n the cases I have examined, the Smallholders' delegates always spoke in favour of more lenient sentences". Andrea Pető, "Problems of Transitional Justice in Hungary: An Analysis of the People's Tribunals in Post-War Hungary and the Treatment of Female Perpetrators" in *Zeitgeschichte*, 2007, vol. 34, p. 339.

¹¹⁰ Andrea Pető, "Népbírószág és Vértud az 1945 utáni Budapestben" [People's Tribunals and Blood Libel in Post-1945 Budapest], in *Múltunk*, 2006, vol. 1, p. 42.

have tried to illustrate in this chapter, the emerging norms of international criminal law did have an actual influence on the prosecution of perpetrators of international crimes. Maybe it is too much to say that the principles of the people's adjudication were corresponding with the Nuremberg principles as suggested in contemporary literature.¹¹¹ Nonetheless it is undeniable that not only scholarly articles¹¹² but also actual judgments reflected on international legal questions employing legal argumentation that often closely followed the jurisprudence of the international military tribunals.

This is particularly important since the prevalence of the belief that the People's Tribunals operated merely as political tools could fundamentally change our perceptions about war criminality as well. As Immi Tallgren reminds us: "A deficient trial may by its trauma engender taboos and martyrs. It may endanger open analysis of acts and responsibilities, thereby cementing a period in history under its protective cover. In a bedtime story turning into a nightmare, a trial becomes a damaged nuclear reactor that maintains its toxicity for interminable periods, slowly leaking emissions into its environment".¹¹³ This chapter aimed to show that despite the many flaws of the People's Tribunals their jurisprudence concerning the prosecution of war criminals was hardly deficient.

¹¹¹ Sándor Szalai, *Ítélt a Magyar Nép! A Magyar Háborús Bűnperek Tanulságai* [The Hungarian People Will Judge! The Morale of the Hungarian War Crime Trials], Athenaeum Irodalmi, Budapest, 1946, p. 29.

¹¹² See *inter alia* Andrei Trainin, "A Nürnbergi Per" [The Nuremberg Trial], in *Jogtudományi Közlöny*, 1946, vol. 1, pp. 171–72; László Stux, "Háborús Perek és a Nemzetközi Jog" [War Crime Trials and International Law], in *Jogtudományi Közlöny*, 1946, vol. 1, pp. 103–4; Imre Szabó, "A Jog a Béke Szolgálatában" [Law in the Service of Peace], in *Jogtudományi Közlöny*, 1947, vol. 2, pp. 100–3; Béla Hajdu, "A Genocídium Kérdéséhez" [About the Question of Genocide], in *Jogtudományi Közlöny*, 1948, vol. 3, pp. 378–79.

¹¹³ Immi Tallgren, "The Finnish War-Responsibility Trial in 1945–6: The Limits of Ad Hoc Criminal Justice?", in Heller and Simpson 2013, pp. 453–54, see *supra* note 79. This might be contrasted with Mark Drumbl's observation that the "[l]egal process can narrate history and thereby express shared understandings of the provenance, particulars, and effects of mass violence; punishing the offender contributes yet another layer of authenticity to this narration". Mark Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, p. 174.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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The background of the bottom half of the page is a photograph of stone steps, likely made of granite or a similar material, showing some wear and discoloration. The steps are arranged in a descending pattern from the top left towards the bottom right.

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