Procedure and Facts

N.B. As per the disclaimer [1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: European Court of Human Rights, Case of *Korbely v. Hungary*, Application no. 9174/02, Judgement, 19 September 2008, available at http://www.echr.coe.int [2]. Footnotes omitted]

CASE OF KORBELY v. HUNGARY

(Application no. 9174/02)

JUDGMENT

STRASBOURG

19 September 2008

[…]

PROCEDURE

1. The case originated in an application […] against the Republic of Hungary lodged with the Court […] 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. […]

[…]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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 submachine gun and a pistol; the group was, moreover, equipped with two 7.62-mm machine guns and some 25 hand grenades.
13. On their way to the Police Department, the applicant's squad met two young men, one of whom was carrying a submachine 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 submachine 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 submachine 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 on to 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.

[…]

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.

[…]

I. The […] applicant's final conviction

[…]

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 […].

[…]

40. The fact that, in addition to the fatalities, two more persons had been wounded was deemed to be an aggravating factor […].

[…]

The Law - part 1

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 retroactive 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 published by the International Committee of the Red Cross, 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 Red Cross, namely to apply the Geneva Conventions to the largest possible number of conflicts, thereby allowing for humanitarian intervention by the Red Cross. 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.

[…]

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.

[…]

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 International Committee of the Red Cross 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 retroactively 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.

[…]

The Law - part 2

B. The Court's assessment

[…]

2. Merits

a. General principles

[…]

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 […].
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 […].

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 […].

(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 of 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

[…]

77. Thus, the Court will examine (1) whether this act was capable of amounting to "a crime against humanity" as that concept was understood in 1956 and (2) whether it can reasonably be said that, at the relevant time, Tamás Kaszás […] was a person who was "taking no active part in the hostilities" within the meaning of common Article 3.

?. 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 […].

79. The Court notes that according to the Constitutional Court, "acts 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 [**See** Case No. 153, ICJ, Nicaragua v. United States [3]] and on a reference made to common Article 3 in the report by the Secretary-General of the United Nations on the Statute of the International Criminal Tribunal for the former Yugoslavia […] [**See** Case No. 210, Statute of the ICTY [4]]. 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. […] [T]he 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), Article 5 of the ICTY Statute (1993), Article 3 of the ICTR Statute (1994) and Article 7 of the ICC Statute (1998) […]. 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. 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 […].

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 […].

84. […] 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" […]. 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.

?. 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 recalls that the applicant's conviction was based on the finding that Tamás Kaszás was a non-combatant for purposes of common Article 3 of the Geneva Convention (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 Article 3 of the Geneva Conventions had an original scope of application which could not be considered to have been retroactively 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 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 […].

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 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 (cf., for example, the Commentaries on Additional Protocol I to the Geneva Conventions, published by the International Committee of the Red Cross […]; the proposed Rule 47 of the ICRC's study on customary international humanitarian law (2005) [**See** ICRC, Customary International Humanitarian Law [5]] […]; and the UN Secretary-General's report on respect for human rights in armed conflict, UN Doc. A8052, 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.

Discussion

1.

a. What was the nature of the armed conflict at the time of the events? What is the law applicable to the events? Did Protocol II apply? Would it apply today?
b. How could one argue that it was an international armed conflict? If it had been an international armed conflict, would the conclusions of the Court have been different? Would the killing of a person directly participating in the hostilities have violated IHL?
c. (Para. 55) Why does the applicant wish to apply Protocol II to the events? With regard to the applicant's acts, what difference would it make together with a literal application of common Art. 3?

2. a. (*Para. 74*) Do you agree with the Hungarian courts that the applicant's acts ought to be considered "a crime against humanity punishable under Article 3(1) of the Geneva Convention"? Does common Art. 3 criminalize the acts mentioned in its first paragraph?
b. (*Paras 82, 84*) Assuming that the applicant's act amounted to murder as defined in common Art. 3, could it also amount to a crime against humanity? Is murder as defined in common Art. 3 always a crime against humanity? What other elements are required for murder to be a crime against humanity?

3. (*Para. 87*)
a. What is the Court's conclusion regarding the relationship between common Art. 3 and Protocol II? Does it rule that common Art. 3's scope of application should always be interpreted in the light of Protocol II's scope of application? Would you agree with such a conclusion?
b. Could common Art. 3's scope of application be restricted by Protocol II in situations where Protocol II itself does not apply? Could common Art. 3's scope of application be retroactively restricted by Protocol II for armed conflicts which took place before 1977?

4. a. (*Para. 88*) In your opinion, what is meant by "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or by any other cause"? Has the meaning of the phrase changed since 1956? (GC I-IV, Art. 3(1) [6])
b. (*Paras 59 and 90*) Does the mere fact of carrying a weapon automatically turn a

civilian, in a non-international armed conflict, into a person directly participating in hostilities? At least if the civilian uses the weapon? Does the fact of guarding captured enemy fighters turn a civilian, in a non-international armed conflict, into a person directly participating in hostilities? [**See also** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities [7]]

5. (*Paras 91, 94*)
    a. Does the Court's conclusion, i.e. that Tamás Kaszás "could [not] be said to have laid down his arms within the meaning of common Article 3" and that he therefore "did not fall within any of the categories of non-combatants protected by common Article 3", correspond to the literal meaning of common Art. 3?
    b. Would Tamás Kaszás today be considered as having assumed a "combatant" (or continous fighting) function allowing for him to be killed at any time? Or would he be considered as a civilian directly participating in hostilities at the time when the applicant shot at him? [**See also** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities [7]]
6. a. Does the Court address the applicant's act of ordering his men to fire at the other insurgents? Had it done so, do you think the latter would have been considered as directly participating in hostilities? Were they protected by common Art. 3? [**See also** Interpretive Guidance on the Notion of Direct Participation in Hostilities [7]]
    b. Could the presence of Tamás Kaszás be deemed to have turned the rest of the group into a legitimate target? Could the presence, among a group of civilians, of a "combatant" or a person directly participating in hostilities ever lead to the civilians losing their protection? Do you think the Court was right in not dealing with the order to fire at the other insurgents?
7. To come within the definition of a crime against humanity, could the attack on Tamás Kaszás be considered as part of an attack on a civilian population even if Tamás Kaszás, at the time when he was killed, was not protected as a civilian under IHL because he was directly participating in hostilities?

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