

Tamás Vince ÁDÁNY<sup>1</sup>:

### Rebellion or War of Independence? The Case of the Martyrs of Arad

#### Preliminary Remarks

The international system in the first half of the 19<sup>th</sup> century was undoubtedly determined by the *regime* of the Sacred Alliance. After it had been forged by a couple of foreign policy masterminds at the Vienna Conference in 1815 the system managed to uphold a special kind of *status quo ante* among the great European powers for more than half a century, until the Crimean War had put it to an end.<sup>2</sup> In its heydays the Holy Alliance subjugated a number of revolts all over Europe in order to preserve the power of the reigning dynasties of the Great Powers.<sup>3</sup>

From this point of view it conflicted with some of the fundamental philosophical ideas of the Enlightenment Era: people's sovereignty and the basic human rights. That was the price of a European stability.

By late 1847 it was palpable, that the peoples of Europe would not endure this price any more. In February 1848 a wave of revolution blustered across the continent, shaking the very foundations of this Alliance. From a continent-wide perspective all these heroic struggles ended at the Hungarian fortress of Arad (today to be found in Romania), where the execution of twelve generals and a colonel symbolized the long and painful revenge of the Habsburg Empire. At the very same day, in Pest-Buda the Prime Minister of the first independent, democratic government of Hungary had also been executed. Both events, especially this later one were pure political murders,<sup>4</sup> considering the antecedent so-called „legal” procedures.

Former political and other differences among these high officials were washed away immediately in the Hungarian public thinking. They became national heroes, martyrs of the nation. After some romantic legends had been removed from their story, the truth, as we know it today, the example they had given is still uplifting, yet tragic. Some of them did not even

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<sup>2</sup>The Alliance was not merely aimed at the preservation of the status of borders, power, etc. It was about defending the power of the sovereigns, the reigning *dynasties* of Europe, against any force, be it a foreign or a domestic one. See: Kissinger, Henry: Diplomacy (Hungarian edition) PanEm – McGraw Hill, Budapest, 1996 p. 75

<sup>3</sup>For a number of examples see the relevant chapters in: Nagy, Károly: A nemzetközi jog valamint Magyarország külkapcsolatainak története (History of International Law and the Foreign Relations of Hungary) Antológia Kiadó, Lakitelek 1995 pp. 35-39, or Kissinger op. cit.

<sup>4</sup>Urbán, Aladár: Batthyány Lajos gróf főbenjáró pöre (Európa Könyvkiadó – Batthyány Társaság, Budapest, 1991)

speak Hungarian: they are not „just” national martyrs. They are martyrs of liberty, victims of a dictatorship oppressing nations and abusing law.

### **Integration of Hungary into the Habsburg Empire during the 18<sup>th</sup>-19<sup>th</sup>**

The constitution of Hungary had not been concluded in one single constitutional document for almost a millennium. The system of rights and duties between the Sovereign and the Dependants had been regulated by a number of Acts, dating back to 1222, the year the so-called Golden Bill, a Hungarian Magna Charta had been issued. This recognised the right of the Estates of the Realm to stand up against the King's will, in given circumstances even by arms: that is the famous Resistance Clause<sup>6</sup>.

This became one of the cornerstones of the Hungarian public law up until 1687. I would like to highlight, that this clause originally served as a guarantee of the whole document: if the king does not obey his obligations under in . One year after Buda, the capital had been gained back from the Turkish rule, and the Ottoman Empire had been being driven out from the country, the powerless Estates „willingly” waived this „inalienable” prerogative. Formally it happened by the „interpretation” of the original text from 1222, and removing the clause from the text of Art. 31.<sup>7</sup>

The legal effects of this waiver however are not at all obvious. In the next two decades two wars of independence were led against the Habsburg Empire, thus the domestic and international consciousness of this act of the Diet was determined by sole political interests. It is noteworthy to add, that each and every one of the forthcoming Habsburg rulers of Hungary excluded *expressis verbis* this prerogative from their oath sworn at the crowning ceremony – up until the 20<sup>th</sup> century.<sup>8</sup> This means that in spite the right was deleted from the Golden Bill in 1687, even two hundred years later Habsburg kings felt it necessary to mention, that they are not going to grant it. For me it seems like a systematic denial in order to prevent the emergence of a customary rule.<sup>9</sup>

As for the international acceptance, I have to mention the war of independence (1703-1711) led and represented by Prince Ferenc Rákóczi II, heir to the princes of Transylvania. Compared to former Hungarian wars of independence this received more serious international support,<sup>10</sup> as it was going on at the same time as the War of the Spanish Succession. An element of this support was a statement from the French foreign minister, who declared, that „the forbearance from supporting any nation, revolting against its sovereign ruler, could not be applied to neither prince Rákóczi, nor the discontented Hungarians, as they are just practicing their rights established by the most ancient laws of their country. These allow them to spring

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5As in the present paper my argumentation is partially based upon the public law relations between the Habsburg Monarchy and the Hungarian Kingdom, it seems inevitable to very briefly outline these.

6Art. 31, para. 2.

7Act 4, 1687. (no paragraphs)

8See Act 1 1687, Acts 2 from 1715, 1741, 1791, 1792, Act I, 1836, or Act II, 1867.

9For other domestic issues concerning related customary regulations see section below on Substantive Law.

10Nonetheless, this „more serious” international support was far from being „serious”. The diplomatic relations of this war however are far too complicated to be described here, moreover they are not strictly connected to my present topic.

to arms, if their king disobeys his oath.”<sup>11</sup> One of the Diets held during the war declared for the first time the dethronement of the Habsburg house. In spite of this action, the war was not followed by revenge: even the high ranking officials were offered amnesty, if they had sworn loyalty to the King.<sup>12</sup>

This war ended in 1711, by the Szatmár peace treaty. Shortly after a new king came into power: Charles III<sup>13</sup>, (1711-1740) Charles III had arrived from Spain<sup>14</sup>, thus he was able to treat the Hungarian problem with much less passion than his predecessors.<sup>15</sup> Lacking a male heir, he had to introduce a female line succession of the throne. In the so-called Hereditary Provinces it was a simple widening of the scope of a family treaty, published to an inner circle of counselors: that is the „Austrian” *Pragmatica Sanctio*.<sup>16</sup> In Hungary an act of the Diet was necessary: thus in 1723 Act 2 constituted the succession regime of the Hungarian kings – and from here on: queens as well. The acts declared that Hungary is an „undividable and unseparable” part of the Empire (*indivisibiliter ac inseparabiliter*), and that Hungary accepts only Habsburg rulers.<sup>17</sup> Nevertheless these Acts also reaffirmed the duty of the rulers to respect the laws and customs of the country.<sup>18</sup>

During the reign of Queen Maria Theresa (1740-1780), Hungary many times served as a strong base for the seldom peaceful foreign policy of the empire.<sup>19</sup> Although the relationship between the Habsburgs and the country developed as the country herself developed, there were serious incidents to outrage these relations.<sup>20</sup>

His son, Joseph II, tried to create a unified, enlightened empire. His experiments turned out to be a total failure. He had avoided swearing an oath to the Hungarian constitution by not being crowned at all; governed the country by royal resolutions, without summoning the Diet. Before his death, his last action was to annul all the reforms, except for the resolutions on the peasants, and on religious tolerance.

His heir, Leopold II, threatened by the discontented nobility and pressing international conditions, managed to reach a compromise with the discontented Estates of the Realm.<sup>21</sup> This

11Cited in Hungarian in: Herczegh, Géza: Magyarország külkapcsolatainak története 896-1919, History of the foreign relations of Hungary 896-1919) p. 172. . (Kossuth Kiadó, Budapest, 1987)

12Actually the possibility for swearing loyalty was limited in time by the Szatmár Treaty. In 1715, §3, Act 49 penalized the mere contact with Prince Rákóczi and his followers as high treason.

13As Emperor of Austria and the HRE: Charles VI. This exemplifies the strict distinction between the titles, that survived centuries and conflicts, up until the early 20<sup>th</sup> century.

14Based upon the rules of succession under Act 3, 1687.

15Kosáry, Domokos: Magyarok Európában III. Újjáépítés és polgárosodás 1711-1867 (Hungarians in Europe vol. III. Reconstruction and civil development 1711-1867) Háttér Lap-és Könyvkiadó, Budapest, 1990. p. 32.

16 Niederhauser, Emil –Gonda, Imre: A Habsburgok (The Habsburgs) Gondolat, Budapest, 1978 p. 109. KOSÁRY op. cit. p. 41.

17Originally declared in Act II, 1723, §7. This phrase was included in the national coat of arms even in the early 20<sup>th</sup> century, in the last days of the Austro-Hungarian Monarchy.

18Act III, 1723 (no paragraphs)

19As for one example it is enough to recall the famous scene at the Diet, when the Hungarian nobility offered their „life and blood” to protect the young queen in the Austrian Hereditary War. For other examples see: Niederhauser-Gonda: op. cit. pp. 115-134

20The so-called *Sicolidium*, or the Mádéfalva Peril, is probably the most tragic example, where hundreds had been slain for denying forced military service in a would-be Transylvanian border-controlling army.

21Kosáry op. cit. pp.184-186

compromise is embodied in Act X, 1790/91, declaring that *Hungary*, as an independent country, having her own constitution, *can only be governed by her own laws and customs*, and not like other provinces of the Empire.

That was the special public law situation at the beginning of the 19<sup>th</sup> century. While industrial revolution was forming other countries in Europe, Hungary dropped behind: partially because the Habsburg policies, partially because of the bull-headed insistence to the ancient laws of the country, protecting from one side the remnants of „independence”, and blocking the way of overall development from the other side.

Following an offer of count Széchenyi to finance the establishment of the Hungarian Academy of Sciences, the Diets between 1823-1848, dully respecting the requirements of legality within the Empire opened a long line of reforms: the Hungarian reform-age. Feudal remnants of the economy and society were being removed slowly, and the idea of national independence was developing as well. The situation in Europe changed by the wave of revolutions in Spring 1848. Lajos Kossuth, the leader of the radical opposition, recognising the historical opportunity, delivered a speech at the Diet in March 3, demanding a constitution for Hungary, as well as the Hereditary Provinces.<sup>22</sup> This demand received vast support from almost every corner of the Empire, and a delegation was sent to the king with the demands. Events rushed, a practically bloodless revolution won in Pest-Buda on the 15 of March, after which still within the borders of legality, the Diet accepted a number of Acts, sanctified by King Ferdinand V on April 11. These -I must emphasize again, in a legally due and correct way- established a constitutional monarchy from Hungary.<sup>23</sup> New Government was found, holding responsibility exclusively to the newly created representative National Assembly. The King appointed the Prime Minister, count Louis Batthyány, later to become possibly the most tragic hero of the revolution. By Summer, as the situation in Europe „settled”, and absolutism subjugated the revolution, the Habsburg Empire managed to settle its ranks. The Austrian leadership drew the Croatian ban<sup>24</sup> Jellačić to attack Hungary, and started to apply the ancient „*divide et impera*” principle: „[s]o early as the beginning of July, Austrian officers, with the permission of the minister of war, had joined the Serb insurgents who, under Stratemirowic; were defying the Magyar power in the Bánát. By the end of August the breach between the Austrian and Hungarian governments was open and complete, on the 4th of September Jellachich was reinstated in all his honours,<sup>25</sup> and on the 11th he crossed the Drave to the invasion of Hungary. The die was thus cast, and, though efforts continued to be made to arrange matters, the time for moderate councils was passed.”<sup>26</sup> As the King had not obeyed his duty to protect the Realm, the nation had to organize its own army, and defend herself.<sup>27</sup> From an international legal perspective this war is the clear example of self-defense of a nation, having a

22 Katus, László (ed.): Magyarország története (History of Hungary) vol. 6/1, p. 67. (Akadémiai Kiadó), Budapest, 1979

23Such relevant examples among the April Acts of 1848 are for example: Act 3 on the Government, Act 4 on the Annual Parliamentary Assembly, Act 5 on people's representation, Acts 17 and 24 on the elections, Act 22 on the National Guard

24Ban is an ancient rank close to the rank of an earl, in the Hungarian border control zones.

25By the Emperor, who had him to attack Hungary. From a public law point of view it most interesting, that the Emperor of Austria was not entitled to give orders to the Ban of Croatia, as this prerogative was reserved by the Hungarian King. As Franz Joseph was not crowned as such, he was not entitled to do so.

26 Steed, H. Wickham - Phillips, Walter Alison - Hannay, David: A Short History of Austria-Hungary Chapter IV: The Revolution of 1848 <http://www.msstate.edu/Archives/History/hungary/austria/cover.htm>

27Urbán: op. cit. p. 22.

Constitution, against the King, who does not recognize the Constitution, whose most revolutionary elements were sanctified month before by himself. This way the King, breaking his oath, attacked against the laws of the country. On the 4<sup>th</sup> of October, a royal verdict had been issued, that appointed Jellačić the high commander of Hungarian troops and royal executive of country. This verdict was also to introduce martial law in Hungary, until the situation is settled. This way later formed a „legal”<sup>28</sup> basis of the procedures, of the revenge.

As the Empire started to settle its ranks, founding its next steps, Emperor Ferdinand V and his brother resigned in December, and his nephew, Franz Joseph followed him to the throne, at the age of 18. The aim of this move was to crown an Emperor, who is not humiliated by signature of the April Acts, who is not effected by the promises of his predecessors. The reaction of the Hungarian Parliament was determined and immediate. At the public plenary on 7 December, they denied the acceptance of such a succession to the throne. As they rightfully stated, only those, who swear an oath in front of the Parliament can be Kings of Hungary, if they crowned by the Sacred Crown. A family agreement like this could not be the base for succession, therefore the King of the Realm is still Ferdinand V.<sup>29</sup> I have to recall the conditions of the acceptance of the Pragmatica Sanctio, when Charles III had to use the Diet to enact the Habsburg agreement already in force in the Hereditary Provinces into a Hungarian act.

Franz Joseph and his court had different ideas of a constitution. In February, 1849, following a number of Austrian military successes, „a proclamation [had been made] in which the emperor announced his intention of granting a constitution to the whole monarchy "one and indivisible." On the 4<sup>th</sup> of March the constitution was published; but it proved all but as distasteful to Czechs and Croats as to the Magyars, and the speedy successes of the Hungarian arms made it, for the while, a dead letter.”<sup>30</sup> This was the so-called Olmütz Constitution, which respected nothing from the some hundred years old relations between countries of the Empire, like Hungary and the Hereditary Provinces. The „speedy succes” mentioned above, the so called Spring Campaign resulted in a total change of the military and the political situation. This opened the way to the Hungarian Declaration of Independence, and the dethronement of the House of Habsburg-Lorraine. The reason was *-inter alia-* response to the Olmütz Consitution: „*The house of Austria has publicly used every effort to deprive the country of its legitimate independence and constitution, designing to reduce it to a level with the other provinces long since deprived of all freedom, and to unite all in a common link of slavery.*”<sup>31</sup> Another justification was the attitude of the Habsburg House toward Hungary:

*„[...] the history of the government of that dynasty in Hungary presents but an unbroken series of perjured acts from generation to generation.*

*In spite of such treatment, the Hungarian nation has all along respected the tie by which it was united to this dynasty ; and in now decreeing its expulsion from the throne, it acts under the natural law of self-preservation, being driven to pronounce this sentence by the full conviction that the house of Habsburg-Lorraine is compassing*

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28I shall turn back to this problem in the section on applicable procedural law.

29 Fónagy, Zoltán: A korona és a király 1848-49-ben, In: *História*, 2003/2 p.12.

30A Short History of Austria-Hungary, Chapter IV

31Originally the text of Act II, 1849. (Omitted from the 1900 edition of the *Corpus Iuris Hungarici*) Published in English in: Henry M. De Puy: *Kossuth and his Generals*, (Buffalo, Phinney& Co., 1852) pp. 203-204.

*the destruction of Hungary as an independent state; [...] For many causes a nation is justified, before God and man, in expelling a reigning dynasty. Among such are the following:*

*When it forms alliances with the enemies of the country, with robbers, or partisan chieftains, to oppress the nation ; when it attempts to annihilate the independence of the country and its constitution, solemnly sanctioned by oaths, attacking with an armed force the people who have committed no act of revolt; when the integrity of a country, which the sovereign has sworn to maintain, is violated, and its power diminished ; when foreign armies are employed to murder the people, and to oppress their liberties.<sup>[32]</sup>*

*Each of the grounds here enumerated would justify the exclusion of a dynasty from the throne. But the House of Lorraine-Habsburg is unexampled in the compass of its perjuries, and has committed every one of these crimes against the nation[...]*<sup>33</sup>

Finally, the Empire had to give up its pride, and call assistance from the Russian czar to subjugate the war of independence in Hungary. By the end of July, the only realistic aim for the Hungarian military actions could be to lessen the destruction: thus, under the command of Arthur Görgey an *act of surrender* was arranged, near the small village called Világos in Eastern Hungary. Generals were held in Russian custody, as the troops fought to lay down arms in front of Russian troops. They did so to symbolize the overwhelming pressure of the two great powers of the holly Alliance, to demonstrate, that it is not just a rebellious group once again obeying its sovereign leader. Also, they had chosen this option for security purposes.<sup>34</sup>

Some historians said, that if they had laid down their weapons in front of the Austrian general Haynau, revenge would have been less cruel. Taking a brief look in the materials and documents of the following procedure at Arad, and at the private letters of the mad butcher, Haynau shows that this assumption cannot be upheld. Even this temporary Russian custody saved hundreds of lives, as it delayed the fury of Haynau for weeks. After the execution of the 13 martyrs at Arad, and the *justizmord* against Batthyány in Pest, harsh international pressure was laid upon Austria, which was the main cause for ceasing the executions late Autumn, 1849.

## The procedures

Examining the „legal” procedures, first and foremost I should like to stress, that considering the alleged crime was committed against the *king of Hungary*, mostly within the country, Hungarian law should have been applied as I am going to show it in my next sections.

## Substantive law

The procedures against the martyrs of Arad started on 25<sup>th</sup> August, 1849. This day Julius Jacob von Haynau, the all-powerful executive of Hungary, issued a written order to Judge Karl Ernst, appointed leader of the tribunal, to commence the procedures against certain military and civil leaders, elected Members of Parliament on account of committing the crime of *high treason*.<sup>35</sup>

32N.B. the contents of the section on Grotius.

33De Puy, op. cit. pp. 204-206.

34 Katona, Tamás: Az aradi vértanúk Vol. I. (The Martyrs of Arad) Európa Kiadó, Budapest, 1983. p. 36

35Cited in Hungarian In: Bartha Albert, Az aradi 13 vértanu pörének és kivégzésének hiteles története, Budapest 1930, Dr. Kellner & Kiss, p. 18

The law in force in 1849 dates back to the times of St. Stephen (997-1038), the first king of the realm.<sup>36</sup> His regulation about high treason introduced an open crime: any kind of taking part in a conspiracy, against the life or dignity of the king, constituted high treason, as well as willful agreement with the perpetrator.<sup>37</sup> As no conduct of commission was included in the law, this meant any act could form such a crime, if it was against the life and dignity of the king. Basically the same was upheld by Coloman, the Booklover (1095-1116), under the title „infidelity”; although the text was much more „technical”, and much less sacral.<sup>38</sup> Both texts resulted in huge legal developments during the centuries, by involving a number of other crimes within high treason, such as coinage offense, and other similar crimes against „public order”, or „national interests”<sup>39</sup>.

The comprehensive collection of Hungarian medieval customary law, the *Tripartitum* by Werbőczy, also covered the customary regulation of high treason, or according to his wording: infidelity. It was clearly about any form of violence against the king's life or against the „house he's staying at”.<sup>40</sup> For my topic the second phrase is much more important: the crime is committed, if somebody „challenges and attacks the public power of the „constitution”, the King or the Crown<sup>[41]</sup>. You must understand if the *attack happens to be self-defense, this does not constitute infidelity.*”<sup>42</sup> In the edition I had access to, there was an „N.B.” editorial comment connecting this rule to the Resistance Clause of the Golden Bill.<sup>43</sup> Nevertheless, I am convinced, that there is a vast and relevant difference: the Resistance Clause was a guarantee of the rights included in the Golden Bill: opposition was only possible if the king does not fulfilled his obligation deriving from the Bill. This exception from the crime of infidelity under customary law protects the right of self-defense. Moreover the waiver in 1687 formally „only” meant the deletion of the relevant Clause from the Golden Bill – and was absolutely not generally worded. Thus, bearing in mind also the texts of royal oaths, I do believe that the customary right of self-defense against a royal attack existed in 1848.

I have already mentioned, that the 1848 war of independence started as a defensive war against the Habsburg-suggested attack of Jellačić, and after his failure the offensive led by Prince Windisch-Grätz. Even if domestic customary law would not answer the question, what happens, *if the king himself attacks the public power* of the laws and the Crown of the realm one can try to find the answer under natural international law.

For the normal legal thinking in the age of *Dei gratia* rulers even the question was absurd – asking this question in this particular procedure would have surely been fatal to the person

36For details of his foreign policy see the Eszter Kirs's work in the present volume.

372<sup>nd</sup> Law Book of St. Stephen, Chapter 51: *De conspirationem contra regem et reginam*, 1§

382<sup>nd</sup> Law Book of Coloman I, Chapter 6: *De notis infidelitatis (no paragraphs)*

39The phrases in quotation marks are hard to be interpreted in a medieval environment. Instead of these, the defended interest was the dignity of the king. This was the way these crimes became forms of high treason, in other law books called infidelity, the highest crimes of the legal system up until the 19<sup>th</sup> century.

40Stephanus de Werbőczy: *Tripartitum opus iuris consuetudinarii incluty regni Hungariae*, Vol. II. Title 14, para. 1

41The Sacred Crown is much more than just a crown jewel. Briefly it is the symbol of the State itself, at the examined age it was also the bearer of sovereignty. Thus – in theory – it was possible, that the King offended the Crown.

42*Tripartitum*, Vol. II. Title 14, para. 2.

43Corpus Iuris Hungarici, 1000-1895, Franklin társulat, Budapest, 1900. Vol. 4. p. 324. Comment by Dezső Márkus.

raising it. One might think there would be hardly any traces of opinions on this issue. Well, surprisingly none other than Hugo Grotius (1583-1645) himself - the greatest founding father of modern international law and legal doctrine – already examines this question in his great work, *De iure belli ac pacis*.<sup>44</sup>

It is a renown fact, that his work is based upon the medieval dichotomy of just and unjust war. Grotius, elaborating the various causes of war, whether they are just or unjust, finds, that the lust for freedom of a nation leads to and an unjust war.<sup>45</sup> Similarly, waging a war in order to govern others contrary to their will, asserting that it is their interest is also unjust.<sup>46</sup> Applying these to the 1848-49 Hungarian war of independence one finds, that we find that the Hungarian desire for freedom appeared in the form of legal reforms, and not an armed attack, till the country herself was not attacked. The war was started by the Empire, in a way that is unjust, consequently illegal according to the system of Grotius.

While writing his wonderful work Grotius was bearing in mind the needs and the system of an absolute monarchy. Fleeing from a political imprisonment in the Netherlands, he found shelter in France, even his great work is dedicated to Louis XIII<sup>47</sup>. Nevertheless, he left his diplomatic carrier because of Cardinal Richelieu, the mastermind behind French absolutism.<sup>48</sup> As the founder of the school that derives the obligatory nature of international law from the ratio, smoothly breaking the hegemony of the Christian school,<sup>49</sup> his arguments are still based on the concept of Sovereigns having absolute, sort of sacred power. Therefore dozens of sections concern the outrageous illegality of the attack of a nation against its Sovereign monarch. Nevertheless, the brilliance of Grotius included some extraordinary cases, in which revolting against the sovereign must not be considered illegal.

*First*,<sup>50</sup> a free nation can wage a just war against a king, who bears responsibility to the nation, offends the laws or the State. In such cases, armed resistance is allowed, moreover, if necessary the king might be subject to capital punishment.<sup>51</sup> In the present case, I have only to refer to aforementioned 18<sup>th</sup> century public law developments<sup>52</sup> and the April Acts, signed by the Ferdinand V. I think there is no need to seriously evaluate the effects of the change in the person of the King. If such an action would have any legal effect to former legal regulations of the Diet, that would have undermined the legal system of the Habsburg Empire as a whole.<sup>53</sup>

44For the purposes of this work I used a Hungarian translation, published in Budapest (Pallas Stúdió - Attraktor)1999 Quotations are my translations to English.

45It is not at all surprising, if one bears in mind, that self-determination of nations had not yet been invented. The organizing principle of international relations was the so-called dynasty-principle. Detailed in: Bibó,

46Grotius: *De iure belli ac pacis*, Vol I, Chapter 3, Section XI-XII

47Gajzágó: *A háború és béke jogáról* Budapest, 1942, p. 62.

48*ibid.*

49N. Q. Dinh – A. Pellet – P. Daillier – P. Kovács: *Nemzetközi közjog* (Hungarian version of „Droit International Public” Budapest, Osiris, 2003) p. 53

50Grotius establishes a laxative list of ten possible causes. In my present paper I only mention some of these, consequently I could not keep his original numbering.

51Grotius, *op. cit.* Vol I, Chapter IV, Section VIII

52Act X, 1790/1791 mentions that this regulation is established for Leopold II and for all his successors, for all the kings of Hungary. This way the change on the throne had no effect to the obligation of the House of Habsburg-Lorraine to govern Hungary according to its own laws and customs.

53For one example, I already cited plenty of times the Pragmatica Sanctio, the act regulating *-inter alia-* the system of royal succession. Alleged breach of this act is even mentioned in the summary of relevant facts by the judge in the present procedure. *Votum Informativum*, In: Katona, Vol 2.



Second, the king unconditionally loses his power if he attacks willingly against his nation, with openly hostile intentions to ruin it.<sup>54</sup> I think there is no need to cite again the phrases of the Olmütz Constitution. It seems rather clear for me, that the application of this document in the long term would have meant for the Hungarians the destruction of our national identity, culture, language and remnants of independence, as it was stated in the Declaration of Independence. From this perspective, the Declaration is nothing more, than reaffirming the existing situation under *ius naturale*.

As if Grotius would have foreseen the future, he adds that this situation is hardly imaginable on the supposition a sane king ruling only one nation. If there are several nations living under the power of a certain king, it might occur, that the king allows one nation to perish for the sake of another of his nations.<sup>55</sup> Another subsequent evidence of this: Prince Paskevich, leader of the Russian troops in Hungary, before leaving the country asked in a letter Franz Joseph to be merciful with the revolting military leaders, and save their lives. The answer of Franz Joseph is shockingly similar to the wording of Grotius: „[...] I must not forget that I have other holly duties to fulfill towards other nations of mine, and the public good of my empire lays obligations upon me, I must not neglect.”<sup>56</sup>

Third, and finally, if the right of opposition was upheld at the time the power was entrusted with the king.<sup>57</sup> I have already added some remarks on this issue, at this point I only want to note, that the deletion of the Resistance Clause in 1687 was not enough to remove the right of self defense from the Hungarian customary law. It was in force and in practice from Autumn, 1848, under existing positive domestic and natural international law.

### Procedural issues

First of all I have to clarify that any legal argumentations on these „legal” procedures are in vain today, and were in vain -if not dangerous- for the officers at Arad, and for our first Prime Minister in Pest. Some the documents of the Habsburg Government, and even from Haynau, the butcher are about the various „examinations”. Evaluating the seriousness of these is a must before delivering any legal argumentations.

At the 3<sup>rd</sup> of August the defenders of the last castle still resisting the Russian and the Austrian armies, managed to make a glorious sally, dividing Austrian forces, and effecting the attitude of the Habsburg Government. After more than a month not paying any attention how Haynau treats the Hungarian situation, a less harsh plan was set up in Vienna, demanding less executions, than actually happened. Meanwhile, the news of the surrender reached the Burg: immediately resulting in a change of the Habsburg policy. This change led to a massacre never before seen in the history of the Austrian army.<sup>58</sup> This concept was about to court-martial all

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54Based upon Barclay, Grotius, op.cit. Vol I, Chapter IV, Section XI

55ibid.

56The original french text was published in a footnote by Mihály Horváth, in 1863. Magyarország függetlenségi harczának története, Genf, Nicholas Puky, 1863. p. 542.

57Grotius, op. cit. Vol I, Chapter IV, Section XIV

58This was a usual phrase in contemporary foreign press. Nonetheless, there are other tragic examples of the empirical revenge in similar scale. Mádéfalva Peril in Transylvania, revenge on the Horia peasant revolt against the Romanians, and the Brescia massacre committed by Haynau in Lombardy.

the generals, field officers and those officers, who served in the Austrian army before joining the Hungarian one.<sup>59</sup>

Haynau, who received this order on August 25, felt that even this rule is a constraint to his omnipotent power. The utilization of any court was not among his plans, and he never resisted the idea to send judgments on capital punishment for ratification to the Emperor. The first execution,<sup>60</sup> took place on August 22. Colonel Ormai's identity was proved, as well as he served in the Austrian army as a lieutenant before joining the revolution's army and then, after a few hours of his capture, he was hanged.<sup>61</sup> Haynau could not be silent of his satisfaction: in a private letter two days later he mentions what happened, then lists some of the generals. His invention for reforming the procedure is shocking: „the procedure is going to be as fast as possible. We prove, that the person had served in our army, and then he established an armed service within the rebellious army. [...] There will be no revolutions in Hungary for a century, my head stands as a guarantor for it”<sup>62</sup>

After this, it might seem, that there is no need to discuss any legal issues concerned; at least there are some historians who think so. Even if the problems seem domestic legal issues, I think there is no need to over-emphasize the parallelisms, with the 20<sup>th</sup> century and recent development of international criminal law problems.

First, let us see the jurisdiction of the war tribunals, what was not at all questioned during the procedures. The indictment as I have already said consisted of high treason, and taking part in rebellion. According to the judgments, the first one was the main cause of the application of death penalties.<sup>63</sup> So what was high treason anyway? The ancient substantive legal questions have already been discussed. Based upon this 700 years old rules, in 1715 a new act was concluded at the Diet,<sup>64</sup> collecting a number of conducts constituting high treason. From our perspective there is only one great development: high treason (as it is a Hungarian Act, this means that high treason committed in Hungarian territory), should be judged by the King himself,<sup>65</sup> according to Hungarian laws: I am convinced, that the original Latin term „*leges patrias*” in a Hungarian law cannot be interpreted somehow else. Interpretation is rendered more certain by the wording of the next paragraph. If the king does not want to prosecute the accused personally, instead of him only Hungarian judges can lead the procedures, „within the country, applying the law of the country”. The substantive issues were modified several times during the 18<sup>th</sup> century, but these issues show no relevance to my topic: the first -and last-modification to be mentioned is the one in 1790. This Diet – and the King as well – accepted a new regulation, which stated that the jurisdiction over high treason is solely laid upon the Royal Curia, i.e. the Hungarian Supreme Court. The King accepted to never prosecute the

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59Katona, *op. cit.* Vol. I. p. 30

60col. Ormai „Auffenberg” Norbert

61Legend states, that he was trying to stand by his fellow officers in Arad, when he was captured, and Haynau allegedly said to his aide-de-camp, that he would shoot him, if this man -i.e. Ormai- is not hanged in ten minutes. After that he allegedly was hanged on the first suitable tree by the first coming gipsy, who accepted the money offered. There are written evidences in the archives, that not even a letter of this legend is true.

Truth is much more horrible, as it is outlined above, based upon Katona, *op. cit.* Vol. I, p. 34.

62Haynau's letter to gen. Schönhals. Hungarian translation *inter alia* In: Katona, *op. cit.* Vol. I. 35.

63ítélet, Katona vol 2. , Bartha,

64Act 7, 1715

65ibid, 4 §

perpetrators personally.<sup>66</sup> Thus the Tribunal at Arad, and the other similar courts all over the Realm did not have jurisdiction over the cases concerning high treason.

Application of martial law would be the only possible ground for jurisdiction, but this question was also regulated in the Hungarian legal system:<sup>67</sup> in such procedures courts could only close cases with death penalties: if they found that this is not suitable, they had to send back the case to the normal procedure courts.<sup>68</sup> The royal order from the 4<sup>th</sup> of October 1848 tried to introduce martial law in Hungary. Yet again, I have to add that the applicable law should have been determined by Pragmatica Sanctio, cited by the judge in the proceedings and Act X, 1790/1791 in general, and in the particular case of high treason Act LVI, 1791 should have been applied.

To the contrary, Austrian Military Law was applied to the cases, and even that was limited by individual orders of the judges. Haynau for example ordered Judge Ernst to ignore any regulation -"unnecessary formalities"- in the trial but his own commands.<sup>69</sup> Standing international law was not even mentioned in the procedures. According to Bynkershoek, the unlimited right of the victor over the captives was theoretically speaking still in force, but not in practice.<sup>70</sup> Nevertheless, even in the 17-18<sup>th</sup> centuries international law moved from this point, via bilateral agreements following social needs and ideological development.<sup>71</sup> First the medieval institute of ransom had been eased, than quartering of the PoWs became an obligation, though rather moral, than legal. At the end of the 18<sup>th</sup> century some scholars, like Vattel added,<sup>72</sup> that deserters of an army, if captured in the enemies' ranks, need not be treated as prisoners of war: yet even in this case showing mercy to these people was a common custom.<sup>73</sup> Moreover most of the generals at Arad were ordered to come to Hungary, thus in my position they cannot be treated as deserters.

Although there were no international legally binding multilateral conventions, or unambiguous custom in 1848-49 regarding this issue, tendencies of legal development were quiet visible. In the first half of the 19<sup>th</sup> century even the rules of maintaining PoWs were existing in its modern form, i.e. costs were paid by the captor state.<sup>74</sup> Nevertheless I had to admit that formally the punishment of the captive generals at Arad was not in clear violation of then existing international law. However the tendencies and needs of the international public opinion was so clear in the issue, that it resulted strong diplomatic pressure on Austria to stop the execution, as soon as Europe became aware, what's happening in Hungary in Autumn, 1849.

In order to realize the true merits of such an order, I must outline the structure of the tribunal. As an extraordinary military court, based upon Austrian law, it chiefly reflected military rankings. This reflection was only representative in nature, as the master of the case was the

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66Act LVI. 1790

67Act I, 1849

68Csizmadia -Kovács – Asztalos: Magyar állam-és jogtörténet (Budapest, Tnakönyvkiadó, 1991) p. 286

691849 augusztus 31-i levele, Katona Vol 2. p. 104.

70 Rosas, Allan : The Legal Status of Prisoners of War (Academic Dissertation, University of Turku. Published in Helsinki, 1976) p. 53.

71Hercegh: A humanitárius nemzetközi jog, p. 23

72See Emmanuel Jouannet's article in the present volume.

73Rosas, op. cit. p. 68

74Rosas, op. cit. p. 69

judge, the only lawyer in courtroom. He delivered the indictment, he had to defend the accused, and then after evaluating the case, he had to judge him. After this he issued the so-called *Votum informativum*, a document between a summary of relevant facts and a preliminary judgement. Ordering the judge this way determined the whole procedure, and not just the judgement. Moreover the judge was responsible for the records of the trial, this way the records of the defense of the accused seem hardly credible.<sup>75</sup>

In front of the Arad tribunal 4 cases were trialled from 25 August to 5 October. Judge Ernst followed the order given by Haynau on September 1, basically reconstituting his former ideas, in front of a military tribunal. Practically nothing else was questioned: who is the perpetrator, did he serve in Austrian and/or Hungarian army. If yes, this was a high treason, judgment is death penalty. Other conditions were so inconsistently evaluated, that they cannot even be grouped. Lying down weapons in front of Haynau was not relevant: even among those four, who Haynau was merciful to -in his vocabulary this meant being shot to death instead of being hanged- were generals present at the surrender at Világos to the Russians.

The defense of the high officers was very clear-cut, and so to say brilliant. Tamás Katona carefully states in his comprehensive work, that this defense could save them, supposing a sane court, and a fair trial. All the generals, during their Russian custody agreed upon a common behaviour. Its first element was that they had to join the revolution's „honvéd” army, and swear an oath to the Constitution by royal verdict. Later this oath bid them to the Hungarian side.<sup>76</sup> In defense of this point, I must add, that Görgey and Csány, the military and civil leaders of the Hungarian army appointed officials of the „honvéd” army in the name of the King and the Realm even in November 1848.<sup>77</sup> The core of the indictment was the Declaration of Independence. Those, who did not take part in the war after this, were given less serious punishment.<sup>78</sup> Foreseeing this the generals agreed upon, that they would state, they had not supported the dethronement, even if personally they did so.

I daresay, that supposing a fair trial, this defense would surely save them. For this the evaluation of the legality of their trialled actions would have been necessary, what had not happened in the procedures. Judge Ernst stated in the *Votum informativum*: „I cannot go into details of the historical perspectives of the events and the course of the revolution that led to the treasonous rebellion of the Hungarian nation against its King. That would lead the case too far. However, for the better understanding of the situation, I must briefly outline the most important elements.”<sup>79</sup>

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75Katona, op. cit. Vol. I. p. 56.

76In the case against Poeltenberg it was most easy to evidence: he had expressively asked for not to be ordered to serve in Hungary.

77 Eckhart, Ferenc: Magyar alkotmány- és jogtörténet (Hungarian Legal and Constitutional History) (Budapest, Osiris, 2000) p. 351

78E.g. in the case against András (Endre) Gáspár. He even was the riding teacher of Franz Joseph in His Majesty's childhood. His life was spared in the Arad trials, because he had not served after the dethronement. Nevertheless he got serious imprisonment. (Katona, op.cit. Vol. I. pp. 44-45) In my position dethronement was a core, but not indispensable element of high treason. In the case against count Batthyány, who was captive since early January 1849, the indictment was practically the same. This shows, that in the Austrian argumentation support of the dethronement was not a *conditio sine qua non* of high treason.

79*Votum informativum*, summary of relevant facts in the case of Kiss Ernő, in katona, vol 2, p. 126.

## The Martyrs

After such pre-determined proceedings the thirteen officials were executed, on the first anniversary of the Vienna revolution. The respect for this people demands to cite their names correctly, as they spelled them. As some of them were not Magyars, some new only the basic military jargon, they had wrote their names quite differently.

### The Thirteen<sup>80</sup>

On October 6, first the four „less serious” punishments were executed. *Arisztid Dessenffy*,<sup>81</sup> *Ernő Kiss*,<sup>82</sup> *Vilmos Lászlár*, *József Schweidel*<sup>83</sup>.

Only an hour later, Lajos Aulich,<sup>84</sup> János Damjanich,<sup>85</sup> Károly Knézić,<sup>86</sup> György Láhner,<sup>87</sup> <sup>88</sup> Károly Leiningen-Westerburg,<sup>89</sup> József Nagysándor,<sup>90</sup> Ernő Poeltenberg,<sup>91</sup> Ignác Török,<sup>92</sup> and

80It was a hard decision how to spell the names of the martyrs. As a compromise, I chose to put their Christian names first, contrary to the Hungarian customs. As most of them were not Magyars, I tried to spell their family names, as they generally spelled it. Nevertheless, according to the 19<sup>th</sup> century habits, I used the Hungarian versions of the Christian names.

81After the surrender, he was on his way to Turkish emigration, when just 30 kilometers from the border, one of his former fellow officers, prince Lichtenstein, still serving in the Austrian army, convinced him to lay down his arms. Dessenffy, as a young husband in love, trusting his former companion, agreed, and stayed to meet his fate. Prince Lichtenstein kept his promise: he asked for remorse for his former comrade. Haynau was merciful in his own way: Dessenffy was not hanged. He was the first to be shot. When the priest came for him in his last morning, he found this man in a calm good night sleep. László Csorba: *A tizenhárom aradi vértanú (The Thirteen Martyrs of Arad) Panoráma*, 1989, p. 23

82He was a member of a Hungarian/Armenian family. As an officer, he had his confrontations with some of the other martyrs, for example Damjanich. As he was chiefly responsible for logistics, and he had not fought against Austrian troops, he was among the four, who were shot instead of hanged. Katona, op. cit. vol. I., p. 44

83The eldest of thirteen had already served as a cadet in the battles against Napoleon. Although he tried to show evidences that he was not taking part in the armed conflict after Austrian attack in December 1848, in this procedure his fate had already been decided. Even in his last night – along with some of his companions – he hoped that the judgment is merely intended to frighten them. Katona, *ibid.*

84He was born in Pozsony (today's Bratislava, Slovakia), former Minister of defense in Summer 1849. He never learned Hungarian, but gave his life to fulfill his oath to the constitution. His elder brother worked also as a military judge, and even in the 1850's he was a colleague of Judge Ernst in the Ministry in Vienna. Katona, op. cit. vol. I., p. 38

85He was born in a Serbian family. While he was possibly the most heroic character of the war of independence, Haynau considered him as a personal enemy, for Damjanich, still serving under his command in April, 1848, stood up against him, when Haynau was rowing Kossuth and Hungary in general. For this he had to suffer even more: a peculiar action from Haynau was that the injured Damjanich was taken to the gallows pole in the coach, that was used for carrying out the waste of Arad castle. Katona, Vol I., p. 43

86Just like all the other generals, before joining the Hungarian revolution he was a professional soldier of the Austrian army. He always respected his origins, he spelled his family name in the Croatian way. He faced the cruelty of the Habsburg policy while still in the Austrian army, in the territory of today's Ukraine. That convinced him, that for the Croats p. 45.

87He was the leader of the logistics and the armory management of the war of independence. He was behind the establishment of the great weapons factory at Nagyvárád. Katona, op. cit. vol. I., p.50

88He was the only one of the martyrs who was „only” a field officer: not a general, but a colonel. Leading the remnants of the IX<sup>th</sup> legion as only a field officer, a newly appointed colonel, he surrendered some days later than the core of the honvéd army, convinced -just like Dessenffy- by the letter of prince Lichtenstein.

89He was a German aristocrat from Hessen, hardly speaking any Hungarian. He was asked in the trial about alleged killing of Austrian POWs after the siege of Buda. He denied this till the very last moment of his life,

Károly Vécsey<sup>93</sup> were hanged. The news about the execution of the officers spread rapidly, and caused a country-wide shock. The storm of indignation went from London to St. Petersburg. Nevertheless, there were 290 other sentences to death. Yet, only two other of these were carried out. All other were imprisoned.

## The Fourteenth

At the very same day, in Pest-Buda the first Prime Minister of Hungary had also been executed. Although it might seem even more frivolous to analyze certain legal questions of this so-called „trial”, I would like to highlight some points.

He fell into Austrian custody in Early January, 1849, as a member of the peace delegation that was set up on his own proposal. His questioning started almost immediately, but the whole procedure was hastily established: the Austrian authorities were simply not ready with the list they wanted Batthyány to be blamed for. Batthyány was ready to co-operate with Judge Leuzendorf, but he categorically stated, that for his acts as prime minister he has responsibility only to the two chambers of the Hungarian Parliament.<sup>94</sup> Although he had some occasion to flee from captivity, he never did so: not like he did not want to. He did not liked the methods offered. At a small village in Western-Hungary, called Jánosháza, the locals wanted to escape him from his prison-coach, and he was the one to dissuaded the villagers from it.<sup>95</sup>

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citing a number of witnesses from both sides of the battle, testifying the very opposite of the gossips. according to certain memoirs he denied these charges against him literally till his very last moment. (Bartha, Albert: *Az aradi 13 vértanú pörének és kivégzésének hiteles története*, Kellner & Kiss, Budapest, 1930 p. 226) His letters to her wife are possibly the most touching documents of the case. Published in: Katona op. cit. Vol. I., pp. 89-114

90He had some serious republican ideas, nevertheless he agreed to deny this in order to save his companions: as we know, in this pre-determined trial this ideological sacrifice could have absolutely no use. Katona, op. cit. vol. I., p. 49

91He was a son of a lawyer from Vienna. He begged to be sent to Italy instead of Hungary. He would even have accepted lower rank positions, and tried to ask it personally from the Austrian minister of defense. His request was ignored, and he had to swear an oath to the Hungarian constitution. Although he was faithful to it to the utmost, he was never really accepted in the honvéd army: distrust followed his every move even in his last days, at Arad. Katona, *ibid*

92He was a professor of fortification in the Hungarian Noble's Guard. As an artificer officer, he probably never shot a bullet in the battles of the war of independence. Yet he was the one to lead and control the fortification of the Komárom castle. Katona, op. cit. vol. I., p.51.

The strategic importance of this place as well as the success of Török's work is marked by the fact, that the castle, under the leadership of György Klapka was fighting against overwhelming Habsburg superior numbers till October 5, 1849. The defending troops were the only ones in the Hungarian army who managed to literally fight out their amnesty.

93He was the last of the Thirteen to be executed. The aide-de-camp of Franz Joseph was a personal enemy of Vécsey's. Moreover his father was the last captain of the Hungarian Noble's Guard. From this position he wrote a letter to the Tribunal, that was -to put it mildly- not at all supportive. Reading the documents of the trial we found some very self-conscious remarks of the general: it is the evidence of another peculiarity of the Tribunal. I already mentioned the role of the Judge in the Tribunal. At the trial of Vécsey the records were not kept by Judge Ernst personally, but a certain judge Zimmer. Consequently, some remarks had not been removed, such as: „I am convinced, that the Hungarian army was not a rebellious one, as you want me to put it!” Katona, op. cit. vol. II., p. 30

94Urbán, op.cit. p. 12

95Urbán op. cit. p. 10

The trial itself was more fair than that of the 'Thirteens': Judge Leuzendorf even cleared Batthyány of certain charges. He was not held liable for organizing the defense against J. Moreover the procedure cleared, that he had not summoned the former Austrian troops to fight in the Hungarian Army.<sup>96</sup> Although the tribunal in Pest attached a brilliant petition for reprieve<sup>97</sup>, Haynau demanded to judge it instead of the Government in Vienna. Schwarzenberg, the prime minister of Austria recognized, that this way the „mad butcher” would be held liable for the execution of the Hungarian prime minister, so he gave his permission to Haynau to supervise all petitions in Hungary. To the uttermost surprise of every Hungarian, and even Judge Leuzendorf. Batthyány was finally executed, on the day designated to Haynau's revenge.

The terrible shock effected public opinion all over Europe. For example Henrich Heine commemorated the Hungarian war of independence in his poem: October, 1849. Prominent European artists protested against the horrible *Vae victis* symptoms in Hungary. Yet, there were much less poetical signs of other nation's sympathy. After his retirement Haynau paid a visit to England. During one of his dinners somebody recognised him: he was hardly able to save his life from the infuriated mob.

## Conclusions

What was the cause of such immoral set of actions, that hardly can be called „legal” procedure? One was surely revenge: for the threat the revolution meant to the absolute power of the Habsburg-Lorraine House. Another reason can be obvious, looking at the forthcoming events: neo-absolutism in Hungary used as a public law foundation of the system the so called *Vervirkungstheorie*. Basically, this stated that Hungary had lost its constitutional rights by revolting against the Habsburgs.<sup>98</sup> The obsolete regime of absolutism had been formally re-established in December 1851 by nullifying the Olmütz Constitution.<sup>99</sup> From this perspective, prime minister Schwarzenberg's role in the revenge cannot be neglected. He used Haynau to pass the buck, to lead the massacre, while he can

Looking back from the early 21<sup>st</sup> century, it seems strange, how humanitarian issues were ignored in the procedures. Claims arose on either side of the war. The Declaration of Independence for example stated: „*determination [of the Habsburg house] to extinguish the independence of Hungary has been accompanied with a succession of criminal acts, comprising robbery, destruction of property by fire, murder, maiming, and personal ill-treatment of all kinds, besides setting the laws of the country at defiance, so that humanity will shudder when reading this disgraceful page of history.*”<sup>100</sup> As for the Austrian party I do not need to cite again the charges against Leiningen about the killing of Austrian PoWs in Buda.<sup>101</sup>

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96Urbán, op.cit. p. 29

97Urbán op.cit. p.360-363

98Eckhart op.cit. pp. 353-354

99 Katus, László (ed.): Magyarország története (History of Hungary) vol. 6/1, p. 445. (Akadémiai Kiadó), Budapest, 1979

100De Puy, op. cit. pp. 204-206.

101See footnote no. 85 above.

Treatment of the imprisoned generals are self-explanatory: without a system of internationally binding humanitarian requirements, the prisoners were consigned to the will of their captors. While in Russian custody, they were regarded as honored former enemies by the Russian officials – not at all by the Czar who considered them dangerous rebels. General Paskevich even allowed them to wear their weapons, and their honvéd symbols.<sup>102</sup> As a counter-example, I should like to mention the diary of Schweidel,<sup>103</sup> who is the only source for their Austrian imprisonment. They hardly got any food, and according to a report of the doctor of the jail, the guards often took it away from prisoners.<sup>104</sup> The Austrian commander count Deym was reprehended for the human treatment of Batthyány, and other prisoners from the Aristocracy, what included better food and the option of having a bath, naturally on their own account.<sup>105</sup> The humiliation of Damjanich before his execution speaks for itself.<sup>106</sup> Decades before the emergence of modern international humanitarian law these problems were a matter of honor, and morality. Among such circumstances several madmen were more than enough to create long-lasting conflict between two nations.

Even if humanitarian issues were not the core of the trials, the work of this tribunal is related to some of the current problems of international humanitarian and criminal law.

First, it is a clear example that the unsupervised control of the victor over a legal procedure is at least questionable. Today, when recent examples of international criminal jurisdiction is exercised over persons committing most grave and heinous crimes against all mankind, this issue might seem indifferent. The tragedy at Arad warns us that we cannot build an international legal regulation on the false assumption that law and morality are always on the victor's side.

Second, I would like to underline again, that international law in the Arad procedure would have had something to say about legality of the trialled actions, though not without prejudice to domestic constitutional law. In the general history of international criminal law, attempts to legalize the actions of the accused have already occurred. The defense of the prisoners at the Nuremberg bar - „I was following orders”- is probably the most renown example of such attempts. The outrageous immorality of the *Führerprinzip* led to the development of the principle, that declares the irrelevance of superior orders, except for the person was under legal obligation to follow orders from his Government or the superior in question.<sup>107</sup> Although there is not yet a legally binding clear definition for the crime of aggression, it seems evident that it is a kind of *unlawful armed attack*. It is mentioned in the Rome Statute, but not defined. Moreover, in my position, according to the present text of the Statute, there is hardly any place left for this definition. As the decision in the question of launching an attack is typically a parliamentary function, and is present in most democratic constitutions, there is practically no chance that a state representative can commit the crime of aggression alone. There is possibly a governmental or a legislative body giving its permission to the act, or giving orders to commit the act. In this case individual criminal responsibility is precluded, and criminal responsibility of legal persons has been omitted from the Rome Statute. In other words: issues of domestic

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102Katona, op. cit. Vol. I. p. 24.

103Bartha, op. cit. p. 70

104Katona, op. cit. Vol I, p. 46

105Urbán: op.cit., p.10

106See footnote no. 81above.

107Represented e.g. (in very different wording) in the Statutes of the ICC Art. 33, and the ICTY Art. 7 (4).



legality, as a means of foreclosing criminal responsibility will surely mean some challenges, as soon as the crime of aggression is included in the Statute.

Technically speaking there are other possible relations with contemporary problems. I think, it would be very hard to decide for one example, how one would be able to apply the two 1977 Geneva Protocols in such circumstances. Which one is applicable to such a case today? It is quite clear, that in the last days of the 1848/49 war of independence, the conflict would be an „international” one. So today, Protocol I should apply, after a foreign intervention, like the Russian one.<sup>108</sup> But how can we evaluate such a complex public law relation that was in force between Hungary and Austria, even from the perspective of our recent international humanitarian law?

Apropos the intervention: would such an intervention be legal today?<sup>109</sup> That would lead us to questions like the conflicts between State sovereignty and self-determination of peoples, the applicability of the Stimpson doctrine to such cases.

As for the memory of the martyrs: in 1890 an allegoric statute, dedicated to the Thirteen was erected near the place they were -falsely thought to be- executed. In 1925 it had been pulled down by the Romanian Government, and was erected only some 60 years later, in the Arad courtyard. In 2003 the replacement of the Statute to its original place became subject to harsh political debates. According to some official Governmental positions, the Statute is „in violation of the Romanian laws prohibiting the erection of fascist monuments in public places.”<sup>110</sup> Leaders of the Hungarian minority in Romania, as well as the two Governments are negotiating over the monument.<sup>111</sup> Historical tragedies thus seem to haunt recent international relations. Nevertheless, great political characters might successfully start to walk other paths.

Such a statesman was Ferenc Deák, who was the first Minister of Justice in Hungary, in the Batthyány Government, and who was not allowed to plead for his former Prime Minister in his trial. He said, when forging the long lasting Compromise with the Habsburg House in 1867: „I love loving my country more than hating my enemies.”

*Tamás Vince Ádány: Révolte ou guerre d'indépendance: la cas des martyres d'Arad*

L'article s'occupe du procès intenté contre treize généraux de l'armée hongroise après la capitulation en 1849. Au cours des XVII-XVIII siècles, la Hongrie a mené plusieurs guerres d'indépendance (ou d'émancipation) au sein de l'empire des Habsbourg et les précédentes ont été terminées par des accords de compromis. Cette fois-ci, la cour impériale de Vienne a fait lancer cependant un grand procès pénal contre ceux qui ont été considérés par l'armée autrichienne comme „déserteurs” ou „traîtres” de l'armée. Trouvés coupables, certains ont été fusillés, d'autres - pendus. L'article analyse le déroulement du procès aussi bien du point de

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108According to Art. 1 of Protocol II, stating:

109At that time the Münchengrätz Agreement between the Emperors of Austria and Russia served as a justification.

110MTI Report, October, 24, 2003.

111At the time of the closure of my work (January, 2004), it seems, that the erection of the monument will not be allowed at its planned, and once already permitted location, near the former scaffold.

vue formelle que matérielle. Le corps des règles juridiques que nous appelons aujourd'hui droit international humanitaire était présent à ce temps-là, certes, en forme rudimentaire. On peut même voir que les questions de l'applicabilité du statut des prisonniers de guerre aux insurgés d'une guerre interne, la distinction d'une guerre internationale et d'une guerre civile, la qualification des guerres d'indépendances ont été présentes dans les positions de la défense et du parquet. Il s'agissait certainement d'une vengeance impériale: mais le droit applicable à l'époque à ces situations de conflits différaient sensiblement du droit international humanitaire d'aujourd'hui – qui est peu généreux mêmes de nos jours...