

A. Yugoslavia/Croatia, Memorandum of Understanding of November 27, 1991

N.B. As per the disclaimer, 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:** Mercier, M., *Without Punishment, Humanitarian Action in Former Yugoslavia*, Appendix: Document IV, London, East Haven, 1995, pp 195-198]

MEMORANDUM OF UNDERSTANDING

We the undersigned,

H.E. Mr. Radisa Gacic, Federal Secretary for Labour, Health, Veteran Affairs and Social Policy

Lt. General Vladimir Vojvodic, Director General, Medical Service of the Yugoslav People's Army

Mr. Sergej Morsan, Assistant to the Minister of Foreign Affairs, Republic of Croatia

Prim. Dr. I. Prodan, Commander of Medical Headquarters of Ministry of Health, Republic of Croatia

Prof. Dr. Ivica Kostovic, Head of Division for information of Medical Headquarters, Ministry of Health, Republic of Croatia

Dr. N. Mitrovic, Minister of Health, Republic of Serbia

taking into consideration the Hague statement of 5 November 1991 undertaking to respect and ensure respect of international humanitarian law signed by the Presidents of the six Republics; having had

discussions in Geneva under the auspices of the International Committee of the Red Cross (ICRC) on 26 and 27 November 1991 and with the participation of:

Mr. Claudio Caratsch, Vice-President of the ICRC

Mr. Jean de Courten, Director of Operations, Member of the Executive Board of the ICRC

Mr. Thierry Germond, Delegate General for Europe (Chairman of the above-mentioned meeting)

Mr. Francis Amar, Deputy Delegate General for Europe

Mr. François Bugnion, Deputy Director of Principles, Law and Relations with Movement

Mr. Thierry Meyrat, Head of Mission, ICRC Belgrade

Mr. Pierre-André Conod, Deputy Head of Mission, ICRC Zagreb

Mr. Jean-François Berger, Taskforce Yugoslavia

Mr. Vincent Lusser, Taskforce Yugoslavia

Mr. Marco Sassòli, Member of the Legal Division

Mrs. Cristina Piazza, Member of the Legal Division

Dr. Rémy Russbach, Head of the Medical Division

Dr. Jean-Claude Mulli, Deputy Head of the Medical Division

Mr. Jean-David Chappuis, Head of the Central Tracing Agency

have agreed to the following:

(1) *Wounded and sick*

All wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention of August 12, 1949

(2) *Wounded, sick and shipwrecked at sea*

All wounded, sick and shipwrecked at sea shall be treated in accordance with the provisions of the Second Geneva Convention of August 12, 1949.

(3) *Captured combatants*

Captured combatants shall enjoy the treatment provided for by the Third Geneva Convention of August 12, 1949.

(4) *Civilians in the power of the adverse party*

[1] Civilians who are in the power of the adverse party and who are deprived of their liberty for reasons related to the armed conflict shall benefit from the rules relating to the treatment of internees laid down in the Fourth Geneva Convention of August 12, 1949 (Articles 79 to 149).

[2] All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I.

(5) *Protection of the civilian population against certain consequences of hostilities*

The civilian population is protected by Articles 13 to 26 of the Fourth Geneva Convention of August 12, 1949.

(6) *Conduct of hostilities*

Hostilities shall be conducted in accordance with Article 35 to 42 and Articles 48 to 58 of Additional Protocol I, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices annexed to the 1980 Weapons Convention.

(7) *Establishment of protected zones*

The parties agree that for the establishment of protected zones, the annexed standard draft agreement shall be used as a basis for negotiations.

(8) *Tracing of missing persons*

The parties agree to set up a Joint Commission to trace missing persons; the Joint Commission will be made up of representatives of the parties concerned, all Red Cross organizations concerned and in particular the Yugoslav Red Cross, the Croatian Red Cross and the Serbian Red Cross with ICRC participation.

(9) *Assistance to the civilian population*

[1] The parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively for the other party's civilian population, it being understood that both parties are entitled to verify that the consignments are not diverted from their destination.

[2] They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

(10) *Red Cross emblem*

[1] The parties undertake to comply with the rules relating to the use of the Red Cross emblem. In

particular, they shall ensure that these rules are observed by all persons under their authority.

[2] The parties shall repress any misuse of the emblem and any attack on persons or property under its protection.

(11) Forwarding of allegations

[1] The parties may forward to the ICRC any allegations of violations of international humanitarian law, with sufficient details to enable the party reportedly responsible to open an enquiry.

[2] The ICRC will not inform the other party of such allegations if they are expressed in abusive terms or if they are made public. Each party undertakes, when it is officially informed of such an allegation made or forwarded by the ICRC, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

(12) Request for an enquiry

[1] Should the ICRC be asked to institute an enquiry, it may use its good offices to set up a commission of enquiry outside the institution and in accordance with its principles.

[2] The ICRC will take part in the establishment of such a commission only by virtue of a general agreement or an ad hoc agreement with all the parties concerned.

(13) Dissemination

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence, and to paramilitary or irregular units not formally under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- via articles in the press, and radio and television programmes prepared also in cooperation with the ICRC and broadcast simultaneously;
- by distributing ICRC publications.

(14) General provisions

[1] The parties will respect the provisions of the Geneva Conventions and will ensure that any paramilitary or irregular units not formally under their command, control or political influence respect the present agreement.

[2] The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

(15) Next meeting

The next meeting will take place in Geneva on 19-20 December 1991.

[The signatures of the above-mentioned persons follow.]

Geneva, November 27, 1991

B. Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992

[**Source:** Mercier, M., *Crimes Without Punishment, Humanitarian Action in Former Yugoslavia*, London, East Haven, 1995, pp. 203-207]

AGREEMENT

At the invitation of the International Committee of the Red Cross,

Mr. K. Trnka, Representative of Mr. Alija Izetbegovic
President of the Republic of Bosnia-Herzegovina

Mr. D. Kalinic, Representative of Mr. Radovan Karadzic
President of the Serbian Democratic Party

Mr. J. Djogo, Representative of Mr. Radovan Karadzic
President of the Serbian Democratic Party

Mr. A. Kurjak, Representative of Mr. Alija Izetbegovic
President of the Party of Democratic Action

Mr. S. Sito Coric, Representative of Mr. Miljenko Brkic
President of the Croatian Democratic Community

Met in Geneva on the 22 May 1992 to discuss different aspects of the application and of the implementation of international humanitarian law within the context of the conflict in Bosnia-Herzegovina, and to find solutions to the resulting humanitarian problems. Therefore

- conscious of the humanitarian consequences of the hostilities in the region;
- taking into consideration the Hague Statement of November 5, 1991;
- reiterating their commitment to respect and ensure respect for the rules of International Humanitarian Law;

the Parties agree that, without any prejudice to the legal status of the parties to the conflict or to the

international law of armed conflict in force, they will apply the following rules:

1. General Principles

The parties commit themselves to respect and to ensure respect for the Article 3 of the four Geneva Conventions of August 12, 1949, which states, in particular:

1. Persons taking no active part in the hostilities, including members of armed groups who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b. taking of hostages;
 - c. outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

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

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

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

2. Special agreement

In accordance with the Article 3 of the four Geneva Conventions of August 12, 1949, the Parties agree to bring into force the following provisions:

2.1. Wounded, sick and shipwrecked

The treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of August 12, 1949, in particular:

- All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
- In all circumstances, they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

2.2. Protection of hospitals and other medical units

[1] Hospitals and other medical units, including medical transportation may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military

objectives or operations from attacks.

[2] The protection shall not cease unless they are used to commit military acts. However, the protection may only cease after due warning and a reasonable time limit to cease military activities.

2.3. Civilian population

[1] The civilians and the civilian population are protected by Articles 13 to 34 of the Fourth Geneva Convention of August 12, 1949. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. They shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

[2] All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I. Civilians who are in the power of an adverse party and who are deprived of their liberty for reasons related to the armed conflict shall benefit from the rules relating to the treatment of internees laid down in the Fourth Geneva Convention of August 12, 1949.

[3] In the treatment of the civilian population there shall be no adverse distinction founded on race, religion or faith, or any other similar criteria.

[4] The displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

[5] The International Committee of the Red Cross (ICRC) shall have free access to civilians in all places, particularly in places of internment or detention, in order to fulfil its humanitarian mandate according to the Fourth Geneva Convention of August 12, 1949.

2.4. Captured combatants

[1] Captured combatants shall enjoy the treatment provided for by the Third Geneva Convention.

[2] The International Committee of the Red Cross (ICRC) shall have free access to all captured combatants in order to fulfil its humanitarian mandate according to the Third Geneva Convention of 12 August 1949.

2.5. Conduct of hostilities

Hostilities shall be conducted in the respect of the laws of armed conflict, particularly in accordance with Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices annexed to the 1980 Weapons Convention. In order to promote the protection of the civilian population, combatants are obliged to distinguish themselves from the civilian population.

2.6. Assistance to the civilian population

[1] The Parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively to the civilian population.

[2] They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

3. Red Cross Emblem

The Red Cross emblem shall be respected. The Parties undertake to use the emblem only to identify medical units and personnel and to comply with the other rules of international humanitarian law relating to the use of the Red Cross emblem and shall repress any misuse of the emblem or attacks on persons or property under its protection.

4. Dissemination

The Parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- by distributing ICRC publications.

5. Implementation

[1] Each party undertakes to designate liaison officers to the ICRC who will be permanently present in meeting places determined by the ICRC to assist the ICRC in its operations with all the necessary means of communication to enter in contact with all the armed groups they represent. Those liaison officers shall have the capacity to engage those groups and to provide guarantees to the ICRC on the safety of its operations. Each party will allow the free passage of those liaison officers to the meeting places designated by the ICRC.

[2] Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

6. General provisions

[1] The parties undertake to respect and to ensure respect for the present agreement in all circumstances.

[2] The present agreement will enter in force on May 26, at 24h00 if all parties have transmitted to the ICRC their formal acceptance of the agreement by May 26, 1992 at 18h00.

Discussion

1. Do the two agreements qualify the conflicts? Could the ICRC have suggested the Memorandum of Understanding of November 27, 1991 (MoU) if it had qualified the conflict between Croatia and Yugoslavia as an international one? Could Agreement No. 1 of May 22, 1992 (A1) concern an international armed conflict? (GC I-IV, Arts 2, 3 and 6/6/6/7; P I, Art. 1)
2.
 - a. Why does the ICRC suggest such agreements? Why do the parties conclude such agreements? Who are the parties to the two agreements? Who is bound by the two agreements?
 - b. Is the MoU binding for the Socialist Federative Republic of Yugoslavia and Croatia? Is A1 binding on Bosnia and Herzegovina? Is it acceptable that A1 places “the Republic of Bosnia-Herzegovina” and political parties on an equal footing? (GC I-IV, Art. 3(3))
 - c. What difficulties could the ICRC foresee when it invited the parties to negotiate those agreements? How did it overcome those difficulties?
3. Does Art. 3 of the MoU give captured combatants prisoner-of-war status? May Croatian soldiers who formerly served in the Yugoslav People’s Army and fall into the power of Yugoslavia be sentenced for high treason?
4.
 - a. Do Art. 4(1) of the MoU and Art. 2.3(2) of A1 provide the same protection to civilians deprived of their liberty as the IHL of international armed conflicts, less protection, or better protection? (GC IV, Arts 37, 41, 76, 78 and 79)
 - b. Is a Serb inhabitant of western Slavonia, whose ancestors lived for 400 years in that part of Croatia and who is arrested by the Croatian police, “in the power of the adverse party” in the sense of Art. 4(1) of the MoU? Is a Bosnian Muslim inhabitant of Banja Luka, whose ancestors lived for 400 years in that part of Bosnia and Herzegovina and who is arrested by the Bosnian Serb police, “in the power of the adverse party” in the sense of Art. 2.3(2) of A1? Is a Serb inhabitant of Sarajevo, whose ancestors lived for 400 years in the capital of Bosnia and Herzegovina and who is arrested by the Bosnian police, “in the power of the adverse party” in the sense of Art. 2.3(2) of A1? What are the advantages and disadvantages of thus labelling persons as “protected persons” according to their ethnic origin? Is there any other way to apply the law of international armed conflict?
5.
 - a. Is there any prohibition of forced displacements in the MoU? In the IHL of international armed conflicts? Where? Why was that provision not included in the MoU? Did the practice of “ethnic cleansing” therefore not violate IHL in the conflict between Croatia and Yugoslavia? (GC IV, Art. 49)
 - b. Is there a prohibition of forced displacements in A1? Does its wording come from the law of international or of non-international armed conflicts? (GC IV, Art. 49; P I, Art. 85(4); P II, Art. 17)
6.
 - a. Can you imagine why Art. 6 of the MoU and Art. 2.5 of A1 exclude Arts 43-47 of Protocol I from their reference to the Protocol’s rules on the conduct of hostilities?

- b. Was there any obligation for combatants to distinguish themselves from the civilian population in the conflict between Croatia and Yugoslavia? (HR, Art. 1; GC III, Art. 4(A); P I, Arts 44(3) and 48; P II, Art. 13)
7. Do Art. 9 of the MoU and Art. 2.6 of A1 on humanitarian assistance correspond to the IHL of international armed conflicts, or does it go further? If yes, on which points? (GC IV, Arts 10, 23, 59-61, 108-109, 142; P I, Arts 69, 70, 81)
8.
 - a. Which rules on implementation do the two agreements contain? Which implementation mechanisms provided for in the IHL of international armed conflicts are not mentioned? Can you imagine why the parties did not want to mention those mechanisms?
 - b. Are there any provisions on war crimes in the two agreements? Which elements of IHL's grave breaches regime do the agreements lack? Are those gaps crucial, taking into account that the national legislation of the former Yugoslavia, in which the rules of IHL on grave breaches were incorporated, was taken over by its successor States? By accepting a rule of behaviour of the IHL of international armed conflicts in the agreements, did a party thereto necessarily also undertake to treat a violation of that rule as a grave breach if it is so qualified by IHL? Under those agreements, can the International Criminal Tribunal for the former Yugoslavia prosecute any violation of the IHL of international armed conflicts that is qualified as a grave breach? Only if the rule violated is contained in the agreements? Only if it also violates customary IHL?
 - c. What are the differences between the rules on implementation contained in the two agreements? Can you explain them?
 - d. Why is the ICRC, in Art. 12 of the MoU, so circumspect about an enquiry into allegations of violations? Aren't enquiries an important means of implementing IHL? Shouldn't the ICRC conduct an enquiry itself, due to its knowledge of the field, its expertise in IHL and its well-recognized neutrality and impartiality, at least if both parties agree to it doing so? Can you imagine the reasons for the ICRC's extreme prudence in this regard?
 - e. What is the purpose of a mechanism such as that provided for in Art. 5(1) of A1?
 - f. Does the MoU's Art. 14(1) incorporate all of the Geneva Conventions into the MoU? To which units is Art. 14(1) intended to apply? Does that provision make any sense?
9.
 - a. What are the advantages and disadvantages of such agreements? Can they be interpreted and applied without reference to the whole of IHL?
 - b. Was the MoU applicable in the conflict between local Serb inhabitants of parts of Croatia (in particular the Krajinas) and the government of Croatia? Even if Yugoslavia no longer had any control over the activities of those local Serbs?
 - c. Was A1 applicable in the armed conflict in the Bihac area between autonomist Bosnian Muslim followers of Mr. Abdic and Bosnian government forces?