COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF KORBELY v. HUNGARY

(Application no. 9174/02)

JUDGMENT

STRASBOURG

19 September 2008

In the case of Korbely v. Hungary,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Loukis Loucaides,
Ireneu Cabral Barreto,
Karel Jungwiert,
Volodymyr Butkevych,
András Baka,
Vladimiro Zagrebelsky,
Antonella Mularoni,
Elisabet Fura-Sandström,
Renate Jaeger,
Sverre Erik Jebens,
Dragoljub Popović,
Mark Villiger, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 4 July 2007 and 19 June 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 9174/02) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr János Korbely ("the applicant"), on 20 January 2002.

2. The applicant alleged that he had been convicted for an action which did not constitute any crime at the time when it had been committed. He also submitted, in rather general terms, that the proceedings had not been fair and that they had lasted an unreasonably long time. He relied on Articles 6 and 7 of the Convention.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 3 May 2007 a Chamber of that Section, composed of Françoise Tulkens, András Baka, Ireneu Cabral Barreto, Riza Türmen, Antonella Mularoni, Danutė Jočienė, Dragoljub Popović, judges, and Françoise Elens-Passos, Deputy Section Registrar,

relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

5. The applicant and the Government each filed a memorial.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 July 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	L. HÖLTZL,	*Agent*,
Ms	M. WELLER,	*Co-Agent*,
Mr	Z. TALLÓDI,	*Co-Agent*;

(b) *for the applicant*

Mr	A. CECH,	*Counsel*,
Mr	L.S. MOLNÁR,	*Counsel*.

The Court heard addresses by Mr Cech and Mr Höltzl.

7. On the same day the Grand Chamber decided, applying Article 29 § 3 of the Convention, to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1929 and lives in Kisoroszi, Hungary. He is a retired military officer.

A. The events in the town of Tata on 26 October 1956

9. At the outbreak of the Hungarian Revolution in Budapest on 23 October 1956, the applicant, then a captain (*százados*), was serving as an officer in charge of a training course (*tanfolyam-parancsnok*) at the Tata military school for junior officers. Following the demonstrations, gunfight and uprising in the capital on 23 October 1956, on 24 October martial law was introduced, providing, *inter alia*, that any person bearing arms without

authorisation was punishable by death. The applicant was aware of these provisions, which had been announced on national radio.

10. At dawn on 26 October 1956 insurgents unsuccessfully attacked the military school. During the exchange of gunfire, an officer was killed and another wounded. Shortly afterwards, the building of the local prison and prosecutor's office was occupied by the insurgents. The applicant had the task of regaining control of the building. He managed to convince the insurgents, without using force, to leave the premises.

11. In a similar assignment, the applicant was subsequently ordered to disarm other insurgents who had taken control of the building of the local Police Department by force on the afternoon of 26 October 1956. Having overcome the resistance of the police forces, the insurgents, including a certain Tamás Kaszás, armed themselves with guns taken from the police. Among the insurgents, Tamás Kaszás and another person took command. Their intention was to execute the chief of the Police Department, but eventually they refrained from doing so. Tamás Kaszás and a smaller group of insurgents stayed behind in the building, in order to secure their position; Tamás Kaszás informally assumed their leadership.

12. As in his previous assignment, the applicant was specifically ordered to organise a group of officers, deploy them at the Police Department and regain control of that building, using force if necessary. Each member of the applicant's squad, composed of some fifteen officers, had a 7.62 mm sub-machine gun and a pistol; the group was, moreover, equipped with two 7.62 mm machine guns and some twenty-five hand grenades.

13. On their way to the Police Department, the applicant's squad met two young men, one of whom was carrying a sub-machine gun. The applicant's subordinates confiscated the gun and released the two individuals unharmed.

14. The applicant divided his men into two platoons, one of which stayed outside, near the entrance to the police building, while the other went inside. In the yard there were four or five disarmed police officers as well as five civilians, the latter belonging to the group of insurgents. On arrival, the officers in the applicant's platoon aimed their sub-machine guns at the insurgents. One of the insurgents, István Balázs, stated that they were unarmed. However, one of the disarmed police officers said that Tamás Kaszás had a gun. István Balázs asked the latter to surrender the weapon. Thereupon, a heated dispute, of unknown content, broke out between the applicant and Tamás Kaszás.

15. Finally, Tamás Kaszás reached towards a pocket in his coat and drew his handgun. The applicant responded by resolutely ordering his men to fire. Simultaneously, he fired his sub-machine gun at Tamás Kaszás, who was shot in his chest and abdomen and died immediately. One of the shots fired on the applicant's orders hit another person and three hit yet another person. A further insurgent was shot and subsequently died of his injuries.

Two individuals ran out onto the street, where the other platoon of the applicant's men started to shoot at them. One of them suffered a non-lethal injury to his head; the other person was hit by numerous shots and died at the scene. As the applicant was subsequently driving away from the premises on a motorcycle, he was shot at by unidentified persons, fell off the motorcycle and suffered some injuries.

B. Proceedings before the Constitutional Court

16. On 16 February 1993 Parliament passed an Act ("the Act") which provided, *inter alia*, that – having regard to the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (proclaimed in Hungary by Law-Decree no. 1 of 1971) – certain acts committed during the 1956 uprising were not subject to statutory limitation. Subsequently, the President of the Republic initiated the review of the constitutionality of the Act prior to its promulgation.

17. On 13 October 1993 the Constitutional Court adopted a decision in the matter, laying down certain constitutional requirements concerning the prosecution of war crimes and crimes against humanity. It held that the statutory limitation on the punishability of a certain type of conduct could be removed by the lawmaker only if that conduct had not been subject to a time-limit for prosecution under Hungarian law at the time when it had been committed – the sole exception being if international law characterised the conduct as a war crime or a crime against humanity and removed its statutory limitation, and moreover if Hungary was under an international obligation to remove that limitation. Consequently, it declared section 1 of the Act unconstitutional, since that provision was aimed at the removal of the statutory limitation on the punishability of such conduct which did not fall within the category of war crimes.

18. The relevant parts of the reasoning of the Constitutional Court's decision (no. 53/1993) read as follows:

> **"IV. The particular characteristics of war crimes and crimes against humanity**
>
> 1. War crimes and crimes against humanity are criminal offences which did not arise as part of domestic criminal law but are deemed to constitute criminal offences by the international community, which defines their essential elements.
>
> These criminal offences – according to the prevailing legal standard of international law that has evolved since the Second World War – are not simply offences punishable by the domestic law of most countries. (Therefore, homicide may not, in itself, be classified as amounting to a crime against humanity.) Their international status is linked with their definition at a supranational level either on the basis of natural law ... or by reference to the protection of the 'foundations of the international community', or by citing the threat posed by these activities to all humanity: their

perpetrators are ‘enemies of the human race’. Thus, the significance of these offences is too great to allow their punishment to be made dependent upon their acceptance by, or the general criminal-law policy of, individual States.

2. It is the international community that prosecutes and punishes war crimes and crimes against humanity: it does so, on the one hand, through international tribunals, and, on the other hand, by obliging those States which wish to be part of the community of nations to undertake their prosecution. ...

4. The prosecution and punishment of war crimes and crimes against humanity may only proceed within the framework of legal guarantees; it would be contradictory to protect human rights without such guarantees. But these international guarantees cannot be replaced or substituted by the legal guarantees of domestic law.

(a) International law applies the guarantee of *nullum crimen sine lege* to itself and not to domestic law. ‘Customary international law’, ‘the legal principles recognised by civilised nations’ and ‘the legal principles recognised by the community of nations’ constitute a *lex* which classifies certain types of behaviour as prosecutable and punishable according to the norms of the community of nations (through international organisations or the States belonging to the international community), irrespective of whether the domestic law contains a comparable criminal offence or whether the relevant treaties have been incorporated into domestic law. The gravity of war crimes and crimes against humanity – namely the fact that they endanger international peace and security and mankind as such – is irreconcilable with leaving their punishability within the ambit of domestic laws. ...

Article 15 § 1 of the International Covenant on Civil and Political Rights – which, in its content, matches Article 7 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – obliges member States to uphold unconditionally the principles of *nullum crimen sine lege* and *nulla poena sine lege.* The reference by international law to the criminal offence defined (‘[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed’) has been interpreted by legal scholars to refer only to those criminal offences which are undoubtedly punishable by domestic law, either through ratification or direct application.

By Article 15 § 2 of the Covenant, ‘[n]othing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations’. (The content of Article 7 § 2 of the European Convention is similar, with the distinction that the latter substitutes ‘civilised nations’ for the term ‘community of nations’.) This separation makes possible the prosecution of the previously noted *sui generis* criminal offences defined by international law even by those States belonging to the community of nations whose domestic system of law does not criminalise or punish that action or omission. It follows logically, therefore, that such acts are permitted to be prosecuted and punished in accordance with the conditions and requirements imposed by international law. The second paragraphs of the Covenant’s and the European Convention’s relevant articles evidently override the guarantees of domestic criminal law, all the more so since Article 4 § 2 of the Covenant and Article 15 § 2 of the European Convention both imperatively require the prevalence of the principles of *nullum crimen* and *nulla poena*, even in situations of war or in states of emergency. For those States which incorporate into domestic law the international legal norms concerning war crimes and crimes against humanity subsequent to the commission of these crimes, the second paragraphs of the above-

mentioned Articles amount to authorising retrospective criminal legislation in the State's domestic legal system. It is the international, rather than the domestic, law which must have declared, at the time of their commission, these acts to be punishable.

Historically, this exception has been applied in respect of the punishability of war crimes and crimes against humanity committed during the Second World War. But the development of international law has since separated the sphere of 'international humanitarian law' from the context of war and made the prosecution and punishment of these crimes independent of the requirements and conditions laid down in the domestic criminal-law system, with regard also to statutory limitations, inasmuch as two conventions on the non-applicability of statutory limitations for war crimes and crimes against humanity have been concluded. ...

V. Criminal offences defined by international law and the Constitution

1. The definition of, and conditions for, punishing war crimes and crimes against humanity are laid down in international law; these crimes – directly or indirectly through the obligations imposed on States – are prosecuted and punished by the community of nations. The rules on the punishment of war crimes and crimes against humanity – since these crimes threaten the foundations of humanity and international coexistence – constitute cogent rules of general international law. Those States which refuse to assume these obligations cannot participate in the community of nations. ...

2. The regulation under international law of war crimes and crimes against humanity disregards the principle of *nullum crimen* prevailing in domestic laws, inasmuch as it punishes these crimes, irrespective of whether or not they were punishable under domestic law at the time of their commission. ... It is not the very principle of *nullum crimen* that is breached in the circumstances but [only] its limitation to the sphere of domestic law. Within its system, international law demands that certain criminal acts be characterised, on the basis of the general principles recognised by the community of nations that were prevailing at the time when the act was committed ... as war crimes or crimes against humanity. In the context of these crimes, it is indeed the international community's criminal-law power that is being exercised – under conditions and guarantees prescribed by the community of nations – through the Hungarian State's criminal-law power. Domestic law is applicable to the extent that international law expressly so requires (for instance, as is the case with the determination of penalties). No domestic law in conflict with an express cogent rule of international law may be given effect. ...

4. ...

(b) Acts defined in Article 3 common to the Geneva Conventions constitute crimes against humanity; [this Article] contains those 'minimum' requirements which all the conflicting Parties must observe, 'at any time and in any place whatsoever'. The International Court of Justice has recognised that the prohibitions contained in common Article 3 of the 1949 Geneva Conventions are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character (*Nicaragua v. United States of America*, judgment of 27 June 1986, *ICJ Reports 1986*, p. 114). In defining crimes against humanity, paragraph 47 of the Report[1] on the Statute of the International

1. Report of the Secretary-General of the United Nations pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993 (S/25704).

Criminal Tribunal for the former Yugoslavia also makes reference to common Article 3. ...

(d) A typical feature of war crimes and crimes against humanity is that they are punishable irrespective of whether they were committed in breach of domestic law. ... It is therefore immaterial whether the Geneva Conventions were properly promulgated or whether the Hungarian State fulfilled its obligation to implement them prior to ... 23 October 1956. Independently [of these issues], the responsibility of the perpetrators existed under international law, and potential subsequent domestic legislation may give effect to this responsibility in its original scope. ..."

19. In pursuance of decision no. 53/1993, the Act was subsequently amended and promulgated as Act no. 90 of 1993.

C. Investigation and indictment in respect of the applicant

20. On 14 December 1993 the Budapest Investigation Office started an investigation into alleged crimes against humanity perpetrated in Tata during the 1956 revolution. On 20 April 1994 the applicant was questioned as a suspect.

21. On 27 December 1994 the Budapest Military Public Prosecutor's Office indicted the applicant for the role he had played in the incident in Tata on 26 October 1956. He was charged with having commanded a military squad in an assignment to regain control of the Police Department building, and with having shot, and ordered his men to shoot at, civilians, causing the deaths of, and injuries to, several persons. On account of these alleged facts, the applicant was indicted for:

"[A] crime against humanity in violation of Article 3 § 1 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted in Geneva on 12 August 1949 and proclaimed in Hungary by Law-Decree no. 32 of 1954, punishable pursuant to section 1(2a) of Act no. 90 of 1993 [on the procedure concerning certain crimes committed during the October 1956 revolution and freedom fight]."

D. First-instance proceedings before the Budapest Regional Court

22. On 29 May 1995 the Military Bench of the Budapest Regional Court discontinued the criminal proceedings against the applicant, holding that the crime with which he was charged constituted homicide and incitement to homicide, rather than a crime against humanity, and was thus statute-barred.

23. The relevant part of the reasoning of the decision states as follows:

"[T]he legal provision to be applied by the court is an international convention in respect of its hypothesis, but refers back to the domestic criminal law in respect of the sanctions.

Article 7 § 1 of the Constitution requires that the relevant international legal instrument be applied, incorporating it into domestic law; and Act no. 90 of 1993 transforms it into a provision of positive criminal law. Given that the hypothesis of the

crime in question has been incorporated into domestic law – but domestic law does not have its own notions in this connection – the interpretation of that hypothesis can only be carried out in accordance with the international law.

Both Act no. 28 of 1990 on the enactment of the significance of the 1956 revolution and freedom fight and Act no. 90 of 1993 on the procedure concerning certain crimes committed during the October 1956 revolution and freedom fight state that in 1956 a revolution and a freedom fight took place in Hungary. On this basis, as well as according to the [commonly known] facts, it can be established that at the time of the perpetration of the crime on 26 October 1956 a revolution was in progress in Hungary. Nevertheless, this definition contained in the domestic legislation does not make it unnecessary to examine whether there was a non-international armed conflict. In its part establishing the hypothesis [of the crime in question], Act no. 90 of 1993 refers to the Convention signed on 12 August 1949; consequently, the interpretation [of this hypothesis] can only be carried out according to the relevant international legal practice or to international legal documents if such exist.

The above-mentioned Convention defines its own scope of application in Article 2 as follows: 'in addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'. Moreover, Article 3 provides that its rules have to be applied '[i]n the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.

The court had to examine whether at the time of the perpetration of the crime on 26 October 1956 an armed conflict not of an international character was taking place in Hungary.

The term 'armed conflict not of an international character' is defined by the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), proclaimed by Law-Decree no. 20 of 1989. Article 1 § 1 of this Protocol lays down the conditions of application of the relevant provisions as follows: 'This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of 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 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 organised 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.' Article 1 § 2 states that '[t]his 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'.

The problem which may emerge because the term 'armed conflict not of an international character' is defined in Article 1 § 1 of the Protocol relating to the Protection of Victims of Non-International Armed Conflicts, signed on 8 June 1977 and promulgated in Hungary by Law-Decree no. 20 of 1989 – that is, in an international convention that was concluded after the perpetration of the crime – is merely illusory, since Article 1 § 1 of Protocol II declares that '[t]his Protocol develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application'. Therefore, it can be

ascertained that although Protocol II develops and supplements the substantive norms (that is, the rules of conduct in the case of a non-international conflict), it does not introduce any modifications to their existing conditions of application. In view of this, Article 1 § 1 of Protocol II itself establishes that the definition of an armed conflict not of an international character, which is contained in the same paragraph, does not modify the meaning of that term as used by the 1949 Geneva Conventions, but merely interprets it. With respect to [the original definition], [this one] is neither a restrictive nor an extensive interpretation, but the very first interpretation defining the meaning of the initial term. (In the court's view, this interpretation cannot be either restrictive or extensive in any event, since no other international legal document contains a definition of the term with which to compare this interpretation.) Accordingly, the term 'armed conflict not of an international character' must be seen as having been already conceived with this meaning at the time when the Convention was signed.

When analysing the term, it can be observed that such armed conflicts fall into the category of conflicts that 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised 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'. ...

During the night of 23 to 24 October 1956, the first spontaneously organised armed groups came into existence in the territory of Hungary, especially in those parts of Budapest where they confronted the Soviet army which was being deployed unexpectedly. It can be unambiguously established that these armed groups were opposing the central power, although several of them maintained regular negotiations with the government of the Hungarian People's Republic and the Ministry of Defence. It can also be determined that the armed groups did not operate under any central command, because by the time the joint command of the national guards and the government's forces was established under the leadership of Béla Király, appointed by Prime Minister Imre Nagy, the armed conflicts in the country had already essentially ceased. Consequently, it is self-evident that, although the armed groups maintained a loose network of information between themselves, they did not perform their military operations in various parts of the country in a concerted manner. It seems that it will forever be impossible to ascertain the territories in which and the extent to which the armed groups stood under the control of the various spontaneously organised revolutionary bodies or under that of the former administration, which remained partly operational throughout.

Comparing the definition of Protocol II and the statements contained in the opinion of the expert historian, it can be ascertained that Act no. 90 of 1993 and, consequently, Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed in Geneva on 12 August 1949, are not applicable to the instant conduct as set out in the indictment.

This is so because, according to the opinion of the expert historian, on 26 October 1956 the operating armed groups did not remain under a central command. There were no distinct combatant parties, since the armed groups and persons that were effectively operating, while they might even have been active in the same area yet independent from each other, were often guided by different political motivations. It cannot be ascertained which territories of the country were controlled, and to what extent, by armed groups which may have allowed them to carry out sustained and concerted military operations. On no account can it be established that the armed groups reached a level of organisation or submitted to a central command to such an

extent that enabled them to implement the regulations of the Protocol during the military activities.

In view of the above, the court has found neither the international Convention promulgated in Hungary by Law-Decree no. 32 of 1954 nor Act no. 90 of 1993 to be applicable to the present crime.

The conduct of the accused ... would constitute multiple homicide, committed in part as an inciter, had it occurred as stated in the bill of indictment. ...

The crime committed by the accused – even if proven – became statute-barred on 26 October 1971; therefore, the court has discontinued the criminal proceedings."

24. On 8 June 1995 the prosecution appealed to the Supreme Court.

E. Suspension of the case pending further proceedings before the Constitutional Court

25. On 29 November 1995 the relevant bench of the Supreme Court suspended the appeal proceedings pending the outcome of a new case before the Constitutional Court in which the President of the Supreme Court and the Attorney-General had challenged the constitutionality of the Act (referred to in paragraph 16 above) on the ground that it was allegedly in breach of international treaties.

26. On 4 September 1996 the Constitutional Court abrogated the entirety of the Act as being unconstitutional. It observed that although the Act had been amended in the light of decision no. 53/1993 of the Constitutional Court and had been aimed at prosecuting those who had committed war crimes or crimes against humanity in 1956, it nevertheless represented an unconstitutional legislative obstacle to the lawful prosecution of those perpetrators, as required by the general principles of international law. It noted that since the Act contained errors of codification, namely incorrect references to various provisions of the 1949 Geneva Conventions, it did not meet the constitutional requirement of harmony between domestic and international law and was therefore inapplicable. The Constitutional Court's decision (no. 36/1996) contained the following conclusion:

"II. 2. According to the complainants, the Act, being incompatible with the international treaty [the Geneva Conventions], was impossible to interpret or apply. Through its abrogation, the impediment to the Hungarian authorities' prosecuting and punishing [the perpetrators of] war crimes and crimes against humanity, as defined in international law, has been removed ... The Constitutional Court ... draws attention to the fact that it is international law itself that determines all the hypotheses and sanctions for offences ... punishable under international law."

F. Remittal to, and repetition of the proceedings before, the Regional Court

27. On 6 December 1996 the Supreme Court's appeal bench quashed the decision of 29 May 1995 and remitted the case to the first-instance court with the instruction that the proceedings be conducted afresh from the investigation stage onwards. It gave the following guidance on the manner in which the proceedings were to be conducted:

> "III. ... [T]he court will have to examine whether the elements and conditions of the offence as set out in the [Geneva] Conventions [and its Protocols] can be identified in the instant case. This will allow the [defendant's] conduct to be characterised either as a crime against life or as a crime against humanity, not subject to statutory limitation.
>
> The Military Bench failed to elaborate on the facts in a manner detailed enough to allow the establishment of the above elements of the crime, failing which it is impossible to determine unequivocally whether or not the above Conventions apply in the case. Consequently, the decision of the Bench, including the order to discontinue the proceedings, is unsubstantiated (section 239/2a of the Code of Criminal Procedure).
>
> IV. To arrive at a well-founded decision, it is necessary to establish in the findings of fact the chronology of the military events during the October 1956 revolution and freedom fight. On this basis, it will be possible to ascertain whether the revolutionary armed forces operated under responsible command, exercised control over a part of the territory and carried out sustained and concerted operations.
>
> The ill-foundedness may be eliminated in the proceedings to be conducted afresh from the investigation stage onwards by obtaining the opinion of an expert military historian from the Institute for Military History.
>
> The first-instance court will have to examine at a hearing the existing expert opinion and the one to be obtained in the course of the supplementary investigation. The complete findings of fact, which would allow the determination of criminal responsibility, can only be established by way of an analytical assessment of the evidence."

28. On 16 February 1998 an expert military historian presented his opinion on the above questions.

29. On 7 May 1998 the Military Bench held a hearing. At the hearing the military prosecutor argued that the applicant was guilty of a crime against humanity, prohibited by Article 3 common to the Geneva Conventions, and punishable under sections 166(1) and 166(2) of the Criminal Code, which concern homicide.

30. Defence counsel argued that the Fourth Geneva Convention was not applicable to the facts of the case and that, in any event, its application would run counter to the principles of *nullum crimen sine lege* and *nulla poena sine lege*, given that it had not been properly proclaimed in Hungary.

31. On the same day, the Military Bench discontinued the criminal proceedings with the following reasoning:

"In the course of characterising the crime, the court first examined whether the act described in the findings of fact constituted a crime against humanity or the crime of incitement to multiple homicide. Defence counsel's argument – namely, that no criminal liability can be established on the ground of the Geneva Conventions since they had not been promulgated in due form in Hungary, and that criminal liability based on them would thus violate the principles *nullum crimen* and *nulla poena sine lege* – cannot be sustained.

In decision no. 53/1993 (X.13.) the Constitutional Court stated that the legal system of the Republic of Hungary accepted the generally recognised rules of international law, which are likewise part of Hungarian law without any further (additional) transformation. According to chapter IV(4a) of the decision, international law applies the guarantee of *nullum crimen sine lege* to itself rather than to domestic law. Customary international law, the legal principles recognised by civilised nations and the legal principles recognised by the community of nations, constitute a *lex* which classifies certain types of behaviour as prosecutable and punishable according to the norms of the community of nations, irrespective of whether domestic law contains a comparable criminal offence or whether the relevant treaties have been incorporated into domestic law. In view of these considerations, this court has not found it necessary to examine whether the Geneva Conventions had been properly promulgated by Law-Decree no. 32 of 1954.

Article 3 § 1 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 and proclaimed by Law-Decree no. 32 of 1954, reads as follows: ...

In view of the above and of chapters V(4) and II of Constitutional Court decision nos. 53/1993 and 36/1996 respectively, this court had to examine whether the conduct described in the findings of fact corresponds to the elements contained in [common Article 3 § 1 of the Geneva Conventions].

The Geneva Conventions do not define the notion of an armed conflict of a non-international character. In this connection, the court finds decisive Article 1 § 1 of Protocol II relative to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977 and promulgated by Law-Decree no. 20 of 1989, which reads as follows: ...

In view of the above, while making its findings of fact, the court had to examine whether in the material period, between 23 October and 4 November 1956, the armed groups operating in Hungary which were opponents to the armed forces of the government were under responsible command and exercised such control over a part of the country's territory as to enable them to carry out sustained and concerted operations.

In its own findings of fact – in the light of the opinion of the expert historian – this court has not established that these conditions existed in the period when the impugned act was committed.

The Conventions [the Fourth Geneva Convention and Protocol II] subject their scope of application to strict and conjunctive conditions. As is prescribed in the Convention, it becomes effective only if the armed conflict is of high intensity and the fighting activity of the opponents is institutionalised.

From the established findings of fact this court has drawn the conclusion that no so-called armed conflict of a non-international character within the meaning of international law was in progress in Hungary on 26 October 1956. The historical background set out in the findings of fact does not substantiate the establishment of

the crime defined in international law, since several elements of the crime as defined in international law are missing.

In view of the above, the defendant's act – even if proven – should be characterised, according to the rules in force at the time of its commission, as multiple homicide partly committed as an inciter, within the meaning of section 352 of the BHÖ[1]. This crime was, in accordance with section 25(a) of Act no. 2 of 1950 as then in force, statute-barred after a period of fifteen years had elapsed. Having regard to section 2 of the Criminal Code, section 33(2c) of the Criminal Code – which excludes statutory limitation in the case of aggravated murder – cannot be applied.

The court has not established condemnatory findings of fact in regard to the defendant; however, it has not delivered an acquittal, since in its view, in the case of statute-barred conduct, the ground which eliminates punishability – that is, statutory limitation – has precedence over the fact that the impugned act has not been proven in any event.

Therefore, the court has discontinued the proceedings against the defendant for the crime of multiple homicide partly committed as an inciter, since it became statute-barred on 26 October 1971."

G. The appeal proceedings

32. On an appeal by the prosecution, on 5 November 1998 the Supreme Court, sitting as an appellate court, upheld this decision. The court, which had obtained the opinions of three expert historians, put forward the following reasoning:

"Spontaneously and unexpectedly, a revolution and freedom fight broke out in Hungary on 23 October 1956.

In the course of these events, as early as during the night of 23 to 24 October 1956, the first spontaneously organised armed groups came into existence, especially in those parts of Budapest where they confronted the Soviet army, which was progressing unexpectedly. These armed groups were opposing the central power, although several of them maintained regular negotiations with the government of the Hungarian People's Republic and the Ministry of Defence. The armed groups did not operate under any central command, because by the time a joint command of the national guards and of the government forces was established under the leadership of Béla Király, appointed by Prime Minister Imre Nagy, the armed conflicts in the country had essentially already ceased. Consequently, it is self-evident that, although the armed groups maintained a loose network of information between themselves, they did not perform their military operations in various parts of the country in a concerted manner.

On 23 October 1956 the central government still regarded the people's spontaneous revolutionary acts as a counter-revolution, and intended to suppress the armed revolt relying on their armed forces. Because of political disputes, an internal struggle within the leadership of the Hungarian Workers' Party, the success of the armed groups and the political pressure exerted on the government, on 28 October the latter, headed by

1. *Hatályos anyagi büntetőjogi szabályok hivatalos összeállítása* (Official collection of rules of substantive criminal law in force in 1952).

Imre Nagy, ceased to classify the events as a counter-revolution, and declared them to be a national uprising.

...

Therefore, it was appropriate for the first-instance court to state the facts as follows: 'As of 23 October 1956, the spontaneously organised armed groups in Budapest and in the provincial cities were fighting against the Soviet troops that were invading Budapest and also against the armed forces of the government, such as the State Security Authority, the police and units of the national army.

In the first few days (between 23 and 28 October) the insurgent groups were formed in an unorganised manner and were fighting independently, without any common command. They were operating primarily in Budapest, but later on, some less organised and less numerous groups also emerged in the provincial cities. A characteristic of these groups was their continuous dissolution and reorganisation, their rather loose contacts among themselves, which generally concerned only the exchange of information, and the lack of any coordinated military actions between 23 October and 4 November 1956. They elected their commanders from their own ranks, according to their achievements in the course of the fights. The leaders of the groups changed rapidly, because the momentary situation, the success achieved and the defeats sustained spurred the fighters to elect new leaders. It cannot be established that these insurgent groups operated under a responsible command; they were not directed – and nor were their tasks determined – by orders emanating from their commanders. The members of the armed groups did not wear any signs distinguishing them from civilians. The government did not acknowledge the anti-government forces as insurgents or as a combatant party.

The armed insurgent groups in Budapest controlled 3 to 4 square kilometres in the period between 23 and 28 October 1956. The control of this area meant that the activities of the government forces were obstructed and disturbed, but the revolutionary groups did not fully close off the area and the government forces could pass through it, though with losses.

The armed groups formed outside the capital operated independently; and did not control any substantial territory. In the course of their armed operations in certain towns, they did not aim to establish their control over a certain region.

...

In accordance with the requirements of constitutionality set out by the Constitutional Court for the purposes of the application of the law in [its decisions nos. 53/1993 and 36/1996], the Supreme Court has had to examine in the present case whether the multiple homicide committed on 26 October 1956, [i.e.] in the first period of the October 1956 revolution and freedom fight, constituted an offence under common Article 3 of the 1949 Geneva Conventions – that is, whether that crime was committed in a manner prohibited by that provision.

If all the elements and conditions of the above provision prevail, then the deliberate homicide committed in violation of international law will constitute a crime against humanity which is punishable irrespective of the date of its perpetration. Such a crime cannot be statute-barred pursuant to Article 1 (a) or 1 (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the United Nations General Assembly in New York on 26 November 1968 and proclaimed in Hungary by Law-Decree no. 1 of 1971.

If, however, the elements and conditions prescribed by the international law do not fully prevail, then the impugned act will constitute homicide under domestic law.

Article 3 § 1 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 and proclaimed by Law-Decree no. 32 of 1954, reads as follows: ...

Having regard to the principle of *nullum crimen sine lege*, the question whether the impugned act constituted a crime prohibited by international law in 1956 will be resolved depending on whether the general conditions set out in the initial clause of common Article 3 were fulfilled.

However, the Conventions did not clarify either in common Article 3 or in any other provisions the notion of an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Nor have the Conventions laid down the time from which, in the case of a civil war, an internal armed conflict between the parties qualifies as such, or in other words, the time from which the provisions of the Convention apply to the parties to an internal armed conflict.

Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977 and proclaimed in Hungary by Law-Decree no. 20 of 1989, provides that the Protocol 'develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application'.

To develop and supplement a given convention clearly means, according to the grammatical interpretation of the terms, that any legal question arising must be resolved by way of a joint examination of the principal convention and the supplementary protocol, and an eventual interpretation of the law can only be carried out through such joint examination.

Therefore, the Supreme Court has held that the sole authoritative interpretation was the definition set out in Article 1 §§ 1 to 2 of the above Protocol, which reads as follows: ...

In the light of the well-known events of the October 1956 revolution and freedom fight and the other circumstances established in the findings of fact, it is unequivocal that the 1956 revolution and freedom fight started spontaneously on 23 October 1956. During the four days which had elapsed by 26 October 1956, the level of organisation required by the notion of an armed conflict of a non-international character had not been attained.

It can directly be deduced from the first-instance court's complete – and therefore, authoritative – findings of fact that the revolutionary armed groups were not under responsible command, nor did they exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Geneva Conventions properly.

Against the above-mentioned background, it must be concluded that, in the course of the October 1956 revolution and freedom fight, not all the elements of the hypothesis of a crime against humanity within the meaning of Article 3 common to the 1949 Geneva Conventions prevailed on 26 October 1956."

H. The review decision

33. On an application for review of that decision, submitted by the prosecution on 22 January 1999, the Supreme Court's review bench quashed the decision on 28 June 1999 and remitted the case to the second-instance bench.

34. The relevant parts of the review bench's decision read as follows:

> "Crimes against humanity within the meaning of Article 3 common to the 1949 Geneva Conventions regarding the protection of civilians in wartime are not statute-barred.
>
> [Thus], in accordance with the first clause of Article 7 § 1 of the Constitution, the prosecution of war crimes and of crimes against humanity belongs to the category of international legal obligations undertaken without any special amendments or adaptation – the international legal regulations do not take into consideration the principle of *nullum crimen sine lege* prevalent in domestic legislation as they seek to punish such acts regardless of whether these were punishable under domestic law at the time they were committed. Therefore, the absence of relevant domestic legislation, or any deviation [from international law] enshrined in domestic law, is irrelevant, since international law requires within its own system that such crimes be classified as war crimes or crimes against humanity at the time they were committed, in accordance with the general principles accepted by the community of nations. The Hungarian State has signed and ratified the Geneva Conventions, which came into force on 3 February 1955. Hungary also signed the 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
>
> The courts ruling in this case have come to the correct conclusion that the crime described in the prosecution's findings of fact did in essence take place, even though in their assessment it had not been proven that it was committed by the defendant.
>
> However, the courts dealing with the case erroneously took the view that the conduct with which the defendant was charged, if proved, should be characterised solely as a crime of multiple homicide under the domestic law in force at the relevant time, namely section 352 of the BHÖ, and thus could no longer be assessed from the perspective of crimes against humanity within the meaning of Article 3 common to the Geneva Conventions, with the result that, under the relevant provisions of Act no. 2 of 1950, the act was no longer punishable.
>
> ...
>
> Thus, the courts interpreted the words 'develops and supplements' contained in the above-mentioned Article of Protocol II erroneously in both the grammatical and the logical sense, applying an exclusive and in itself erroneous grammatical interpretation. They disregarded the passage of the Protocol explaining that the instrument was intended to develop and supplement common Article 3 'without modifying its existing conditions of application', for from this wording it can only be concluded that the Geneva Conventions are invariably in force and their conditions of application remain valid.
>
> The conditions for the applicability of Protocol II, however, are to be applied exclusively to the Protocol itself, as also follows from the following passage of the Protocol: 'This Protocol ... develops and supplements Article 3 common to the Geneva Conventions ... without modifying its existing conditions of application ...'

Article 3 common to the Geneva Conventions had an original scope of application, and the Additional Protocol cannot be taken to have a retrospective effect restricting that scope.

Through Article 3 common to the Geneva Conventions, the community of nations intended to secure safeguards for protected persons in civil-war situations where the population of a given State and the armed forces of that State confronted each other. The wording of this provision does not contain any further condition in addition to this. To require further criteria would impair the humanitarian character of the Conventions. If the Convention and the Protocol were to be interpreted in conjunction with each other, it would mean that, should the resistance of the population under attack by the armed forces of the State not attain the minimum level of organisation required by the Additional Protocol, Article 3 common to the Geneva Conventions would not be applicable even if the armed forces of the State were to exterminate a certain group of the population or the entire population.

...

Independently of the findings of fact, it is common knowledge that, from 23 October 1956 onwards, the central power of the dictatorship made use of its armed forces against the unarmed population engaged in peaceful demonstrations and against armed revolutionary groups whose organisation was in progress. During this time, the armed forces employed significant military equipment, such as tanks and aircrafts, and their activities against the population opposed to the regime spread over the whole country. In practical terms, they waged war against the overwhelming majority of the population. The same is confirmed by the orders issued in this period by the dictatorship's Ministers of Defence.

Having regard to all this, it can be established that an armed conflict of a non-international character was in progress in the country from 23 October 1956 onwards, for such time as the armed forces of the dictatorship were acting against the population, and until the country was occupied by the army of the Soviet Union on 4 November, from which time the conflict became international.

Against this background, the courts dealing with the case wrongly applied the substantive criminal law in holding that the conduct described in the findings of fact did not constitute crimes against humanity but multiple homicide within the meaning of the domestic law alone, an offence that was thus already statute-barred, and in consequently discontinuing the proceedings against the defendant on the ground of non-punishability ..."

I. The resumed proceedings and the applicant's final conviction

35. In the resumed second-instance proceedings, the Supreme Court's appeal bench held hearings on 18 May and 6 September 2000. On the latter date it quashed the decision of 7 May 1998, essentially on account of shortcomings in the findings of fact, and remitted the case to the first-instance court.

36. In the resumed first-instance proceedings, the Military Bench of the Budapest Regional Court held hearings on 9, 10, 11, 16, 17 and 18 January 2001. On the latter date it found the applicant guilty as charged.

37. The court relied on the testimonies of the accused, the victims and numerous witnesses as well as extensive documentary evidence (including

the Army's Service Regulations as in force in 1956, the defendant's personal service file, death certificates of the victims, minutes of the investigation, hospital records, photographs, plans of Tata and sketches of the scene) and the opinions of a forensic medical and a firearms expert.

38. On the basis of the findings of fact thus established and relying on Article 3 § 1 of "the Geneva Convention", the court convicted the applicant of multiple homicide constituting a crime against humanity which he had committed as a perpetrator in respect of the killings inside the building and as an inciter in respect of the killing outside (*több emberen – részben felbújtóként – elkövetett emberöléssel megvalósított emberiség elleni bűncselekmény*).

39. In sentencing the applicant, the court, in accordance with section 2 of the Criminal Code, compared the relevant rules of criminal law, as in force at the time of the commission of the crime, with those of the Criminal Code as in force at the time of the delivery of the judgment. It found that the former were more lenient and were therefore to be applied to the case.

40. The fact that, in addition to the fatalities, two more persons had been wounded was deemed to be an aggravating factor, whereas the fact that the criminal proceedings had lasted some six years at the time was treated as one of the mitigating factors.

41. The court sentenced the applicant to three years' imprisonment and a five-year deprivation of certain rights. By virtue of an intervening amnesty decree, the applicant would have qualified for an exemption from serving the sentence (see paragraph 45 below).

42. The relevant passages of the findings of fact as established by the Military Bench of the Budapest Regional Court read as follows.

> "In the resumed proceedings, the Military Bench of the Budapest Regional Court has established the following findings of fact:
>
> At 3 p.m. on 23 October 1956 a demonstration against the regime started in Budapest, escalating into a mass movement by the evening. In the days following 23 October 1956, the clashes and mass demonstrations extended to several towns, and later on to the whole country. The Budapest uprising spread over to the area of the Tata military garrison on 25 and 26 October. In this period, the Dózsa Armoured and Fusilier Junior Officer School was stationed in Tata, under the command of Colonel T.L. The Officer School trained officers of the Hungarian army as fusiliers and armoured vehicle officers. At the material time, the defendant, then a captain, was serving as the commander of the training course for motorised officers at the Dózsa Armoured and Fusilier Officer School. A significant part of the Officer School's staff was ordered to Budapest to participate in the attempt to bring the uprising in Budapest to an end. The staff ordered to Budapest left the area of the school in the early hours of 24 October under the command of Colonel T.L. From 24 October 1956 onwards, the command was assumed by Major J.L.
>
> The staff that remained at the school had only fragmentary information about the events in Budapest. The announcements, orders and commands broadcast by the radio were contradictory, which made the commanders' task even more difficult. At 8.45 a.m. on 24 October 1956 an order concerning the introduction of martial law was

read out, according to which: '... any act intended to overthrow the People's Republic, mutiny, instigation or incitement to or conspiracy with the purpose of mutiny, murder, homicide, arson, possession of explosives or any crime committed by using explosives, violence against the authorities, possession of weapons without a licence ... shall constitute crimes punishable by death ...' But less than four hours later, Imre Nagy, in his speech to the Hungarian people, said that those who stopped fighting and laid down their weapons would be exempt from martial law. At 2.08 p.m. the deadline was postponed to 6 p.m.

The demonstrations which broke out on 23 October were considered to be a counter-revolution by the political and military leadership. The Minister of Defence, Colonel-General István Bata, issued the following order in a telegraph he sent in the early hours of 26 October 1956 to the troops: 'I order as follows: ... Carry out your duties with extreme vigilance! ... Prevent any disorder in your garrison; protect the most important buildings from vandalism! ... Stop every vehicle going to or coming from Budapest, and should you find any weapons, ammunition or hostile leaflets, take possession of them and arrest the passengers of the vehicle! ...' The order given on 27 October first by Colonel-General István Bata, then by Lieutenant-General Károly Janza, who replaced him as Minister of Defence, instructed the troops to '[a]nnihilate all armed resistance fighters!' The defendant was aware of the introduction of martial law and knew that, pursuant to the decree announced, anyone found in illegal possession of firearms was punishable by death.

The staff remaining at the school were called to a meeting on 24 October, where the officers were ordered to remain permanently at the school, and the defence of the school was organised. Major J.L. returned from Budapest to the school on 25 October at about 7 p.m., bringing back the body of his fellow officer, Major M.P., who had fallen in the fights in Budapest. The staff remaining at the school only then received information about what was actually happening in the capital.

The insurgents attacked the Szomódi shooting range belonging to the school on 25 October at about 8 p.m. and the school itself in the early hours of 26 October. These attacks were repelled by the officers. Of the school's staff, Lance-Sergeant T. died and Corporal N. was wounded in these armed clashes. On 26 October the insurgents occupied the building of Tata County Prison and Public Prosecutor's Office and released the inmates, including the convict J.K.

The school's command sent a squad of twenty to twenty-five officers by vehicle to the prison building under the command of the defendant. He encountered some unarmed civilians at the building, whom he persuaded to leave the scene; then the squad returned to its post.

In the meantime, Captain I.S., who was returning to the school from an official assignment, noticed a group of about 250-300 persons at the monument of Soviet Heroes; fifteen to twenty persons were attempting to knock down the statue. After Captain I.S. had stopped his service vehicle, he was assaulted by several persons, beaten and knocked out; his service gun and car were then confiscated.

In the afternoon on 26 October, the insurgents headed to the police station from the monument of Soviet Heroes, which had been knocked down in the meantime. At that time, all staff were present at the police station, together with some soldiers led by a lieutenant (name unknown) of the national army. The members of the police had service pistols; the soldiers had machine guns and hand grenades. The chief of the Tata District Police Department at this time was Police Captain J.T.

The insurgents had the intention of occupying the police station in order to acquire some firearms. In the crowd attacking the police station there were also civilians, such as Mihály Csernik, Béla Kiss, István Medved, Tamás Kaszás and J.K., the latter having been freed from the County Prison by the insurgents earlier that day.

An exchange of fire broke out outside the police station building. The insurgents used a lorry to break through the gate to the police station and as they entered the building they called on the policemen and soldiers, who at this point were no longer resisting, to hand over their weapons. The policemen and the soldiers obeyed the demand, and an army officer, a lieutenant (name unknown), handed over his cartridge-drum sub-machine gun to Mihály Csernik, while Police Sergeant-Major I.B. gave his service pistol to a civilian named Mihály Neumann.

After the occupation of the police station, István Medved and Tamás Kaszás escorted Captain J.T. to an office with the intention of executing him. However, the execution did not take place because István Medved and Tamás Kaszás were dissuaded by some of the insurgents, including J.K. ...

Major J.L. received information about the events at the monument of Soviet Heroes and at the police station. He commanded the defendant to advance to the police station with some officers, and to act on the scene according to his discretion – using firearms if necessary – to bring about the end of the riot and to restore order. The defendant organised a group of about fifteen officers as ordered. The members of this group were Lieutenant J.T., Lieutenant K.M., a lieutenant by the surname T., First Lieutenant J.V., First Lieutenant J.L. and Captain I.L. The identities of the further members of the group were not ascertainable. All members of the group organised by the defendant were students at the motorised branch; as their training officer, he was the superior of all members of the squad. Captain I.L. was the defendant's deputy in the latter's capacity as training course commander.

The defendant and the members of the group organised by him were armed with PPS-type 7.62 mm sub-machine guns and TT pistols. They also carried two 7.62 mm DP-type machine guns and a case of approximately twenty-five 42M hand grenades. They had ammunition for the firearms and detonators for the hand grenades.

Before departure, the defendant briefed his men and informed them about their task, explaining that because the police officers had been disarmed at the Tata Police Department, the squad was going there to undertake police duties and restore order. The squad left the school in the early afternoon by lorry. They parked the vehicle at a certain distance from the police station ... Alighting from the vehicle on the defendant's orders, the group split into two squads. One squad was led by the defendant, and the other by his deputy, Captain I.L. The two groups advanced ... towards the police station. On their way, they encountered two young men, one of whom was carrying a cartridge-drum sub-machine gun. The officers stopped these persons, who did not resist, confiscated the sub-machine gun and released them.

The members of the officers' group arrived at the police station between 5 and 6 p.m. The street lighting was already on. Given this fact, the visibility outside the police station was quite good.

By the time the officer group arrived at the police station, the armed insurgents had already left the scene by lorry for the Tata Main Post Office, and by occupying the telephone centre, had disabled the telephone system. Most of the disarmed policemen had also left the building of the central police station and gone to their homes or, together with their families, had sought refuge at the Officer School. The soldiers who, at the time of the raid on the police station, had been in the building together

with their commander, a lieutenant, had also left the building in the meantime – the defendant did not know about them.

At that time, four or five unarmed policemen were in the building and in the yard of the police station, together with the victims István Balázs, Béla Rónavölgyi, Tamás Kaszás, János Senkár and Sándor Fasing. István Balázs and Béla Rónavölgyi had remained at the police station in order to prevent the insurgents from insulting or harming the policemen who had stayed in the building. Sándor Fasing, who was 16 at the time, came to the police station because, having heard about the events which had taken place in front of the building, he wanted to find his brother who belonged to the staff of the Tata District Police Department. The reason for János Senkár's presence could not be confirmed. ...

One of the squads including Lieutenant K.M., Lieutenant J.L. and Lieutenant T., under the command of Captain I.L., remained near the entrance to the police station. Lieutenant K.M. carried a machine gun. Lieutenants M. and T. took up position across the road, opposite the entrance to the police station, while Captain L. and Lieutenant L. took up position on the right side of the exit. Near the gate, next to Lieutenant L., there stood a civilian with a motorcycle, who was talking to Lieutenant L. The members of the other squad, under the command of the defendant, went through the gate and entered the corridor of the police station. The defendant went to the door on the right side of the corridor and asked a policeman who else was in the building. He tried to phone the school but in vain since the telephone centre had been disabled. Then he ordered his group to separate the civilians from the policemen.

Subsequently, the defendant went to the inner yard with his fellow officers and they took up a semi-circle position. J.T. and his fellow officer, who were carrying the case of hand grenades, stopped and placed the case on the left-hand side of the corridor, while J.T. remained on the right-hand side. In front of the officers, near the entrance of the building which is situated to the right in the inner yard, István Balázs stood at a distance of about one metre from the door, Tamás Kaszás at about three metres to his right, and Béla Rónavölgyi at about one metre to his left. Sándor Fasing was next to the entrance to the building on the right-hand side of the yard. It was not possible to confirm exactly where János Senkár was; most likely he was also positioned on the right-hand side of the inner yard, near the wall of the office building. Near the entrance door to the office building to the right of the inner yard, behind the victims, there stood a few unarmed policemen.

The officers were continuously pointing their sub-machine guns at the civilians. István Balázs informed them that they had no weapons. An unknown policeman standing behind István Balázs said at this point that Tamás Kaszás had a pistol on him. István Balázs asked Tamás Kaszás to hand over the weapon if he had one.

At this point the defendant was facing Tamás Kaszás and there was a distance of only a few metres between them. An argument broke out between the defendant and Tamás Kaszás.

Tamás Kaszás, further to the request, reached into the inner pocket of his coat and took out a pistol.

The defendant – presumably misunderstanding the motion of Tamás Kaszás or because of fear or shock – gave a resolute order to fire. At almost the same time as the command was given, the defendant fired a short round from the sub-machine gun which he was pointing at Tamás Kaszás; and then the officers moved on towards the back yard.

Of the shots fired by the defendant, one hit Tamás Kaszás in the stomach area and another hit him in the lung region. He died on the spot.

As a result of the shots fired by the defendant and his fellow officers, one shot accidentally hit Lieutenant J.D. on his thigh. He stepped out of the semi-circle when the command to fire was given and was moving towards the access to the loft, where he was hoping to take cover. István Balázs was hit on his right hand; Sándor Fasing was hit by three bullets on his chest and on his thigh. At least one bullet hit János Senkár, who was wounded in the head and died after he had been taken to hospital, on 28 October 1956 ...

About fifteen to twenty minutes after the shooting had stopped, the defendant mounted one of the motorcycles which was in the yard, with the intention of riding to the Officer School. He turned left on his way out of the building; after he had covered 30-40 metres, unknown armed individuals shot at him, as a result of which he fell and suffered injuries because of the fall. He fled back into the police station, and left for the school on foot through the back yard. At the school, he reported to Major L. that there had been an exchange of fire between soldiers and civilians at the police station which had resulted in injuries on both sides. In reply to his superior's question as to who had initiated the shooting and commanded the soldiers to fire, the defendant could give no answer. Afterwards, a tank was sent to the police station to rescue the officers who were stranded in the building ...

The court established these facts on the basis of testimonies given by the defendant and the victims examined in the fresh proceedings and on the basis of further documentary evidence presented at the hearing.

At the hearing, the representative of the Military Public Prosecutor's Office maintained the prosecution's findings of fact and legal qualification and proposed that the court find the defendant guilty of a crime against humanity which he had committed as the principal and as an inciter to multiple homicide, in violation of Article 3 § 1 of the Geneva Conventions of 12 August 1949, promulgated by Law-Decree no. 32 of 1954. Regarding the sentence, the Military Public Prosecutor proposed that the court sentence the defendant to imprisonment and deprivation of his basic rights.

...

Throughout the investigation and the court procedure, the witness J.T. asserted firmly and consistently, without contradiction and contrary to the defendant's denial, that the latter had stood in the inner yard of the police station, where an argument had broken out between him and a civilian and he had given the order to fire. At the same time, the witness's statement that after having given the order to fire, the defendant had used his machine gun was based on an assumption.

In the course of the investigation, when interviewed as a witness on 8 March 1994, and afterwards at the confrontation held on 29 April 1994, the witness J.D. stated, in identical terms to J.T.'s testimony, that the defendant had been standing in the inner yard and had given the order to fire after an argument had broken out between him and a 'revolutionary'. ... In the repeated proceedings, however, he stated that he did not know who had given the order to fire. ... This court has found implausible the witness's statement that he heard the order to fire but could not tell who had given it.

With regard to the events that took place in the inner yard of the police station, the investigation authority managed to identify four witnesses. Out of these, two were officers, who were subordinates of the defendant and thus met him every day and must have known his appearance and voice.

The officers arriving in the inner yard were unknown to the civilian witnesses István Balázs and Sándor Fasing, and, as a consequence of the speed and brevity of the events, they could not have observed the officers particularly well. In the court's view, this is the reason why the two civilian witnesses did not recognise the defendant as the officer who had given the order to fire.

However, the court is of the opinion that, unlike the civilian witnesses, the witness J.D. – and similarly, the witness J.T. – should have recognised among the officers standing in the inner yard the person who had given the order to fire. Taking the above-mentioned reasons into consideration, the court has accepted the testimony of J.D. given at the investigation stage, according to which the defendant had given the order to fire.

Apart from the testimonies at the court's disposal, the court refers to the well-known military guideline whereby members of an armed subordinate unit may only use their weapons on the orders of the unit's commander. At the material time, the commander of the officer group was the defendant.

The court finds disconcerting the defendant's material defence presented at the court hearing, to the effect that he had been in the corridor of the building at the time when the short sub-machine gun round was heard, since when he was questioned as a suspect on 20 April 1994 he admitted that he had gone into the inner yard, where he had seen a group of people argue. On the sketch map of the scene, he actually marked where he and the arguing group of people had been standing. ... Consequently, it can be established that the evidence which the defendant gave as a suspect on 20 April 1994 is in accordance with the testimonies of witnesses T. and D., namely that before using the gun, the defendant had also been standing in the inner yard.

At the hearing in the repeated proceedings the defendant could not give an acceptable explanation as to why he had modified the testimony he had given at the investigation stage.

After weighing up the items of evidence jointly and severally, the court has come to the unambiguous and certain conclusion that it was the defendant who, in the course of an argument in the inner yard of the police station, gave the order to fire.

For these reasons, the court has established condemnatory findings of fact, contrary to the defendant's testimony denying any offence ...

It can be established from the available testimonies of witnesses (J.K., István Balázs) and the archive material obtained that Tamás Kaszás played an active part in the occupation of the police station. During the disarming of the policemen he took possession of a weapon (a pistol), and together with István Medved, he had the intention of executing the chief of the police station, Captain J.T. According to the documents from the period, after the occupation of the police station, the crowd moved to the telephone centre of the main post office to cut off telephone connections so as to prevent the policemen from calling for help. It is obvious that the reason why the defendant, having meanwhile been assigned to the police station, could not call from the building was that by that time the revolutionaries had occupied the local telephone centre ...

On the basis of the testimonies, it has not been possible to determine beyond reasonable doubt that Tamás Kaszás was already holding the pistol in his hand in the course of the argument with the defendant ...

In the court's view, Tamás Kaszás remained in the police station building in order to continue securing the insurgents' position there. Considering the earlier conflict

between Tamás Kaszás and Captain J.T., it is also evident that among the civilians who remained there, Tamás Kaszás claimed to be in charge and played a leading role upon the arrival of the officers.

It is also obvious that after having entered the building of the police station, the defendant had to look for and negotiate with the person who had played a leading role in the occupation of the building and the disarmament of the policemen.

Taking the above-mentioned reasons and the witnesses' testimonies into consideration, it can be established that the defendant, as commander of the officers' group, had to negotiate, and must have got into an argument, with the civilian Tamás Kaszás.

It can only be assumed what the defendant and Tamás Kaszás were talking or rather arguing about. It is clear that the defendant asked Tamás Kaszás why they had occupied the police station building, what their intention was and how he had got hold of the pistol. Considering that following the demands by the insurgents, the policemen had surrendered and handed over their service guns voluntarily, it can likewise be assumed that Tamás Kaszás called upon the defendant either to go over to the insurgents or to hand over their guns.

It is also evident that Tamás Kaszás might have behaved towards the defendant facing him in a way that made the latter give the order to fire and/or to use his gun. ...

From the established findings of fact it can be deduced that – in reaction to nationwide and local mass demonstrations – on 26 October 1956, between 5 and 6 p.m. the defendant arrived at the building of the Tata Police Department with a squad composed of some fifteen officers armed with sub-machine guns, machine guns, pistols and hand grenades. On the premises, he found some policemen who were already disarmed and a few civilians. Of the squad led by the defendant, four persons stayed at the entrance of the police building to secure that position, while the other officers went into the inner yard of the police building under the defendant's leadership. There an argument broke out between the defendant and a person among the civilians called Tamás Kaszás, who had a pistol in his possession. Following demands by the officers, Tamás Kaszás had the intention to hand over the pistol in his possession when the defendant ordered fire. Among the civilians in the inner yard, the shots fired on the defendant's orders hit Tamás Kaszás, János Senkár, István Balázs and Sándor Fasing. Subsequently, the shots fired by the four officers who were waiting on the street and securing the entrance hit István Balázs and Béla Rónavölgyi, who were fleeing from the yard to the street. Tamás Kaszás and Béla Rónavölgyi died on the spot, while János Senkár died after having been taken to hospital. István Balázs and Sándor Fasing were seriously injured ... by the shots fired by the officers.

The legal position adopted by the court is that, through the act described in the findings of fact, the defendant committed a crime against humanity, as was submitted by the public prosecutor, as the principal and – in respect of the actions outside the police building – as an inciter to multiple homicide, in violation of Article 3 § 1 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 and promulgated by Law-Decree no. 32 of 1954. ...

[...T]he court has analysed what facts and situations affected the defendant's volitional ability at the material time.

The deaths of Lieutenant P. and Sergeant T., who belonged to the school's staff, and the insurgents' subsequent assault on Captain S. must have shaken the defendant.

Being aware of the introduction of martial law, the defendant knew that any person participating in violent acts against the authorities or bearing arms without a licence committed a serious crime which was punishable by death.

Against this background the defendant received the command to advance into the police station to restore order, since the insurgents had occupied the building and disarmed the policemen. Considering this, the defendant was aware that there was a possibility of an armed attack by the insurgents who were already ... in possession of guns and that the lives of all officers entering the police station were thus in danger.

At the same time, the defendant and his fellow officers did not have knowledge of or training in policing; thus, they would not have known how to behave when encountering or confronting a hostile group, armed or unarmed.

The defendant had resolved the assignment at Tata Prison in a peaceful manner. He had persuaded the civilians whom he had found in front of the building to leave the premises. On their way to the Tata Police Department, the applicant's squad encountered two young men, one of whom was carrying a weapon. Instead of capturing and arresting them, the defendant confiscated the gun and released the two individuals unharmed.

At this juncture, the court draws attention to the case of the 'Kecskemét fusillade', where the officers of the Kecskemét District Cadre arrested two individuals, on whom they had found guns, and accompanied the captured civilians into the yard of the District Cadre building, where the officers – on the command of Major-General G. – executed them.

After having received the order to regain control of the police building with the option of using firearms, the defendant and his fellow officers were carrying out a tactical assignment.

In the testimonies they gave during the repeated proceedings, the defendant and his former fellow officers stated that they had been frightened while carrying out the assignment. Although the Military Criminal Code regarded fear as cowardice and as such, as a punishable act, in the view of this court, fear is a natural human reaction, which, in a given condition or situation, could paralyse a person's volition.

Under the influence of these emotional and intellectual impacts which affected his volition, the defendant met Tamás Kaszás in the yard of the police building, the latter having acquired a gun during the occupation of the building and having intended to execute the chief of the Department. In the court's view, it is no coincidence that the argument broke out between no other than Tamás Kaszás and the defendant. The content of their dispute and what actually happened between them can only be assumed, as mentioned by the court in chapter V of the assessment of the evidence. In his testimony, the witness István Balázs did not find it impossible that the defendant might have misunderstood Tamás Kaszás's motion in reaching into his pocket, because the order to fire was given immediately afterwards. It is obvious for this court that Tamás Kaszás must have behaved in a way that increased the defendant's sense of fear, as a result of which he felt that his and his fellow officers' life and limb was in danger in the situation. In the court's opinion, the defendant ordered fire in a situation which in his judgment was threatening.

On the other hand, the defendant should have realised that, because of their weapons, the officers' force was superior to that of the civilians in the inner yard, and that the conflict at hand could have been resolved without the use of firearms against people. Obviously, he did not take this possibility into account because, owing to the threat which had emerged in the circumstances, he was restricted in his volition."

43. On appeal, on 8 November 2001 the Supreme Court, acting as an appellate court, amended that judgment, which became final on that day.

44. The relevant parts of the judgment read as follows:

> "The Supreme Court has found during the appellate review that the first-instance court conducted the hearings by adhering to the rules of criminal procedure and that the findings of fact were established by evaluating the evidence and are largely well-founded. The requirements of reasoning were also fulfilled.
>
> A significant part of the findings of fact is that it was the defendant who ordered fire, that he himself opened fire and that, by doing so, he killed one of the aggrieved parties. This finding of fact, devoid of unfoundedness, is decisive for the second-instance proceedings.
>
> The Supreme Court corrects the findings of fact ... by omitting the statement that the defendant '– presumably misunderstanding the motion of Tamás Kaszás or because of fear or shock – gave a resolute order to fire' ... since in its view, it is incorrect for the following reasons.
>
> Since the defendant denied having committed a crime, he did not give a statement as to what had been going on in his mind before giving the order to fire. Obviously, the first-instance court must have drawn the above conclusion from the established fact that Tamás Kaszás 'had taken out a pistol from his inner pocket'. This conclusion would seem to allude to the fact that the defendant interpreted (or – since the word 'presumably' is used – may have interpreted) Tamás Kaszás's move as an attack.
>
> However, the findings of fact in the judgment also state that 'István Balázs asked Tamás Kaszás to hand over the weapon if he had one. At this point the defendant was facing Tamás Kaszás and there was a distance of only a few metres between them' ... From this, it can rightly be deduced that the defendant heard this call. Because it was immediately thereafter that a quarrel broke out between the defendant and the victim and that the victim drew his gun, the correct conclusion concerning what was on the defendant's mind is that he knew that the victim intended to hand over the gun, rather than to attack with it. ... "

45. As to the characterisation of the applicant's conduct, the Supreme Court, endorsing the first-instance court's reference to Article 3 § 1 of "the Geneva Convention" as the basis for the conviction, held that the crime against humanity which the applicant had committed consisted of having intentionally murdered more than one person (*több emberen elkövetett szándékos emberöléssel megvalósított emberiség elleni bűntett*). The Supreme Court considered that the applicant bore no responsibility, as an inciter, for the killing committed outside the building. Nevertheless, in response to a request by the prosecution for a heavier sentence, it increased the principal sentence to five years' imprisonment. Given the increased sentence, the applicant could no longer be exempted from its execution; however, its duration was to be reduced by one-eighth because of the relevant amnesty provisions.

The Supreme Court endorsed the first-instance court's assessment of the mitigating factors, including the protracted nature of the proceedings.

46. On 14 July 2002 the Military Bench of the Budapest Regional Court dismissed an application by the applicant for a retrial. An appeal he

subsequently lodged with the Supreme Court was unsuccessful. A renewed request was rejected on 16 June 2004.

47. On 22 September 2003 the Supreme Court's review bench declared inadmissible a petition for review by the applicant, without examining it on the merits, since it was incompatible *ratione materiae* with the relevant provisions of the Code of Criminal Procedure in that it essentially challenged the findings of fact.

48. A request by the applicant for a pardon was to no avail. On 24 March 2003 he started to serve his sentence. On 31 May 2005 he was conditionally released.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949

Article 3[1]

"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;

(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 recognised as indispensable by civilized peoples. ..."

49. The Geneva Conventions were made part of Hungarian law by virtue of Law-Decree no. 32 of 1954. The Law-Decree did not contain the text of the Conventions. Section 3 of the Law-Decree required the Minister for

1. This Article appears, with identical wording, as Articles 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; and Convention (III) relative to the Treatment of Prisoners of War; all adopted in Geneva on 12 August 1949.

Foreign Affairs to make the official translation of the Geneva Conventions available to the public prior to its entry into force. In 1955 a brochure containing the text was issued by the Economic and Legal Publishing House on behalf of the Ministry of Foreign Affairs. However, the text was not officially published until 14 November 2000, in Official Gazette no. 2000/112.

B. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977

Article 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 of 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 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 organised 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."

50. This Protocol was promulgated in Hungary by Law-Decree no. 20 of 1989 and its translated text was published on 12 October 1989.

C. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977

Article 41 § 2

"A person is '*hors de combat*' if ... (b) he clearly expresses an intention to surrender; ..."

D. Commentary on Protocol Additional (I), published by the International Committee of the Red Cross (§§ 1618-19)

"[I]n land warfare, surrender is not bound by strict formalities. In general, a soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands. ... If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons.

In these various situations, surrender is unconditional, which means that the only right which those who are surrendering can claim is to be treated as prisoners of war.

If the intention to surrender is indicated in an absolutely clear manner, the adversary must cease fire immediately; it is prohibited to refuse unconditional surrender ..."

E. Customary international humanitarian law

51. In the view of the International Committee of the Red Cross (ICRC), the rule that any person *hors de combat* cannot be made the object of attack has become a customary rule applicable to both international and non-international armed conflicts. The ICRC has reminded the parties concerned of the obligation to observe this rule in a number of armed conflicts[1]. Accordingly, the ICRC's study on customary international humanitarian law (2005) proposes the following rule in the section on specific methods of warfare:

"Rule 47. Attacking persons who are recognised as *hors de combat* is prohibited. A person *hors de combat* is:

(a) anyone who is in the power of an adverse party;

(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or

(c) anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape."[2]

F. Charter of the International Military Tribunal annexed to the London Agreement (8 August 1945)

Article 6 (c)

"Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution 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 domestic law of the country where perpetrated."

G. Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) (1993)

Article 5 – Crimes against humanity

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

1. See, for example, the conflicts in Rhodesia/Zimbabwe in 1979, Bosnia and Herzegovina in 1992, Rwanda in 1994 or Afghanistan in 2001.

2. Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC, Cambridge, 2005, vol. I, pp. 164-70.

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.”

H. Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) (1994)

Article 3 – Crimes against humanity

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.”

I. Rome Statute of the International Criminal Court (ICC Statute) (1998)

Article 7 – Crimes against humanity

“1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

J. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968)

Article 1

"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 (1) 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 Conventions 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 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, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article 2

If any of the crimes mentioned in Article 1 is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."

52. This Convention was promulgated in Hungary by Law-Decree no. 1 of 1971, which entered into force on 2 February 1971.

K. Constitution of the Republic of Hungary (Act no. 20 of 1949 as amended)

Article 7 § 1

"The legal system of the Republic of Hungary shall accept the generally recognised rules of international law and shall furthermore secure harmony between its obligations under international law and domestic law."

L. Act no. 90 of 1993 on proceedings concerning certain crimes committed during the 1956 uprising and revolution

"Having regard to the decision of the Constitutional Court of 12 October 1993, Parliament enacts the following statute on proceedings concerning certain crimes committed during the 1956 uprising and revolution:

Section 1

(1) Having regard to Article 1 of the United Nations Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968 ... (promulgated by Law-Decree no. 1 of 1971), section 33(2) of the Criminal Code [in which the cases of non-applicability of statutory limitations are enumerated] shall be applied to the statutory limitation on the punishability of crimes committed during the 1956 uprising and revolution, which are defined as grave breaches ...

...

(b) in Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War adopted on 12 August 1949 [and promulgated by Law-Decree no. 32 of 1954], on the basis of Article 3 § 1 of that Convention.

(2) The penalty for the crimes listed in subsection (1), having regard to section 2 of the Criminal Code, shall be

(a) in the case of intentional murder ..., five to fifteen years of imprisonment ... ."

The Act was abrogated by the Hungarian Constitutional Court on 4 October 1996.

M. Order no. 20/1956 (H.K.6.)VKF of the General Chief of Staff on the Teaching of the 1949 Geneva Conventions

53. This order was published on 5 September 1956 in the Military Gazette and accompanied by a synopsis of the Conventions. It included the following paragraph:

"The commanding officers of companies and institutes shall ensure, as of the 1956/57 academic year, that members of the forces take cognisance of the basic principles of the Conventions."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

54. The applicant complained that he had been prosecuted for an act which had not constituted any crime at the time of its commission, in breach of Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Submissions of those appearing before the Court

1. The applicant's arguments

55. As to the relationship between Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("common Article 3") and the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"), the applicant stressed that the latter "developed and supplemented" the former; therefore, they could be applied only together. Should Article 3 have a wider field of application and include that of Protocol II, the latter would be superfluous. In the interests of defendants, Protocol II should be allowed to have retrospective effect, to restrict the scope of common Article 3. Such an approach did not reduce the level of protection of the civilian population, because in addition to the law of war, several other international instruments prohibited the extermination of civilians.

56. However, even if common Article 3 were applicable to the applicant's act, it must be concluded, in view of the Commentaries on the Geneva Conventions ("the Commentaries") published by the International Committee of the Red Cross (ICRC), that its field of application was not unlimited but subject to certain restrictions. In other words, it could not be broader than the scope assigned to the Conventions by their drafters. For example, simple acts of rioting or banditry did not fall within the scope of Article 3: for it to come into play, the intensity of the conflict must have reached a certain level. Whether or not this condition was met in the applicant's case should have been decided by relying on the opinions of the expert historians, which had infelicitously been discarded by the Supreme Court.

57. It was true, the applicant argued, that according to the Commentaries, the widest possible interpretation was to be pursued. This approach, however, could only be accepted with reservations, since it was set out in an instrument which was not law, but only a recommendation to States and since it served the purposes of the ICRC, namely to apply the Geneva Conventions to the largest possible number of conflicts, thereby allowing for humanitarian intervention by the ICRC. In the applicant's view, this approach – laudable as it might be in the context of humanitarian law – could not be accepted as being applicable in the field of individual criminal liability, where no extensive interpretation of the law was allowed.

58. Moreover, in accordance with Article 7 of the Constitution and in view of the Constitutional Court's case-law, war crimes were not subject to statutory limitation. However, this provision had been enacted in Hungary as late as in 1989. Therefore, in 1956 war crimes and crimes against humanity had still been subject to statutory limitation. In any event, the Geneva Conventions did not regulate the issue of statutory limitation; this principle was laid down by the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (the 1968 New York Convention), but without retrospective effect. At the time of the commission of the act of which the applicant had been accused, neither domestic nor international law had precluded the applicability of statutory limitations to the crime in question. The applicant could not have foreseen that one day the act which he had committed would be characterised as a crime against humanity and would not be statute-barred.

59. Furthermore, as to the events which had taken place in the yard of the Tata Police Department, the applicant maintained that even if the civilians present, who had been guarding the police officers, had been unarmed, they could not be regarded as "persons taking no active part in the hostilities". To guard captured enemy combatants was to take an active part in the hostilities. The disarmed police officers had been led to believe that their guards might have arms which they would use if they faced resistance. Tamás Kaszás had actually had a gun, which he had drawn after a quarrel; consequently, he could not be characterised as a non-combatant. In view of Tamás Kaszás's conduct, the applicant could not have been certain that the other insurgents present – including János Senkár, who had also been fatally wounded – had not had concealed firearms on them. In other words, the applicant had been convicted as a result of the incorrect classification of the victim as a non-combatant, although the latter had been armed. His conviction had been based on common Article 3 although not all its elements had been present.

60. Lastly, concerning the question of accessibility and in reply to the Government's assertion that the applicant, a training officer, was supposed to be familiar with the Geneva Conventions because they had been made

part of the teaching materials used by him, he drew attention to the fact that the relevant instruction of the General Chief of Staff had been issued on 5 September 1956, less than two months before the events.

2. The Government's arguments

61. The Government emphasised at the outset that the October 1956 events in Hungary had amounted to a large-scale internal conflict and had not simply been an internal disturbance or tension characterised by isolated or sporadic acts of violence not constituting an armed conflict in the legal sense.

62. As to the questions of accessibility and foreseeability, the Government shared the position expressed by Judge Zupančič in his concurring opinion in *Streletz, Kessler and Krenz v. Germany* ([GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II):

> "The powerful objective guarantees of substantive criminal law entrenched in the principle of legality cannot be reduced to the subjective right to advance notice of what is punishable under positive law. ... [E]xcessive reliance upon the subjective criteria of accessibility and foreseeability would facilitate the applicants' defence based on the principle of legality. ... [S]uch an argument would then introduce the defence of an excusable mistake of law (*error juris*)."

In the Government's view, allowing such a defence would undermine the effective enforcement of criminal law and especially international criminal law, which provided for protection from the most serious attacks against the basic values of humanity and whose rules were generally less accessible to many individuals than domestic rules of conduct. A narrow interpretation of the subjective criteria of accessibility and foreseeability would undermine any ground for universal jurisdiction over war crimes, genocide and other crimes against humanity and even the legality of the newly established International Criminal Court. The international community had, however, created a presumption that these rules were known to everyone since they protected the basic values of humanity.

63. Concerning accessibility in particular, the Government submitted that, by the present-day standards of the rule of law, the Geneva Conventions had not been properly made part of Hungarian law until their publication in the Official Gazette in 2000. However, their validity and applicability as international law did not depend on their status in domestic law. In any event, Law-Decree no. 32 of 1954 – which declared the Geneva Conventions to be part of national law – required the Minister for Foreign Affairs to ensure the publication of a translation prior to their entry into force. This had been done in 1955, rendering the Conventions generally accessible in Hungarian. Furthermore, given his position as a commanding military officer in charge of training, the applicant had been under the obligation to take cognisance of the content of the Conventions and to include it in the training programme he taught to junior officers.

64. The Government also referred to Constitutional Court decision no. 53/1993 in which it was stated that common Article 3 was part of customary international law, and that acts in breach thereof were to be regarded as crimes against humanity. Consequently, the offence of which the applicant had been convicted constituted a criminal offence under international law. The Constitutional Court had held that international law alone was a sufficient ground for the punishment of such acts, and its rules would be devoid of any effect if the punishability of war crimes and crimes against humanity were subject to incorporation into domestic law.

65. As regards the issue of foreseeability and the relationship between common Article 3 and Protocol II, the Government drew attention to the fact that common Article 3 was regarded as a "convention in miniature" within the Geneva Conventions, containing the basic rules of humanity to be observed in all armed conflicts of a non-international character. Protocol II, which further developed and supplemented the "parent provision", was an additional instrument which was designed to set out more detailed rules and guarantees for a specific type of internal armed conflict, that is, for situations when insurgents exercised control over a territory of the State and were thereby able and expected to have the rules of war observed. It was clear that Protocol II had not been intended to leave the victims of all other types of internal armed conflicts unprotected. It was also evident from its wording and the Commentaries on it published by the ICRC that Protocol II did not affect the scope of application of Article 3. Although they could not identify any international judicial interpretation on the issue, the Hungarian courts had taken those Commentaries into account. In view of this, the Supreme Court's interpretation of common Article 3 – namely that it had a scope of application which could not be considered to have been retrospectively restricted by Protocol II – had been reasonably foreseeable.

66. Concerning the domestic courts' characterisation of the victims as non-combatants although one had had a handgun, the Government pointed out that the offence with which the applicant was charged had not consisted of the shooting of a single person dressed in plain clothes and armed with a handgun, in which case the victim's characterisation as a civilian or combatant would have been highly relevant. On the contrary, the applicant had been charged with having ordered his squad to fire at a group of unarmed civilians, among whom there had been a person with a handgun in his pocket. That person – who at first sight must have appeared to be a civilian, since he had not been pointing his gun but hiding it in his pocket – did not in any case make the group a lawful military target. When applying international humanitarian law, the Hungarian courts had been concerned with the entire group rather than with characterising Tamás Kaszás as a civilian or a combatant.

67. Moreover, the margin of appreciation enjoyed by the Hungarian courts in the case should, in the Government's view, be dealt with in the light of the principles of interpretation enshrined in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which provided that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose. In the field of international human rights law, it was a generally accepted method of interpretation to choose, in case of doubt, an interpretation which led to the effective protection (*effet utile*) of the individual rights to be safeguarded. The reasoning of the Supreme Court reflected this approach. Its interpretation of the offence committed by the applicant and defined by international humanitarian law had been aimed at the effective protection of the civilian population. Thus, it had remained within the margin set by Article 3 common to the Geneva Conventions. Since Article 7 of the Convention could not be read as outlawing the clarification of the rules of criminal liability through judicial interpretation – provided that the outcome could reasonably be foreseen – it could not be argued that the interpretation of the scope of application of common Article 3 or the characterisation of the victim as a civilian had been arbitrary.

B. The Court's assessment

1. Admissibility

68. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

69. The guarantee enshrined in Article 7 of the Convention, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

70. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and

the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The Court has thus indicated that when speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.

71. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Jorgic v. Germany*, no. 74613/01, §§ 100-01, ECHR 2007-III; *Streletz, Kessler and Krenz*, cited above, § 50; and *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, 22 November 1995, §§ 34-36, Series A no. 335-B and §§ 32-34, Series A no. 335-C respectively).

72. Furthermore, the Court would reiterate that, in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I).

(b) Application of the above principles to the present case

73. In the light of the above principles concerning the scope of its supervision, the Court notes that it is not called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts. Its function is, rather, to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's act, at the time when it was committed, constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law (see *Streletz, Kessler and Krenz*, cited above, § 51).

(i) Accessibility

74. The Court observes that the applicant was convicted of multiple homicide, an offence considered by the Hungarian courts to constitute "a crime against humanity punishable under Article 3 § 1 of the Geneva Convention". It follows that the applicant's conviction was based exclusively on international law. Therefore, the Court's task is to ascertain, first, whether the Geneva Conventions were accessible to the applicant.

75. The Geneva Conventions were proclaimed in Hungary by Law-Decree no. 32 of 1954. It is true that the Law-Decree itself did not contain the text of the Geneva Conventions and its section 3 required the Minister for Foreign Affairs to ensure the publication of the official translation of the Geneva Conventions prior to their entry into force. However, in 1955 the Ministry of Foreign Affairs arranged for the official publication of a brochure containing the text. It is also to be noted that an order of the General Chief of Staff was published in the Military Gazette on 5 September 1956 on the teaching of the Conventions and was accompanied by a synopsis of them. In these circumstances, the Court is satisfied that the Geneva Conventions were sufficiently accessible to the applicant.

(ii) Foreseeability

76. In order to verify whether Article 7 was complied with in the present case, the Court must determine whether it was foreseeable that the act for which the applicant was convicted would be qualified as a crime against humanity. In this respect, the Court notes that the applicant was convicted of multiple homicide constituting a crime against humanity and was sentenced to five years' imprisonment (see paragraphs 37, 38, 45 and 75 above). In convicting the applicant, the courts essentially relied on common Article 3, which – in the view of the Hungarian Constitutional Court – characterised the conduct referred to in that provision as "crimes against humanity". In the opinion of those courts, such crimes were "punishable irrespective of whether they were committed in breach of domestic law". Thus, it was "immaterial whether the Geneva Conventions were properly promulgated or whether the Hungarian State fulfilled its obligation to implement them prior to ... 23 October 1956. Independently [of these issues], the responsibility of the perpetrators existed under international law" (see paragraph 18 above). Consequently, the crime at issue was considered not to be subject to statutory limitation.

77. Thus, the Court will examine (a) whether this act was capable of amounting to "a crime against humanity" as that concept was understood in 1956 and (b) whether it can reasonably be said that, at the relevant time, Tamás Kaszás (see paragraphs 11 et seq. above) was a person who was "taking no active part in the hostilities" within the meaning of common Article 3.

(α) The meaning of "crime against humanity" in 1956

78. It follows that the Court must satisfy itself that the act in respect of which the applicant was convicted was capable of constituting, at the time when it was committed, a crime against humanity under international law. The Court is aware that it is not its role to seek to establish authoritatively the meaning of the concept of "crime against humanity" as it stood in 1956. It must nevertheless examine whether there was a sufficiently clear basis, having regard to the state of international law as regards this question at the relevant time, for the applicant's conviction on the basis of this offence (see, *mutatis mutandis*, *Behrami v. France and Saramati v. France, Germany and Norway* (striking out) (dec.) [GC], nos. 71412/01 and 78166/01, § 122, 2 February 2007).

79. The Court notes that, according to the Constitutional Court, "[a]cts defined in Article 3 common to the Geneva Conventions constitute crimes against humanity". In that court's opinion, this provision contained "those 'minimum' requirements which all the conflicting Parties must observe, 'at any time and in any place whatsoever'".

The Constitutional Court furthermore relied on the judgment of the International Court of Justice in the case of *Nicaragua v. United States of America* and on a reference made to common Article 3 in the report by the Secretary-General of the United Nations on the ICTY Statute (see paragraph 18 above). The Court observes, however, that these authorities post-date the incriminated events. Moreover, no further legal arguments were adduced by the domestic courts dealing with the case against the applicant in support of their conclusion that the impugned act amounted to "a crime against humanity within the meaning of common Article 3".

80. In addition, it is to be noted that none of the sources cited by the Constitutional Court characterises any of the actions enumerated in common Article 3 as constituting, as such, a crime against humanity. However, even if it could be argued that they contained some indications pointing in this direction, neither the Constitutional Court nor the courts trying the applicant appear to have explored their relevance as regards the legal situation in 1956. Instead, the criminal courts focused on the question whether common Article 3 was to be applied alone or in conjunction with Protocol II. Yet this issue concerns only the definition of the categories of persons who are protected by common Article 3 and/or Protocol II and the question whether the victim of the applicant's shooting belonged to one of them; it has no bearing on whether the prohibited actions set out in common Article 3 are to be considered to constitute, as such, crimes against humanity.

81. On the latter issue, the Court observes that the four primary formulations of crimes against humanity are to be found in Article 6 (c) of the Charter of the International Military Tribunal annexed to the London Agreement (8 August 1945) ("the Charter"), Article 5 of the ICTY Statute (1993), Article 3 of the ICTR Statute (1994) and Article 7 of the ICC

Statute (1998) (see paragraph 51 above). All of them refer to murder as one of the offences capable of amounting to a crime against humanity. Thus, murder within the meaning of common Article 3 § 1 (a) could provide a basis for a conviction for crimes against humanity committed in 1956. However, other elements also need to be present.

82. Such additional requirements to be fulfilled, not contained in common Article 3, are connected to the international-law elements inherent in the notion of crime against humanity at that time. In Article 6 (c) of the Charter, which contains the primary formulation in force in 1956, crimes against humanity are referred to in connection with war. Moreover, according to some scholars, the presence of an element of discrimination against, and "persecution" of, an identifiable group of persons was required for such a crime to exist, the latter notion implying some form of State action or policy (see Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, p. 256). In the Court's view, one of these criteria – a link or nexus with an armed conflict – may no longer have been relevant by 1956 (see Schwelb, "Crimes against Humanity", *British Yearbook of International Law*, 1946, vol. 23, p. 211; Graven, "Les Crimes Contre l'Humanité", 76 *Recueil des cours de l'Académie de droit international de La Haye*, 1950, p. 467; and the Draft Code of Offences against the Peace and Security of Mankind, *Yearbook of the International Law Commission*, 1954, vol. I, p. 151).

83. However, it would appear that others still were relevant, notably the requirement that the crime in question should not be an isolated or sporadic act but should form part of "State action or policy" or of a widespread and systematic attack on the civilian population (see, Berry, Keenan and Brown, *Crimes against International Law*, Washington, DC, Public Affairs Press, 1950, pp. 113-22).

84. The Court notes that the national courts confined their examination to the question whether Tamás Kaszás and János Senkár came under the protection of common Article 3 and did not examine the further question whether the killing of the two insurgents met the additional criteria necessary to constitute a crime against humanity and, in particular, whether it was to be seen as forming part of a widespread and systematic attack on the civilian population. Admittedly, the Supreme Court's review bench held that it was common knowledge that "the central power of the dictatorship made use of its armed forces against the unarmed population engaged in peaceful demonstrations and against armed revolutionary groups whose organisation was in progress ... In practical terms, they waged war against the overwhelming majority of the population" (see paragraph 34 above). However, the Supreme Court did not address the question whether the particular act committed by the applicant was to be regarded as forming part of this State policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956.

85. In the Court's opinion it is thus open to question whether the constituent elements of a crime against humanity were satisfied in the present case.

(β) Was Tamás Kaszás a person "taking no active part in the hostilities" within the meaning of common Article 3 according to prevailing international standards?

86. In this respect the Court reiterates that the applicant's conviction was based on the finding that Tamás Kaszás was a non-combatant for the purposes of common Article 3 of the Geneva Conventions (see paragraph 48 above).

87. When applying common Article 3 to the applicant's case, the various domestic courts took divergent views on the impact of Protocol II on this provision. In particular, in their respective decisions of 7 May and 5 November 1998, the Regional Court and the Supreme Court's appeal bench took the view that common Article 3 and Article 1 of Protocol II were to be interpreted in conjunction with each other. The decision of the Supreme Court's review bench of 28 June 1999 and the ensuing judgments reflected another approach, according to which common Article 3 of the Geneva Conventions had an original scope of application which could not be considered to have been retrospectively restricted by Protocol II. Consequently, any civilian participating in an armed conflict of a non-international character, irrespective of the level of intensity of the conflict or of the manner in which the insurgents were organised, enjoyed the protection of common Article 3 of the Geneva Conventions. The Court will proceed on the basis that the above interpretation by the Supreme Court is correct from the standpoint of international law (see Bothe, "Conflits Armés Internes et Droit International Humanitaire", *Revue Générale de Droit International Public*, 1978, p. 90; Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva, 1986, §§ 4424-26; and *Prosecutor v. Jean-Paul Akayesu*, judgment of 2 September 1998, ICTR (Chamber I), § 607).

88. In his submissions to the Court, the applicant has questioned whether Tamás Kaszás could be considered to be protected by common Article 3 which affords protection to "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". He argued that Tamás Kaszás could not be regarded as a non-combatant since he had a gun (see paragraph 59 above).

89. At the outset, the Court observes that, according to the facts as established by the domestic courts, Tamás Kaszás was the leader of an armed group of insurgents, who – after committing other violent acts – took control of a police building and confiscated the police officers' arms. In

such circumstances he must be seen as having taken an active part in the hostilities (see paragraph 42 above).

90. The question therefore arises whether Tamás Kaszás was a member of the insurgent forces who had "laid down his arms", thereby taking no further part in the fighting. In this connection, the Court finds it to be crucial that, according to the domestic court's finding, Tamás Kaszás was secretly carrying a handgun, a fact which he did not reveal when facing the applicant. When this circumstance became known, he did not seek to surrender in a clear manner. The Court notes that it is widely accepted in international legal opinion that in order to produce legal effects such as the protection of common Article 3, any intention to surrender in circumstances such as those in issue in the present case needs to be signalled in a clear and unequivocal way, namely by laying down arms and raising hands or at the very least by raising hands only (see, for example, the Commentary on Additional Protocol I to the Geneva Conventions, published by the ICRC (see paragraph 50 above); the proposed Rule 47 of the ICRC's study on customary international humanitarian law (2005) (see paragraph 51 above); and the Report of the [United Nations] Secretary-General on respect for human rights in armed conflict, UN Doc. A/8052, 18 September 1970, § 107). For the Court, it is reasonable to assume that the same principles were valid in 1956.

91. However, there is no element in the findings of fact established by the domestic courts which could lead to the conclusion that Tamás Kaszás expressed in such a manner any intention to surrender. Instead, he embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions. It was precisely in the course of this act that he was shot. In these circumstances the Court is not convinced that in the light of the commonly accepted international law standards applicable at the time, Tamás Kaszás could be said to have laid down his arms within the meaning of common Article 3.

92. The Court is aware of the Government's assertion (see paragraph 66 above) that the applicant's conviction was not based solely on his having shot Tamás Kaszás but on his having fired, and ordered others to fire, at a group of civilians, resulting in several casualties.

93. The Court observes, however, that the domestic courts did not specifically address the issue of the applicant's guilt in respect of the other fatality, János Senkár; rather, they focused on his conflict with Tamás Kaszás. Nor did those courts regard the injuries inflicted on István Balázs and Sándor Fasing as a constitutive element of the crime; instead, they characterised their occurrence as a mere aggravating factor (see paragraph 40 above). That being so, the Government's argument that the applicant's conviction was not primarily based on his reaction to Tamás Kaszás's drawing his handgun, but on his having shot, and ordered others to shoot, at a group of civilians, cannot be sustained.

94. The Court therefore is of the opinion that Tamás Kaszás did not fall within any of the categories of non-combatants protected by common Article 3. Consequently, no conviction for crimes against humanity could reasonably be based on this provision in the present case in the light of relevant international standards at the time.

(c) Conclusion

95. In the light of all the circumstances, the Court concludes that it has not been shown that it was foreseeable that the applicant's acts constituted a crime against humanity under international law. As a result, there has been a violation of Article 7 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE UNFAIRNESS OF THE PROCEEDINGS

96. The applicant also complained in general terms that his conviction had been politically motivated and as such, unfair, in breach of Article 6 § 1 of the Convention, the relevant parts of which read as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

97. The Government argued that the domestic courts had given appropriate reasons for the applicant's conviction for crimes against humanity. The applicant contested this view.

98. The Court considers that this complaint is also admissible. However, in the light of its finding of a violation of Article 7 of the Convention (see paragraph 95 above), it concludes that in the circumstances of the present case it is unnecessary to examine the applicant's complaint under Article 6§ 1 of the Convention (fairness of the proceedings).

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF THE PROCEEDINGS

99. Lastly, the applicant complained that the criminal proceedings against him had lasted an unreasonably long time, in breach of Article 6 § 1 of the Convention.

100. The Government argued that the authorities had acted with the requisite diligence, given the complexity of the case. In any event, since the Budapest Regional Court had assessed the protracted nature of the proceedings as a mitigating factor and this consideration had been endorsed by the Supreme Court (see paragraphs 40 and 45 above), the applicant had, in the Government's view, already been afforded adequate redress and

could not claim to be a victim of a violation of his Convention rights in this connection. The applicant contested these views.

101. The Court considers that it is not necessary to examine the applicant's victim status in respect of this issue, because this complaint is in any event manifestly ill-founded for the following reasons. The Court observes that the proceedings commenced on 20 April 1994 and ended on 22 September 2003. The period to be taken into consideration thus lasted approximately nine years and five months. It reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

102. The Court notes that the applicant's petition for review was dismissed as inadmissible, without being examined on the merits, since it was incompatible *ratione materiae* with the relevant provisions of the Code of Criminal Procedure in that it essentially challenged the findings of fact. Since the related proceedings were futile, the corresponding period of over one year and ten months (8 November 2001 to 22 September 2003) is entirely imputable to the applicant. During the remaining seven years and seven months, the case was initially examined at one level of jurisdiction, and this was followed by the Constitutional Court's scrutiny of the underlying laws. However, that process halted the proceedings for only nine months.

103. Subsequently, the case was remitted to the first-instance court. In the ensuing proceedings, the case was dealt with at three levels of jurisdiction, in the course of which several hearings were held and the opinion of an expert military historian was obtained. The final decision having been quashed in review proceedings, the case was again remitted to the first-instance court, whose judgment was amended in the final decision of 8 November 2001.

104. In the Court's view, the fact that the case had to be examined repeatedly at several levels of jurisdiction is essentially due to the complexity of the legal issues in question and to the inevitable difficulties the domestic courts faced when establishing facts which had occurred more than forty years earlier. Having regard to the absence of any particular period of inactivity attributable to the authorities, the Court is satisfied that the overall length of the proceedings did not exceed a reasonable time within the meaning of Article 6 § 1 of the Convention.

105. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected, pursuant to Article 35 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

107. The applicant did not submit a claim for damages.

108. In these circumstances, the Court makes no award under this head.

B. Costs and expenses

109. The applicant stated that the amount which his representatives had received from the Council of Europe's legal-aid scheme – altogether, 3,716.06 euros – would cover all his claims under this head.

110. The Government made no comment in this connection.

111. In these circumstances, the Court considers the applicant's claim for costs to have been satisfied.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints under Article 7 and Article 6 § 1 of the Convention (fairness of the proceedings) admissible and the remainder of the application inadmissible;

2. *Holds*, by eleven votes to six, that there has been a violation of Article 7 of the Convention;

3. *Holds*, by twelve votes to five, that it is not necessary to examine separately the applicant's complaint concerning the alleged unfairness of the proceedings (Article 6 § 1 of the Convention).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 September 2008.

Michael O'Boyle
Deputy Registrar

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popović;

(b) dissenting opinion of Judge Loucaides.

J.-P.C.
M.O.B.

JOINT DISSENTING OPINION OF JUDGES LORENZEN, TULKENS, ZAGREBELSKY, FURA-SANDSTRÖM AND POPOVIĆ

(Translation)

We do not subscribe to either the reasoning or the conclusions of the majority as to the violation of Article 7 of the Convention in the present case.

1. The Court initially sets out to determine whether the act in respect of which the applicant was convicted could have amounted to a crime against humanity as that concept was understood in 1956 (see paragraph 77 of the judgment). In that connection, it rightly observes that the definition of the categories of persons who are protected by common Article 3 of the Geneva Conventions and/or Protocol II and the question whether the victim of the applicant's shooting belonged to one of those categories have no bearing on whether the actions prohibited by common Article 3 are to be considered *per se* to constitute crimes against humanity (see paragraph 80). Referring to the four primary formulations of crimes against humanity (Article 6 (c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, Article 5 of the 1993 ICTY Statute, Article 3 of the 1994 ICTR Statute, and Article 7 of the 1998 ICC Statute), the Court concludes that murder within the meaning of common Article 3 § 1 (a) could have provided a basis for a conviction for crimes against humanity. However, it considers that "other elements also need to be present" for an offence to qualify as a crime against humanity (see paragraph 81), namely international-law elements.

Referring in turn to the presence of discrimination against, and persecution of, an identifiable group of persons and a link or nexus with an armed conflict – elements which have been posited by legal experts but are the subject of much debate[1] – the Court concludes that a more relevant constituent element of crimes against humanity is that they should "form part of 'State action or policy' or of a widespread and systematic attack on the civilian population" (see paragraph 83). On that point, it is incorrect in our view to maintain, as the judgment does, that the domestic courts did not

1. According to one approach, persecution is an essential element only for the sub-class "acts of persecution" (ICTY, *Prosecutor v. Kupreskic* et al., IT-95-16, judgment of 14 January 2000, §§ 616-27). From another standpoint, crimes against humanity may be committed even in peacetime (ICTY, *Prosecutor v. Tadic*, IT-94-1, decision of 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction, § 141), and some writers maintain that as far back as the early 1950s, customary international law envisaged the notion of crimes against humanity and did not require a link with an internal or international armed conflict (A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2nd edn., 2008, pp. 101-09).

examine whether in 1956 there had been a widespread and systematic attack on the civilian population, seeing that the Supreme Court's review bench held that it was common knowledge that the central power of the dictatorship had employed troops against the population engaged in demonstrations and against the armed revolutionary groups that were forming (see paragraph 34). As to the contention that the Supreme Court "did not address the question whether the particular act committed by the applicant was to be regarded as forming part of this State policy" (see paragraph 84), it is quite simply at odds with the evidence in the case file and with the historical reality of the events in Tata on 26 October 1956.

Be that as it may, the restraint or caution evident in the conclusion of the judgment leaves open the initial question whether the act in respect of which the applicant was convicted could indeed have amounted to a crime against humanity. The Court thus considers that it is "*open to question* whether the constituent elements of a crime against humanity were satisfied in the present case" (see paragraph 85), which indicates that it cannot find a violation of Article 7 of the Convention on that basis.

2. The reasoning and grounds put forward by the majority thus focus essentially on the second question: could Tamás Kaszás be regarded as a person taking no active part in the hostilities within the meaning of common Article 3 of the Geneva Conventions? More specifically, was he a member of the insurgent forces who had "laid down his arms"? The answer to this question requires an interpretation of the victim's actions at the time of the confrontation and shooting in the Tata Police Department building, where the insurgents were to be found on 26 October 1956. In this instance the Court concludes that "there is no element in the findings of fact established by the domestic courts which could lead to the conclusion that Tamás Kaszás expressed in such a manner any intention to surrender" (see paragraph 91). It therefore considers that he did not fall within any of the categories of non-combatants protected by common Article 3 and that that provision could not reasonably have served as a basis for a conviction for crimes against humanity (see paragraph 94).

In its recapitulation of the general principles, the judgment reiterates that it is not normally the Court's task to substitute itself for the domestic courts and that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. It rightly points out that this also applies where domestic law refers to rules of general international law or international agreements, the Court's role being confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see paragraph 72). Nevertheless, the majority, without any explanation, head off in a different direction and, on a flimsy, uncertain basis, quite simply substitute their own findings of fact for those of the Hungarian judicial authorities.

In view of the complexity of the task of reconstructing the facts of the case more than fifty years after they occurred, we see no reason to place more reliance on the conclusions reached by the Court than on those of the domestic courts. On the contrary, we consider that the national courts were in a better position to assess all the available facts and evidence.

Admittedly, the domestic courts' decisions may have left certain questions unanswered regarding the victim's conduct and the applicant's interpretation of it. However, the possible insufficiency of the reasoning of the Supreme Court's judgment could have raised an issue under Article 6 of the Convention but not, in the circumstances of the case, under Article 7.

Those are the main reasons which have led us to conclude that there was no violation of Article 7 of the Convention in the present case.

DISSENTING OPINION OF JUDGE LOUCAIDES

I am unable to agree with the conclusions of the majority in this case.

I accept the approach of the majority in respect of the concept of crimes against humanity. I consider it useful, however, to add the following thoughts regarding this issue. In its definition of "crimes against humanity" the Charter of the Nuremberg Tribunal included "murder ... committed against civilian populations before or during the war ...". The Nuremberg Trials applied the Charter and attributed criminal responsibility to individuals for "crimes against humanity". However, those crimes were linked to the conduct of war. At that time, it was not clearly established that such crimes were part of customary international law, especially where they were not linked to acts of war. Gradually, however, this was indeed established. Resolution 95 (I) of the United Nations General Assembly of 11 December 1946 expressly affirmed "the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal". This resolution was evidence of the prevailing views of States and of State practice with regard to the principles in question and, additionally, provided solid legal support to the claim that these principles were part of customary international law (see, *inter alia*, Daillier and Pellet, *Droit International Public*, 6th edn., p. 677). A connection between crimes against humanity and war activities was not considered a requirement for the establishment of such crimes (see "Question of the punishment of war criminals and of persons who have committed crimes against humanity: Note by the Secretary-General", UN GAOR, 22nd session, Annex Agenda Item 60, pp. 6-7, UN Doc. A/6813, 1967; see also International Criminal Tribunal for the former Yugoslavia, *Tadić* case IT-94-1, § 623). As rightly observed by Lord Millett in the Pinochet (3) judgment of the House of Lords ([1999] 2 Weekly Law Reports 909 et seq.):

> "[t]he Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of or in connection with war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the Second World War. As memory of the war receded, it was abandoned."

The view that the Nuremberg principles were customary international law became indisputable after Resolution 3074 (XXVIII) of the United Nations General Assembly of 3 December 1973, which proclaimed the need for international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. One may add here that it has also been maintained and adopted by judgments of international *ad hoc* criminal tribunals that "[s]ince the Nuremberg Charter, the customary status of the prohibition against crimes

against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned" (*Tadić* case, op. cit.).

As regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the definition in international law of this crime. In Article 7 of the Statute, we find the following:

> "1. ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) murder;
>
> ...
>
> 2. For the purpose of paragraph 1:
>
> (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; ..."

Yet even if one is guided only by the concept of "crimes against humanity" that emerges from the Charter of the International Military Tribunal of Nuremberg – the principles of which were affirmed by the United Nations Resolutions mentioned above – and even if the present case is examined only by reference to the minimum requirements of such a concept, there is no difficulty in concluding that the activity for which the applicant was convicted did undoubtedly qualify as a "crime against humanity". The minimum elements of the offence in question appear to be the following:

(a) murder;
(b) committed against a civilian population; and
(c) systematic or organised conduct in furtherance of a certain policy.

The last element is implied from the combination of elements (a) and (b).

The majority found that the domestic courts had focused their attention in the relevant criminal case on the conduct of the applicant *vis-à-vis* Tamás Kaszás and they disagreed with those courts that the individual in question could be considered as having "laid down his arms, thereby taking no further part in the fighting". According to the majority:

> "... there is no element in the findings of fact established by the domestic courts which could lead to the conclusion that Tamás Kaszás expressed in such a manner any intention to surrender. Instead, he embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions. It was precisely in the course of this act that he was shot. In these circumstances the Court is not convinced that in the light of the commonly accepted international law standards applicable at the time, Tamás Kaszás could be said to have laid down his arms within the meaning of common Article 3." (paragraph 91 of the judgment)

On the other hand, in the relevant findings of fact of the domestic courts on this question we find the following statements:

> "The officers were continuously pointing their sub-machine guns at the civilians. István Balázs informed them that they had no weapons. An unknown policeman standing behind István Balázs said at this point that Tamás Kaszás had a pistol on him. István Balázs asked Tamás Kaszás to hand over the weapon if he had one. ... On the other hand, the defendant should have realised that, because of their weapons, the officers' force was superior to that of the civilians in the inner yard, and that the conflict at hand could have been resolved without the use of firearms against people." (Military Bench of the Budapest Regional Court, paragraph 42 of the judgment)

The judgment of the Supreme Court subsequently found:

> "However, the findings of fact in the judgment also state that 'István Balázs asked Tamás Kaszás to hand over the weapon if he had one. At this point the defendant was facing Tamás Kaszás and there was a distance of only a few metres between them' ... From this, it can rightly be deduced that the applicant heard this call. Because it was immediately thereafter that a quarrel broke out between the applicant and the victim and that the victim drew his gun, the correct conclusion concerning what was on the applicant's mind is that he knew that the victim intended to hand over the gun, rather than to attack with it. ..." (paragraph 44 of the judgment)

I believe that the findings of the domestic courts to the effect that Tamás Kaszás's behaviour in respect of his gun amounted to the gesture of a man attempting to hand over the gun, rather than to attack with it, were not unreasonable, bearing in mind in this respect that Tamás Kaszás, along with his companions, was facing officers who were continuously pointing their sub-machine guns at them and that the officers' force was superior to that of the civilians. In the circumstances, any attempt on the part of Tamás Kaszás to use his gun against the applicant would have amounted to suicide. I do not therefore see any reason to overrule the relevant findings of the domestic courts.

In any event, I disagree with the majority's finding that the applicant's conviction was essentially focused on the reaction of the applicant to Tamás Kaszás. I accept the Government's position that "the applicant's conviction was primarily based on his having shot, and ordered others to shoot, at a group of civilians". The record of the relevant proceedings clearly supports this view. The applicant was charged "with having commanded a military squad in an assignment to regain control of the Police Department building, and with having shot, and ordered his men to shoot at, civilians, causing the deaths of, and injuries to, several persons" (see paragraph 21 of the judgment).

The domestic courts also found, on the basis of the facts, that the applicant was guilty "of multiple homicide constituting a crime against humanity which he had committed as a perpetrator in respect of the killings inside the building and as an inciter in respect of the killing outside" (see paragraph 38 of the judgment).

Therefore, even if we disregard the incident between the applicant and Tamás Kaszás, I do not see how we can disregard the courts' findings that the case against the applicant and his conviction also concerned other

civilians, who did not draw guns and were not in any way armed. In this respect it is very important to underline the fact that as soon as Tamás Kaszás drew his handgun, "the applicant responded by resolutely *ordering his men to fire. Simultaneously, he fired his sub-machine gun* at Tamás Kaszás, who was shot in his chest and abdomen and died immediately. *One of the shots fired on the applicant's orders hit another person and three hit yet another person. A further insurgent was shot and subsequently died of his injuries. Two individuals ran out onto the street, where the other platoon of the applicant's men started to shoot at them. One of them suffered a non-lethal injury to his head; the other person was hit by numerous shots and died at the scene*" (emphasis added) (paragraph 15 of the judgment; see also paragraph 42).

To complete the picture, I should also add that, according to the evidence, the applicant and the members of his group "were armed with PPS-type 7.62 mm sub-machine guns and TT pistols" (judgment of the Military Bench of the Budapest Regional Court). These random shootings with sub-machine guns, directed against unarmed civilians other than Tamás Kaszás, cannot in my view be regarded as anything other than a crime against humanity.

I must add that I also find that there was sufficient evidence to the effect that the shooting in question formed part of a widespread and systematic attack on the civilian population. In this respect I take into account the judgment of the Supreme Court which found as follows:

> "... it is common knowledge that, from 23 October 1956 onwards, the central power of the dictatorship made use of its armed forces against the unarmed population engaged in peaceful demonstrations and against armed revolutionary groups whose organisation was in progress. During this time, the armed forces employed significant military equipment, such as tanks and aircrafts, and their activities against the population opposed to the regime spread over the whole country. In practical terms, they waged war against the overwhelming majority of the population. The same is confirmed by the orders issued in this period by the dictatorship's Ministers of Defence.
>
> Having regard to all this, it can be established that an armed conflict of a non-international character was in progress in the country from 23 October 1956 onwards, for such time as the armed forces of the dictatorship were acting against the population, and until the country was occupied by the army of the Soviet Union on 4 November, from which time the conflict became international." (paragraph 34 of the judgment)

In fact, the armed oppression and attack on the civilian population which resisted the dictatorship in Hungary at that time was internationally known.

I cannot agree with the finding of the majority that the Supreme Court "did not address the question whether the particular act committed by the applicant was to be regarded as forming part of this State policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956" (see paragraph 84 of the judgment).

The Supreme Court's statement was made in relation to the question that was before it, namely the incident for which the applicant was convicted. Where a situation such as that described by the Supreme Court prevailed, it was to be expected that several separate incidents such as that under consideration would inevitably take place as part of the armed forces' organised activities against the population. One should not lose sight of the fact that the applicant, in confronting and shooting Tamás Kaszás and the group near him, was acting as an agent of the dictatorial regime which was attempting to suppress by force those civilians, such as the victims of the applicant's attack, who were opposing that regime. In short, the use of force by the applicant was on behalf and for the purposes of that regime. In the circumstances, I do not see how we can disassociate the incident for which the applicant was found guilty from the general systematic attack by the military and the relevant State policy against the civilian population.

For all the above reasons I find that the applicant's conviction for a crime against humanity under international law is not in any way inconsistent with the provisions of Article 7 of the Convention and, therefore, I find that there has been no violation of that Article.