

Paragraphs 1 to 10

Case Study prepared by Marco Sassòli, first presented by the authors in August 1998 at Harvard University.

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.



Map of Yugoslavia. The map has no political connotations. © ICRC

1. In the late eighties tension rises in the Socialist Federal Republic of Yugoslavia:

- Economic crisis of the Yugoslav system of self-governing economy and economic tension between the richer northern and the poorer southern Republics.
- Bloody riots in Kosovo (1981, 1989, 1990) by the large Albanian majority living in the historical heartland of Serbia. Kosovo was an autonomous province within Serbia, but also a member of the Federal Republic of Yugoslavia. It held a population of 1,585,000 inhabitants in 1981 – date of the last census – 77% ethnic Albanians and 13% ethnic Serbs. The 1974 constitution gave Kosovo considerable autonomy. During the 80s, the Serb minority suffered discrimination in the hands of the provincial authorities controlled by Albanians, who demanded more power and the status of a Republic for Kosovo. In 1989, constitutional reforms withdrawing jurisdiction from the government of Kosovo over certain issues were adopted, despite strong opposition from the Kosovo Albanian population which organized protests and strikes in response. In 1990, the Serbian parliament suspended the Kosovo Assembly when the latter adopted a resolution declaring Kosovo to be independent from Serbia.
- The publication of a Serbian nationalist Memorandum by the Serbian Academy of Sciences and the rise to power of the Serbian nationalist politician Slobodan Milosevic in Serbia (1986).

- The disbanding of the communist one-party system with the formation of opposition parties in the Republics of Slovenia and Croatia (1988) and multiparty elections in all six Republics bringing nationalist parties to power.

In 1991, the fragmentation increases to such a degree that the Republics of Slovenia and Croatia want to secede; the central Yugoslav institutions are increasingly blocked by a stalemate between the “Serb block” and those Republics wanting to secede.

- As tensions continue to rise, but before conflict breaks out openly, what can humanitarian organizations do to lower tensions, to prevent the outbreak of an armed conflict, or to prevent violations of international humanitarian law in the event that a conflict breaks out?
- For an organization like the ICRC that wants to make sure it will be able to fulfill its mandate and be accepted by all sides in the event that conflict breaks out, what are the limits to such preventive action?
- How are the Croatian and Yugoslav authorities likely to react to proposals:
 - to start a general information campaign on Human Rights?
 - to train the Yugoslav Peoples Army, the Croatian forces, and local Serbian forces in Croatia in international humanitarian law?
 - to visit Kosovo Albanians detained by the authorities of Serbia?
 - to visit Croats detained by the Yugoslav central authorities or local Serbian forces as well as Serbs detained by the Croatian authorities in order to monitor their treatment?
- According to IHL, once the resolution declaring Kosovo’s independence was adopted, has Kosovo become a territory occupied either by the Socialist Federal Republic of Yugoslavia or by Serbia? (HR, Art. 42; GC IV, Art. 2(2); P I, Art. 1(4))

2. On June 26, 1991, Croatia declares its independence. In Croatia, the Serbian minority living in Eastern Slavonia, Western Slavonia, and the Krajinas does not agree with a secession of Croatia and is ready to oppose it violently. The Yugoslav People’s Army tries to hinder Slovenia and Croatia from seceding and to maintain itself at least in parts of Croatia controlled by the Serb minority; first trying to intercede between Croatian and local Serbian forces and later more and more openly supporting local Serbian forces. As a result, the Yugoslav People’s Army obtained or maintained in fierce fighting control over one third of the territory of Croatia, while in other parts of Croatia its troops had to retreat into their barracks where they were besieged.

- Was the conflict in Croatia in fall 1991 of an international or a non-international character? (GC I-IV, Arts 2 and 3)
- What role do the constitution of the former Yugoslavia (arguably implying a right for republics to secede),

the declaration of independence of Croatia of 26 June 1991, and the recognition of Croatia by third States (30 on 17.01.1992) have in answering question a.? Is the ICRC competent to answer this question? Should the UN Security Council answer this question?

c. What dilemmas does the answering to this question create for any humanitarian organization? Does it create different dilemmas for a Human Rights organization?

d. Would you answer this question if you were the ICRC? How could the ICRC otherwise ascertain the application of the rules of the Geneva Conventions and Additional Protocols?

e. Were Croatian soldiers captured in December 1991 by the Yugoslav People's Army prisoners of war? If captured by Croatian forces, were members of local Serbian militias in Eastern Slavonia fighting with the Yugoslav People's Army prisoners of war? (GC III, Arts 2 and 4)

f. Was the part of the Croatian territory controlled by the Yugoslav People's Army an occupied territory under Convention IV?

3. In fall 1991, the Yugoslav People's Army and local Serbian militias besieged and constantly bombarded the town of Vukovar in the easternmost part of Croatia.

a. As a result, the Croatian soldiers defending Vukovar ran short of ammunition and together with the local Croatian and Serbian civilian population, ran short of food and medical supplies. For which of those goods did the Yugoslav People's Army have an obligation to allow passage, and to what conditions could it subject such a free passage? (GC IV, Art. 23; P I, Art. 70, CIHL Rule 55)

b. Would you, as a humanitarian organization, take the initiative of suggesting the evacuation towards the west of local Croatian civilians? Which criteria should those civilians fulfill to be evacuated? What reactions to such a proposal can be expected from the Croats and from the Yugoslav authorities? Do they have an obligation to allow such an evacuation? Under what conditions? What reaction can be expected from local and international public opinion?

c. The hospital of Vukovar is no longer able to cope with the number of wounded soldiers and civilians. The Croatian and Yugoslav authorities are ready to allow the evacuation of the wounded as part of an agreement under which Croatia simultaneously allows Yugoslav soldiers confined in their barracks in Croatian towns since the beginning of the conflict to leave for Yugoslav-controlled territory. As a humanitarian organization, would you suggest such an agreement? Would you let it be negotiated under your auspices? Would you organize the evacuation of the wounded? Would you supervise the simultaneous withdrawal of Yugoslav soldiers from their barracks? Under what conditions? What legal, political, and humanitarian considerations have to be taken into account?

4. The ICRC, facing difficulties to qualify the conflict and the resulting inability to invoke the protective rules of IHL in its operations, and trying to establish a humanitarian dialogue with the parties far from the cease-fire and political negotiations, invites plenipotentiaries of the belligerent sides to Geneva in order to agree on rules to be respected in the armed conflict as close as possible to those IHL provides for in international armed conflicts and to discuss any other humanitarian problems.

- a. What are the difficulties for the Croatian and the Yugoslav authorities in accepting such an invitation? How can the ICRC overcome them? What difficulties can be expected during the negotiations?
- b. Which rules of the law of international armed conflict can be expected to meet particular resistance by each side? Would you suggest Art. 3(3) common to the Geneva Conventions as a legal basis for the agreement to be negotiated? Doesn't an agreement that falls short of the entire law of international armed conflict violate 6/6/6/7 respectively of the four Conventions?
- c. What are the advantages and disadvantages of the "Memorandum of Understanding" finally concluded on 27 November 1991? For the war victims in the former Yugoslavia? For the ICRC? For IHL in the long run? (See Case - Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A.])

5. After the fall of Vukovar, the front-line approaches Ossijek. Again, the wounded flow towards the local hospital, which is not spared by indiscriminate bombardments by the Yugoslav People's Army and local Serbian militias. The Yugoslav authorities claim that the Croatian army systematically places artillery positions around the hospital to either shield them from Yugoslav attacks or to mobilize international public opinion when the hospital is hit during Yugoslav attacks against those positions.

- a. What is your legal evaluation of the bombardments and of the alleged Croatian behaviour? May the alleged Croatian behaviour justify the Yugoslav attacks? (GC I, Art. 21; GC IV, Arts 18 and 19; P I, Arts 12 and 13, CIHL Rules 28 and 30)
- b. What can a humanitarian organization suggest in such a situation? Should it assess the facts and find out whether the hospital is actually targeted and whether the Croats actually use it to shield artillery positions? What are the chances that a humanitarian organization comes to definite findings? Should it make them public? Should it suggest the creation of a hospital zone under Art. 14 or of a neutralized zone under Art. 15 of Convention IV? What are the arguments in favour of each solution? What are the advantages and disadvantages to establishing any such zone: for the war victims? For a humanitarian organization? For the belligerents? What difficulties can be expected in negotiating such an agreement? How would you prepare for those negotiations?

6. On January 4, 1992, the 15th cease-fire agreement between Croatia and the Yugoslav People's Army entered into force and was long-lasting. On February 21, the UN Security Council established through

Resolution 743 (1992) the United Nations Protection Forces (UNPROFOR), deployed, in particular, in the Serb-held territories in Croatia, with the mandate of ensuring that the “UN Protected Areas” (UNPAs) are demilitarized through the withdrawal or disbandment of all armed forces and that all persons residing in these areas are protected from fear of armed attack. In reality, UNPROFOR could only partly fulfill this mandate as local Serbian forces remained in control of the areas.

a. When UNPROFOR deployed in spring 1992 in the Serb-held territories of Croatia, did it have to respect the rules of Convention IV on occupied territories?

b. Could UNPAs be considered Croatian territories occupied by Yugoslavia through local Serbian forces?

7. At the end of 1991 and the beginning of 1992, mutual accusations of war crimes between Croatia and Yugoslavia increased sharply in international media, international fora, the regular sessions of the parties' plenipotentiary representatives under ICRC auspices (in which the atmosphere deteriorates due to such accusations), and in letters from both sides addressed to the ICRC. Croatia refers in particular to the evacuation (under the eyes of an ICRC delegate) and assassination of hundreds of patients of the Vukovar hospital by the Yugoslav People's Army.

a. What follow-up would you give to such accusations if you were the ICRC? What humanitarian arguments are in favour or against a follow-up? Would you accept requests by one side to enquire into such allegations? At least if the request comes from the side against which the allegation is made? If both sides request the ICRC to enquire?

b. What would you do with the letters of mutual accusation addressed to the ICRC?

c. Chairing the meetings of the parties' plenipotentiary representatives, how would you deal with the mutual accusations? Would you allow a discussion? Would you suggest the establishment of a commission of enquiry?

d. Would you suggest the parties to submit their allegations to the International Humanitarian Fact-Finding Commission provided for by Art. 90 of Protocol I?

e. If you had to draft a proposal for the creation of an ad hoc fact-finding commission along the lines of Art. 90 of Protocol I, on which issues could you expect the greatest resistance and by which side?

f. If a fact-finding commission is established, should the ICRC delegate who witnessed the “evacuation” of the patients of Vukovar hospital testify? Under what circumstances? Should this delegate testify today before the International Criminal Tribunal for the Former Yugoslavia? What arguments could the ICRC use not to let him testify?

See Case - ICTY/ICC, Confidentiality and Testimony of ICRC Personnel

8. In spring 1992, when the prisoners of the conflict in Croatia had to be repatriated, Belgrade refused the repatriation of many of them claiming:

- that they were under judicial proceedings for desertion and high treason (as members of the Yugoslav People's Army having "fought for the enemy");
- that they had committed war crimes.

Zagreb refused repatriation for similar arguments.

- a. What do you think of these arguments from a legal point of view? (GC III, Arts 85, 119(5), and 129)
- b. If you were the ICRC, how would you have dealt with this deadlock? What does "repatriation" mean for a Serbian member of the Serbian minority in Croatia, who lived before the conflict in Zagreb, was drafted into the Yugoslav People's Army, and was captured by Croatian forces?

9. Bosnia-Herzegovina is ethnically divided between a relative majority of Bosnian Muslims (considered as a nationality called "Muslims" in the former Yugoslavia), Serbs, and Croats. In April 1992, it declared its independence following a referendum, boycotted by Serbs, in which Muslims and Croats voted in favour of independence. An armed conflict broke out between (Muslim and Croatian) forces loyal to the government, supported on the one hand, by Croatia, and on the other hand by Bosnian Serb forces opposing the independence of Bosnia-Herzegovina, supported by the Yugoslav People's Army, particularly by its units made up of Bosnian Serbs.

- a. How would you qualify the conflict in Bosnia-Herzegovina: Is it an international or a non-international armed conflict? (GC I-IV, Arts 2 and 3; Agreement No. 1 of May 22 1992 (hereinafter Agreement No. 1) [See Case - Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] Arts 1 and 2) Does the involvement of Belgrade (and Zagreb) change your qualification? Whose involvement could change the qualification?

See Case - ICTY, The Prosecutor v. Tadic

- b. Would you qualify the conflict if you were a humanitarian organization? If you had to negotiate an ad hoc agreement between the parties on the applicable international humanitarian law, would you base it on Art. 3(3) common to the Geneva Conventions?
- c. Under Convention IV, who is a protected civilian in Bosnia-Herzegovina? (GC IV, Art. 4) Under Agreement No. 1? (Agreement No. 1, Art. 2(3)) Is the forced displacement of Bosnian Muslims from Serb-held Banja Luka to government-held Tuzla unlawful (GC IV, Arts 35 and 49(1), P II, Art. 17; Agreement No. 1, Art. 2(3)) Is the forced recruitment of Muslims by the Bosnian Serbs unlawful? Is the forced recruitment of

Bosnian Serbs by the Sarajevo government unlawful? (GC IV, Arts 51 and 147) When is it lawful for the Sarajevo government to compel Serb inhabitants of Sarajevo to dig trenches on the front-line? (GC IV, Arts 40 and 51)

10. Beginning in late April 1992 and continuing throughout the whole conflict, the belligerent parties of the three ethnic groups in Bosnia-Herzegovina, particularly at the beginning the Bosnian Serb authorities, undertook a campaign of “ethnic cleansing” against civilians of other ethnic groups living in the regions they controlled. Sometimes villages inhabited by other ethnic groups were indiscriminately bombed to force civilians to flee; often men were rounded up and arrested as “terrorists” and potential combatants, while women were sometimes raped and often sent, together with children and elderly persons, either in organized transports or on their own to areas controlled by “their own” ethnic group. Property belonging to these people was being systematically burned or razed to the ground, thus shattering all hope of return for the ousted families. In other cases, members of another ethnic group simply lost their jobs and were harassed with non-violent means by the local authorities and their neighbours until they saw no more future in their home region and fled. It was not always clear whether those acts of “ethnic cleansing” were planned by the authorities or were spontaneous acts of the local population in a generalized atmosphere of inter-ethnic hatred. In later phases of the conflict, additional waves of ethnic cleansing broke out in reaction to such practices, and the main actors were those forced to flee their homes in territory controlled by other ethnic groups and who sought refuge in territory controlled by their ethnic group.

a. Are all the above-mentioned practices prohibited under IHL? Under IHL of international armed conflict as well as under IHL of non-international armed conflict? (GC III, Arts 3 and 4; GC IV, Arts 3, 27, 32, 33, 35-43, 49, 52 and 53; P I, Arts 48, 51, 52 and 75; P II, Arts 4 and 17, 23, 25; HR, Art. 28; CIHL Rules 49-51, 93)

b. What can humanitarian organizations do against such practices? May they organize appropriate transportation and negotiate passage through the front lines for civilians wishing to leave under the pressure of such practices? Don't they contribute thus to ethnic cleansing? May they do it at least when the concerned civilians fear for their lives?

Paragraphs 11 to 20

11. In May 1992, the ICRC's head of delegation in Sarajevo was killed during a deliberate attack on the Red Cross convoy in which he was traveling in Sarajevo. Since it was no longer able to provide sufficient protection and assistance for the victims and failed to obtain security guarantees from the parties, the ICRC withdrew from Bosnia-Herzegovina.

a. May the ICRC withdraw from a country affected by an armed conflict? (GC III, Arts 9 and 126; GC IV, Arts 10 and 143)

b. May a humanitarian organization withdraw from a conflict area because one of its staff is killed? At least if

no sufficient security guarantees are offered for the future? Even if the party to the conflict responsible for the attack is unknown? Could this withdrawal be considered as a collective punishment? Could it be said that the organization thus takes the victims as hostages against their authorities? Couldn't an organization help at least some victims even without security guarantees? Does that mean that the life of an expatriate aid worker is worth more than that of a local victim?

c. May a humanitarian organization leave a conflict area because IHL is too blatantly violated?

d. May a humanitarian organization withdraw from a conflict area because it cannot sufficiently fulfill its mandate of protecting and assisting victims? If it is denied access to some victims? If it can no longer assist the local population because its relief convoys are not allowed free passage by the other side? If its confidential or public approaches have no impact on the behaviour of the parties? If its visits to prisons do not lead to any improvement of unacceptable conditions of detention of prisoners? What if the organization could nevertheless help some victims? Could this withdrawal be considered as a collective punishment? Could it be said that the organization thus takes the victims as hostages against their authorities? May a neutral and impartial humanitarian organization continue to act in a conflict if only one side allows it access to victims ("belonging" to the other side), while the other side denies access?

12. When the ICRC returned to Bosnia-Herzegovina in the summer of 1992 it was finally allowed to visit, in particular in the "Manjaca Camp", large numbers of the (surviving) men rounded up by Bosnian Serb forces during ethnic cleansing operations in Eastern and Central Bosnia. Its delegates found appalling conditions of detention, seriously undernourished prisoners who could not expect to survive the Bosnian winter, and collected highly disturbing allegations of summary executions. It tried to draw the attention of the international community and public opinion on those facts, but succeeded only when TV Crews were allowed by the Bosnian Serbs to film detainees in Manjaca.

Through considerable relief efforts and frequent visits, the ICRC managed to improve conditions of detention, but it came to the conclusion that only the release of all prisoners before the Bosnian winter could solve the humanitarian problem. Relief efforts in favor of the inmates were hampered by violent demonstrations of the local Serbian population in villages around Manjaca camp who were suffering from the consequences of international sanctions against Serbs and did not want to allow free passage to the relief convoys. On September 15, 1992, 68 injured and sick detainees were evacuated to London to receive medical attention. Thanks to the pressure of international public opinion and by constant negotiations with the parties, the ICRC got them to conclude, on October 1, an agreement under which more than 1,300 detainees were to be released before mid-November (925 by Bosnian Serbs, 357 by Bosnian Croats, and 26 by Bosnian government forces). Under the agreement, the detainees to be released could choose during individual interviews without witnesses with ICRC delegates, whether they wanted to be released on the spot, to be transferred to regions controlled by their ethnic group, or to be transferred to a refugee camp in Croatia in view of (temporary) resettlement abroad. Affected by what they had undergone and in view of the

generalized atmosphere of ethnic cleansing, practically all inmates from Manjaca chose to leave the country.

- a. Why did the Bosnian Serb authorities give TV cameras access to Manjaca? Didn't the world media, by airing the images from Manjaca, increase the fear among ethnic minority groups and thus contribute to "ethnic cleansing"?
- b. Should a humanitarian organization provide food and shelter to detainees? Under IHL, isn't that the responsibility of the detaining authorities? Should a humanitarian organization ask detaining authorities to release prisoners if they do not treat them humanely?
- c. May a humanitarian organization distribute relief aid to the local population of villages surrounding Manjaca so that they let the relief convoys go to Manjaca? Is it an application of the Red Cross principles of neutrality and impartiality or is it a case of pure operational opportunism? Doesn't a humanitarian organization thus give in to blackmail? How would you judge the situation if the Bosnian Serbs were asking for fuel for heating (which could however also be used for tanks) – as they later successfully asked UNPROFOR?
- d. Was the detention of men between 16 and 60 years old, militarily trained as territorial defence in the former Yugoslavia and ready to join Bosnian government forces, necessarily unlawful? (GC III, Arts 4 and 21; GC IV, Arts 4, 42 and 78) Could the ICRC ask for their release? Doesn't the ICRC visit detainees only out of concern for their humane treatment, without interfering into the reasons for their detention or asking for their release? Don't massive requests for releases accredit in the minds of the parties the (wrong) idea that if they give the ICRC access to prisoners they have to release or exchange them, thus increasing the tendency to hide prisoners from the ICRC?
- e. Didn't the releases of the Bosnian Muslim detainees, most of whom understandably chose to be transferred abroad, contribute to "ethnic cleansing"? Should the inmates remain detained, for their protection, until they can safely return home? Does the party controlling the territory where the released prisoners are transferred have an obligation not to enroll them (again) into military service against the party that released them? (GC III, Art. 117)
- f. How would you have reacted to the parties' claims (prima facie not totally unreasonable) during negotiations on the releases that many of the persons detained had committed war crimes?

13. During the whole conflict, Sarajevo was (practically) surrounded by Bosnian Serb forces, but defended by Bosnian government troops. It was constantly bombed by Bosnian Serb artillery. The survival of the inhabitants of Sarajevo or, more precisely, their ability not to surrender to the Bosnian Serbs, was made possible mainly by relief flights of UNPROFOR (offering its logistics to and acting for the UNHCR), which were often interrupted following attacks by Bosnian Serb or unknown forces, or due to lack of security guarantees.

a. Was it lawful to bomb Sarajevo? (P I, Arts 48 and 51; Agreement No.1, Art. 2(5)) Does your appreciation under IHL of those bombings change after Sarajevo had been declared a “safe area” by the UN Security Council (as described infra, point 14.)?

[See also Case - ICTY, The Prosecutor v. Galic]

b. Is the stopping by Bosnian Serbs of relief convoys to Sarajevo unlawful? (GC IV, Arts 23 and 59; P I, Art. 70; Agreement No. 1, Art. 2(6)). Do neighbouring Croatia and the UN Security Council (in case of an embargo) have similar obligations towards the Bosnian Serbs? To what conditions may the Bosnian Serb authorities subordinate the passage of relief convoys?

- to the checking of the convoy?
- to the distribution of relief to civilians only?
- to the distribution of relief to both Serbs and Bosnian Muslims?
- to the distribution of relief under outside supervision?
- to the simultaneous agreement by Bosnian government forces to allow passage of relief convoys to Serb controlled areas?
- to the release of prisoners by the Bosnian government?
- to the respect of cease-fire agreements by the Bosnian Muslims?

c. What are the advantages and disadvantages of bringing relief by airlift to Sarajevo? What may the advantages and risks be for the UNHCR given that the airlift is under the full operational responsibility of UNPROFOR?

d. What could be the legitimate and illegitimate interests of the Bosnian Serbs to hinder relief supplies to Sarajevo?

e. Could the Bosnian government have reasons to hinder relief supplies to Sarajevo?

14. As the ICRC was confronted with continuing practices of “ethnic cleansing” by all parties (the Bosnian Muslim population being, however, the main victims), that threatened the lives of ethnic minority populations and made large groups of population flee when front lines changed, and as no third country seemed ready to offer even temporary asylum to one hundred thousand Bosnian refugees, the ICRC suggested, in the fall of

1992, the establishment of protected zones to shelter endangered civilians. The concept and location of the zones should be based on an agreement of the parties, but UNPROFOR should provide internal and external security for such zones.

In 1993, the UN Security Council established through Resolutions 819 and 824 (1993) safe areas in and around the towns of Sarajevo, Tuzla, Zepa, Gorazde, Bihac, and Srebrenica, controlled by the Bosnian government, asking for the immediate cessation of hostile acts against those areas and the withdrawal of Bosnian Serb units from their surroundings.

[See Case - Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993]

This had to be monitored by UN Military observers. The parties were asked to fully cooperate with UNPROFOR, but UNPROFOR was not given a clear mandate to defend those areas and the Resolutions only invoked Chapter VII of the UN Charter (permitting the use of force) as far as the security and freedom of movement of UNPROFOR was concerned. Security Council Resolution 836 (1993) went further authorizing UNPROFOR “acting in self-defence, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties [...]” The Security Council did not ask for a demilitarization of those areas but decided in Resolution 836 (1993) “to extend [...] the mandate of UNPROFOR in order to enable it [...] to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina [...]”

- a. What humanitarian problems led the ICRC to suggest the establishment of protected zones and the UN Security Council to establish safe areas? How does IHL normally deal with such problems?
- b. What are the particular reasons and dangers in establishing any kind of safety zones in a situation of “ethnic cleansing” like the one in Bosnia-Herzegovina?
- c. Does the ICRC suggest establishing one of the protected zones provided by IHL? Does IHL provide for an international monitoring of such a zone? Is international protection of such a zone provided by IHL? Is it compatible with IHL? Why does the ICRC suggest international military protection? Should the Security Council give UNPROFOR the mandate to defend those areas? (GC I-IV, Art. 3; GC IV, Arts 14 and 15; P I, Arts 59 and 60)
- d. Should the ICRC suggest the demilitarization of the protected zones (from Bosnian government forces)? Is this condition implied in the spirit of IHL on protected zones? Would such a condition have been realistic? Would the creation of a zone without such demilitarization have been realistic? May Bosnian government forces stay in the safe areas established by the Security Council? Under IHL and the UN resolutions, may they launch attacks from the safe areas against Bosnian Serb forces?

- e. Were the zones open to occupation by the adverse party? Under IHL, is such a requirement inherent to protected zones? Would such a requirement have been realistic?
- f. Does the ICRC proposal come under *jus ad bellum* or under *jus in bello*? Does it respect the Red Cross principles of neutrality and impartiality? Doesn't it suggest the use of force against one side of the conflict? What is the legal basis of the ICRC proposal?
- g. On what essential points do the safe areas established by the Security Council differ from the protected zones suggested by the ICRC?
- h. Do the safe areas established by the Security Council come under *jus ad bellum* or under *jus in bello*? Is it appropriate to charge peacekeeping forces with the mandate they got under the Resolutions?
- i. Which elements of the "safe areas" established by Resolutions 819 and 824 recall or implement *jus in bello*? *Jus ad bellum*?

15. In the beginning of 1992, the Co-presidents of the International Conference on the Former Yugoslavia, C. Vance and Lord Owen, presented a peace plan for Bosnia-Herzegovina (the Vance-Owen Plan), which included the division of Bosnia into 10 nationally defined cantons. Bosnian Croats were delighted by the plan which increased their territory, while Bosnian Serbs rejected it coldly. The Bosnian (Muslim) president was undecided. The Bosnian Croats tried to implement it forcefully in central Bosnia. They demanded that the Bosnian government forces withdraw within the borders of their assigned cantons and that the joint command of the forces of Croat Defence Council (HVO) and the BH Army be established. If not, HVO threatened to implement the Vance-Owen Plan itself. After the deadline expired, on April 16, 1993, HVO forces carried out a coordinated attack on a dozen villages in the Lasva Valley (belonging to the Croatian canton of the Vance-Owen Plan). Troops from Croatia were present on HVO-controlled territory but did not fight in the Lasva Valley. Croatia financed, organized, supplied, and equipped HVO.

- a. Was there an international armed conflict between Bosnia-Herzegovina and Croatia? If so, did IHL of international armed conflicts also apply to the fighting in the Lasva Valley between HVO and Bosnian government forces? Were the parts of the Lasva Valley, falling under HVO control during the fighting, occupied territories under IHL? Were its Bosnian Muslim inhabitants protected persons? Were the Bosnian Croats living in parts of the Lasva Valley which remained under government control protected persons too? (GC IV, Arts 2 and 4)
- b. Was Agreement No.1 applicable to the fighting in the Lasva Valley?

[See Case - Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]]

16. In the Bihac area, in the Western-most part of Bosnia-Herzegovina, inhabited almost exclusively by Bosnian Muslims, Mr. Fikret Abdic, a Muslim businessman and politician, and his followers (mainly the employees of his “Agrokommerc” industry near Velika Kladusa) were not ready to follow the politics of the Bosnian government; they claimed autonomy and aligned themselves with the Bosnian Serbs and the neighbouring Croatian Serbs. An armed conflict between Bosnian government forces in the Bihac enclave surrounded by Bosnian and Croatian Serb forces and by those of Mr. Abdic followed. In 1995, the two-and-a-half-year siege of the Bihac enclave was ended by an offensive of Croatian forces against the Croatian Serb forces. When Bosnian government forces subsequently took Velika Kladusa, the followers of Mr. Abdic fled into neighbouring Croatia where they were halted in Kupljensko by the Croatian authorities.

- a. Under IHL, how do you qualify this conflict? What instruments of IHL apply (taking into account that Bosnia-Herzegovina is a party to all instruments of IHL)? (GC I-IV, Art. 3; P II, Art. 1)
- b. Was Agreement No. 1 applicable to that conflict?
- c. Could the Bosnian authorities punish followers of Mr. Abdic for the mere fact that they took part in the rebellion, even if they respected IHL?
- d. Had the Croatian authorities an obligation to let followers of Mr. Abdic into Croatia?
- e. Could the Croatian authorities forcibly drive those persons back from Kupljensko to Bosnia-Herzegovina?
- f. Could the Croatian authorities deny the entering of relief into Kupljensko camp in order to drive its inhabitants back to Bosnia-Herzegovina?

17. Following widely publicized and credible reports by the media, by different human rights organizations, and by representatives of the international community about widespread atrocities committed as part of practices of “ethnic cleansing”, including rapes allegedly committed in particular by Bosnian Serb forces on a systematic basis and as a policy, the international public opinion and the international community insisted on the punishment of those responsible for such serious violations of IHL and of human rights. Particularly outraged about rapes, a specific instrument against such practices was desired and it was said that contemporary IHL does not sufficiently prohibit rape. First, the UN Security Council established in Resolution 780 (1992) a Commission of Experts enquiring into alleged violations which later published a very extensive report, but on May 25, 1993, it went further establishing by Resolution 827 (1993), acting under Chapter VII of the UN Charter, an “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991” (ICTY) in The Hague. The ICTY is competent to prosecute grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. It has concurrent jurisdiction with national courts, but primacy over them when it so decides. All States have to cooperate with the ICTY.

[See Case - UN, Statute of the ICTY and Case - ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic]

- a. Why did the media, the public opinion, and the Security Council react so strongly against violations of IHL in the former Yugoslavia? Was it because they were more serious than those committed in Cambodia, Afghanistan, Zaire, Liberia, or Chechnya? Because they were more wide-spread and systematic? Because the media widely covered them? Because they were seen as having been mainly committed by the party seen as the aggressor? Because the international community was not ready to stop the war? Because it happened in Europe?
- b. Is rape prohibited by IHL of international armed conflicts? By IHL of non-international armed conflicts? Is it a grave breach of IHL? Is it a war crime? Even in non-international armed conflicts? Are there any grave breaches of IHL in non-international armed conflicts? If the law of international armed conflicts is applicable, is the rape of a Bosnian Muslim woman by a Bosnian Serb soldier in Bosnia-Herzegovina a grave breach? Is the rape of a Bosnian Serb woman by a Bosnian government soldier a grave breach? (GC IV, Art. 147; P I, Art. 85(5); Agreement No.1, Art. 5)
- c. Who has the obligation to prosecute persons having committed grave breaches in Bosnia-Herzegovina? (GC IV, Art. 146; Agreement No.1, Art. 5) Does IHL provide for the possibility of prosecuting war criminals before an international tribunal? Are the prosecution of war criminals before an international tribunal and its concurrent jurisdiction compatible with the obligation of States under IHL to search for and prosecute war criminals? (GC I-IV, Arts 49/50/129/146 respectively)
- d. Will the ICTY have to qualify the conflict in fulfilling its mandate?
- e. Were the different armed conflicts in the former Yugoslavia, even those of a purely internal character, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the establishment of a tribunal to prosecute violations of IHL a proper measure to stop that threat? Can we today say whether it contributed to the restoration of peace in the former Yugoslavia? Does that (the final result) actually matter? Doesn't the prosecution of (former) leaders make peace and reconciliation more difficult? Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Could the same be said of gross violations of human rights outside armed conflicts?
- f. May the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a "court established by law"? Is the creation of a tribunal competent to try acts committed before it was established itself violating the prohibition (in IHL and Human Rights Law) of retroactive criminal legislation? How, apart from a resolution of the Security Council, could the ICTY have been established? What are the advantages and disadvantages of other methods?

- g. Is the establishment of an International Tribunal only for the former Yugoslavia a credible measure to increase respect for IHL? At least if the Security Council is willing to establish additional tribunals in similar future cases? Is it reasonable to expect the Security Council to establish similar tribunals in all similar cases? Can one imagine a tribunal not competent to decide when it is competent?
- h. Under IHL and the Statute of the tribunal, does the ICTY relieve States from their obligation to search for and prosecute war criminals?
- i. Is the Statute of the ICTY penal legislation or does it simply provide rules of competence of the ICTY? Even when it applies to non-international armed conflicts?
- j. Can you imagine why the Statute does not refer to grave breaches of Protocol I? Is there any possible justification for this omission, taking into account that the former Yugoslavia and all its successor States are Parties to Protocol I and that the parties to the conflicts have undertaken to respect large parts of it regardless of the qualification of the conflict? How could the ICTY nevertheless try grave breaches of Protocol I?

[See Case - Former Yugoslavia, Special Agreements Between the Parties to the Conflicts]

- k. Has the ICRC a right to visit an accused detained by the ICTY? Must it be notified of sentences as a de facto substitute of the Protecting Power? (GC I and II, Art. 10(3); GC III, Arts 10(3), 107 and 126, GC IV, Arts 11(3), 30, 74 and 143; P I, Art. 5(4)). If you were the ICRC, would you try to visit war criminals?
- l. Do those detained under the authority of the ICTY (pending trial or having been sentenced) lose IHL status as protected civilians or prisoners of war if they had such status before being arrested in the former Yugoslavia? Is it lawful to deport a civilian arrested in the former Yugoslavia to the Hague to stand trial? (GC III, Art. 85; GC IV, Arts 49 and 76(1); P I, Art. 44(2))
- m. Does it weaken the credibility of IHL if the ICTY cannot gain custody over the major violators of IHL in the former Yugoslavia? Do indictments by the ICTY have an impact if arrest warrants are not enforced by States?

18. During the whole conflict in Bosnia-Herzegovina, soldiers who fell into the power of adverse parties and civilian men of fighting age were rounded up in waves of “ethnic cleansing” or to increase the number of persons to be exchanged. Those persons were generally held together; the ICRC often had access to them and was able to register them. From the beginning of the conflict, the parties had been quick to establish “exchange commissions” which drew up lists – or used those provided by the ICRC – of all prisoners available in order to barter with the opposing forces; in many cases civilians were arrested solely for exchange purposes, sometimes for releasing them to impress international celebrities planning a visit in the

region and asking for a gesture. Prisoners were sometimes traded even for fuel or alcohol. Partly because of the length of the conflict and the intermingling of civilians and combatants among the prisoners, humanitarian organizations were often present during those negotiations, facilitating the conclusion of “deals”, and trying to ensure a minimum of humane treatment during such exchanges. The ICRC was also ready to be present at exchanges if certain conditions for the detainees were respected and if the institution was allowed to interview detainees in private to ensure that their choice of destination was respected by the parties.

- a. Which of the mentioned categories of prisoners may be detained under IHL? When must they be released? Is it acceptable under IHL to exchange prisoners who have to be released? To exchange prisoners who do not have to be released? (GC III, Art. 118; GC IV, Arts 37, 41-43, 76, 78 and 132; P I, Art. 85(4)(b))
- b. From a humanitarian and moral point of view, what are the advantages and disadvantages of prisoner exchanges? If two parties exchange all (known) prisoners (of a certain category)? If they exchange one prisoner for another? How can the risk that persons are rounded up just in view of an exchange be avoided? Do hidden or unregistered prisoners have a greater or a smaller “value” on the “exchange market”?
- c. Should humanitarian organizations be present during exchange negotiations? During the actual exchanges? What are the advantages and disadvantages of their presence? What minimum conditions should be fulfilled before a humanitarian organization or representatives of the international community accept to organize, supervise, or monitor exchanges?
- d. What are the reasons for the ICRC to register the prisoners it visits? Should lists drawn up after such registration be transmitted to the detaining authorities? To the adverse side? Even if it is in view of exchange negotiations? Is that provided for in IHL? Are there exceptions? Do such lists reduce the risk that persons are rounded up just in view of exchanges? Does a transmission to the adverse party not incite the detaining party to hide prisoners it does not want to exchange from the ICRC? (GC III, Arts 122 and 123; GC IV, Arts 137 and 140)

19. In the spring of 1995, Sarajevo was again entirely cut off from vital supplies and came under heavy fire from Bosnian Serbs violating once more an agreement upon a heavy weapons exclusion zone established by the UN Security Council in February 1994. This time, however, after a UN ultimatum went unacknowledged, NATO reacted with air strikes against Bosnian Serb ammunition stocks in the Pale area. Bosnian Serb forces responded by arresting some 350 UN military observers and UNPROFOR personnel stationed on territory they controlled. Some of those persons were held on or near possible military objectives. ICRC delegates gained access to only some of them and to Bosnian Serb soldiers captured by UNPROFOR when they tried to attack one of UNPROFOR’s outposts. The UN personnel were finally released after long negotiations.

After another shelling of the Sarajevo marketplace, a joint British/French rapid reaction force was deployed on Mount Igman to enforce access for relief convoys to Sarajevo, and NATO launched air strikes against Bosnian Serb communication posts, arms storehouses, weapons factories, and strategic bridges. A water

reservoir was also struck, and a pregnant woman was wounded by glass splinters from a hospital window that blew up under the shock created by one of the aforementioned bombings. Two French NATO pilots who had to abandon their military aircraft by parachute after it had been shot down by Bosnian Serb forces were captured by Bosnian Serb forces.

- a. Is IHL applicable to NATO air strikes? Even though they only enforce UN Security Council resolutions and act in defence of the inhabitants of Sarajevo? Is IHL of international armed conflicts applicable or is it IHL of non-international armed conflicts? (GC I-IV, Art. 2 and preamble para. 5; P I, Art. 1) Did all the mentioned NATO air strikes comply with IHL? Even when a water reservoir was damaged and a pregnant mother hurt? (P I, Arts 51, 56 and 57, CIHL Rules 15 and 22) Are hospitals and pregnant mothers not specially protected by IHL? (GC I, Arts 16 and 18, CIHL Rules 28, 30, 134)
- b. Is the UN a party to the Conventions and Protocols? Can the UN conceivably be a Party to an international armed conflict in the sense of Art. 2 common to the Conventions? For the purposes of the applicability of IHL, can the UN forces be considered as armed forces of the contributing States (which are Parties to the Conventions), and can any hostile acts be considered an armed conflict between those States and the party responsible for the opposing forces?
- c. Are members of UNPROFOR detained by Bosnian Serb forces prisoners of war or hostages? (GC III, Art. 4; GC IV, Arts 4 and 34) May they be detained? May they be held in a facility considered as a military objective? (GC III, Art. 22; GC IV, Art. 28, CIHL Rule 121) Has the ICRC a right to visit them? Even if they are not prisoners of war? If they are hostages? If IHL is not applicable? If IHL of non-international armed conflicts is applicable? Must they be released? When? Why would the UN object to their personnel being qualified as prisoners of war?
- d. Are Bosnian Serb soldiers captured by UNPROFOR prisoners of war? Even if UNPROFOR captured them in an act of self-defence?
- e. Did the shooting down of the French NATO aircraft violate IHL? May the Bosnian Serb soldiers who shot them down be punished for that attack?
- f. Are the French pilots detained by Bosnian Serb forces prisoners of war, "UN experts on mission" (protected by the relevant multilateral convention), or hostages? (GC III, Art. 4; GC IV, Arts 4 and 34; CIHL Rule 96) Is France engaged in an international armed conflict against Bosnian Serbs?
- g. May the French pilots be detained? Has the ICRC a right to visit them? Must they be released? When? Why would France object to their qualification as prisoners of war? If you were the French pilots, would you prefer to be treated as a prisoner of war under Geneva Convention III or to be protected under the UN Convention on the Safety of UN and Associated Personnel which makes it a crime to attack UN personnel

and establishes a duty not to detain them? What are the advantages and disadvantages of both options regarding treatment, repatriation, and the chances that your status is accepted and respected by the enemy?

[See Case - Convention on the Safety of UN Personnel]

20. Since 1992, Srebrenica and its surroundings, with nearly 40,000 inhabitants and displaced persons, were an enclave held by Bosnian government forces, surrounded and regularly attacked by (but sometimes also attacking) Bosnian Serb forces. In 1993, Srebrenica was declared a "safe area" by the UN Security Council, but it was not demilitarized, continued to be submitted to indiscriminate attacks and insufficient relief was brought in. The only expatriate presence was some 300, mainly Dutch, UNPROFOR peace-keepers. International humanitarian organizations failed to establish a permanent expatriate presence, or abandoned it because they lacked opportunities to develop serious assistance or protection activities. In summer 1995, peace negotiations showed a tendency to divide Bosnia-Herzegovina into a Serb entity in the North and the East and a Croat-Muslim entity in the West and the Centre. Srebrenica is located in the East.

In July 1995, military pressure on Srebrenica increased into a full-fledged offensive with tanks and indiscriminate artillery bombardment. Despite requests by Bosnian government forces (also taking the form of threats, hostage-taking, and attacks against peace-keepers), the Dutch UNPROFOR battalion refused to respond to the Bosnian Serb offensive against Srebrenica. Only on July 11, when Srebrenica had practically already fallen, US military airplanes destroyed one Bosnian Serb tank outside Srebrenica.

12,000-15,000 men fled Srebrenica, many of them with their weapons, through the woods towards Bosnian government controlled territory. At least 5000 of those men never arrived to that territory, but were killed during Bosnian Serb attacks on the column, which also occurred after men surrendered. Some of them even committed suicide in despair.

On July 12, Srebrenica fell. Nearly 26,000 men, women, and children tried to take refuge at the UNPROFOR base of Potocari. There, however, Bosnian Serb forces rounded up women and children and sent them by bus toward the front-line, which they often had to cross on foot while exhausted and amid fighting. More than 3000 boys and men of military age were separated from the women and children and arrested, before the eyes of Dutch UNPROFOR soldiers, by the Bosnian Serb forces allegedly to check whether they had committed war crimes. Only a few men who were wounded and later visited by the ICRC and those who managed to escape were ever seen again, and reported that all others had been summarily executed.

The ICRC, which had not been allowed by Bosnian Serb forces to be present during the events, concentrated on the reception of the displaced on Bosnian government-controlled territory and registered all names of missing men given by their families. The ICRC assumed that at least more than 3000 men arrested at Potocari had to be in Bosnian Serb detention and undertook all possible bilateral steps with the Bosnian Serb authorities to gain access to those prisoners, to monitor their conditions of detention, to register them,

and to inform their worried families. However the Bosnian Serb authorities gave evasive answers and used delaying tactics, as all parties had often done during the conflict. Towards the end of July, when the ICRC was finally given access to Bosnian Serb prisons, it found only very few detainees from Srebrenica. The ICRC, however, did not yet abandon the hope that the others were secretly detained and continued to press Bosnian Serb authorities for access. Only when the ICRC was able to see all prisoners in Bosnia-Herzegovina, after the signing of the Dayton Peace Agreement (See *infra*, point 21.), did it come to the conclusion that the overwhelming majority of the (as of July 1997) more than 7000 missing people from Srebrenica had been killed, mainly after arrest or capture.

- a. Should humanitarian organizations have maintained an expatriate presence in Srebrenica, even when the activities they were able to develop did not justify such a presence? At least for reasons of “passive protection” of the population and to show them that they were not forgotten? Does such “passive protection” work?
- b. How could the UN Security Council have avoided the deaths of 7000 inhabitants of Srebrenica? By not declaring Srebrenica a safe area? By demilitarizing it? By changing the mandate of UNPROFOR? By drastically increasing the number of UNPROFOR personnel to be stationed in Srebrenica? Could it have avoided the massacre without avoiding the fall of Srebrenica? How should it have reacted to the fall in order to avoid the massacre?
- c. Has IHL failed in Srebrenica? How could one have made sure that it worked? Does the case of Srebrenica show the limits of IHL? Does it show that, in certain cases where *jus in bello* is not respected, only *jus ad bellum* contains a solution?
- d. How should the Dutch peace-keepers have reacted to the separation of men from women and children and to the arrest of the former? Was that a violation of IHL?
- e. How could humanitarian organizations and human rights organizations have reacted to the news about the fall of Srebrenica in order to avoid the massacre? Particularly if their analysis of the situation led them to the conclusion that the Bosnian Serb forces would slaughter any Bosnian Muslim men they arrest?
- f. Was the reaction of the ICRC to the events of Srebrenica wrong? What could it have done if it had correctly analysed the situation and arrived at the conclusion that the Bosnian Serb forces slaughtered any Bosnian Muslim men they arrested? Should the ICRC at least have abandoned its line when the first allegations of massacres by survivors were collected? Would that have helped any victims of the conflict?

Paragraphs 21 to 30

21. Following the NATO airstrikes and successful military offensives of Croatian and Bosnian government forces in the Croatian Krajinas and Western and Central Bosnia, the international community, led by the US,

persuaded the parties to conclude a cease-fire on October 5, 1995, and after considerable pressure and exhausting negotiations with the Presidents of Bosnia-Herzegovina, Croatia, and Serbia (the latter two also representing the Bosnian Croats and Serbs) the Dayton Peace Agreement was reached in Dayton, Ohio, on November 21 and signed in Paris, on December 14. Military aspects of the agreement had to be implemented by IFOR, a NATO-led international implementation force, with powers and manpower much greater than UNPROFOR and a mandate clearly permitting it to use force in implementing the Agreements.

One of the crucial humanitarian points on the agenda of those having to implement the peace agreement was the release of all detainees. Annex 1A of the Dayton Agreement on the Military Aspects of the Peace Settlement contains Article IX on "Prisoner Exchanges", which obliges the parties to release and transfer by January 19, 1996 all prisoners in conformity with IHL. They are bound to implement a plan to be developed for this purpose by the ICRC and fully cooperate with the latter. They must provide a comprehensive list of all prisoners they hold and give full and unimpeded access not only to all places where prisoners are kept but also to all prisoners by private interview at least 48 hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner. Notwithstanding those obligations, "each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities."

Despite this commitment of the parties, the process lasted well beyond the agreed time frame and was made all the more arduous by the parties' reluctance to abandon their practice of exchanging detainees and the continuation of negotiations at the local level. The Bosnian government, in addition, objected to a global release on the grounds that no light had yet been shed on the fate of thousands of people who had disappeared after the fall of Srebrenica. Throughout the process, ICRC delegates visited and registered new detainees held by all the parties, building up a comprehensive view of the detention situation in Bosnia-Herzegovina, establishing lists of their own and carrying out private interviews. In January, some 900 prisoners about which the parties had notified the ICRC were released by the stated deadline. However, the ICRC had thereafter to initiate a phase of intensive diplomatic pressure in order to obtain the release of the remainder, informing the political and military representatives of the international community, including IFOR, NATO, and the US of the failure of the parties to fulfil their obligations. Detainees still behind bars were declared by the detaining parties to be held on suspicion of war crimes, although in most of the cases the ICRC was not aware of any proceedings against them either at the national level or through the ICTY. A breakthrough was finally achieved at the Moscow ministerial meeting of March 23, 1996, at which the ICRC President and the High Representative (of the international community, a post created by the Dayton Peace Agreement to oversee civilian aspects of its implementation), placed the issue of release of detainees clearly on the table. The international community was not ready to pledge money for the reconstruction of Bosnia and Herzegovina before this important aspect of the Dayton peace agreement was implemented. The results

were almost immediate. On April 5, the parties finally agreed that the remaining detainees against whom there were no substantiated allegations of war crimes would be released within a day, while accusations of war crimes were checked by ICTY. This was implemented.

[See Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities]

- a. Taking into account its title reading “prisoner exchanges”, does Art. IX of Annex 1-A provide for a unilateral obligation to release prisoners? Is the obligation unilateral under IHL or may it be subject to reciprocity? May the Dayton Agreement differ from IHL, subjecting the obligation to reciprocity? (GC III, Arts 6 and 118; GC IV, Arts 7 and 133; CIHL Rule 128; Agreement No.1, Art. 2(3)(2))
- b. Does Art. IX go beyond the obligations provided for by IHL? (GC III, Arts 118, 122, 123 and 126; GC IV, Arts 133, 134, 137, 138, 140 and 143; CIHL Rule 128)
- c. Is Art. IX compatible with the obligations provided for by IHL in the case of grave breaches? Must a Party release a prisoner it suspects of a war crime but for whom the ICTY does not request arrest, detention, surrender, or access, at the end of the “period of consultations” under Art. IX(1)? Under IHL? May a Party release such a person under IHL? Was the further agreement of the Parties, concluded in Rome, under which no person may be retained or arrested under war crimes charges, except with the permission of ICTY, compatible with IHL? Can you imagine why the US urged the Parties to conclude such an agreement? (GC III, Arts 118, 119(5) and 129-131; GC IV, Arts 133 and 146-148; CIHL Rules 128 and 158)
- d. Why did the ICRC refuse to link the release of prisoners with the problem of missing persons? Is not a missing person for whom a testimony of arrest by the enemy exists or whom the ICRC once visited, a prisoner to be released under IHL?
- e. What are the risks for a humanitarian organization like the ICRC when the massive international political, economic, and even military pressure are the only reasons why it managed to carry out a humanitarian operation like the release of all prisoners (which is part of the implementation of IHL)? In particular, if that pressure is mainly directed at one side? Is that compatible with the Red Cross principles of neutrality and impartiality? Could the ICRC have avoided constantly informing the international community about the (extent of) non-compliance of each party with its obligations? Could the ICRC have pursued its traditional bilateral and confidential approach with each party separately?

22. When the conflict in Bosnia-Herzegovina ended, families continued to report nearly 20,000 missing persons [among them, as of July 1997, 16,152 Bosnian Muslims (including more than 7000 from Srebrenica), 2331 Bosnian Serbs, and 621 Bosnian Croats]. Article V in Annex 7 of the Dayton Peace Agreement stipulates that: “The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the

identities, whereabouts and fate of the unaccounted for.” Art. IX(2) of its above-mentioned Annex 1-A furthermore obliged the Parties to give each other’s grave registration personnel, “within a mutually agreed period of time”, access to individual and mass graves “for the limited purpose of proceeding to such graves, to recover and evacuate the bodies of deceased military and civilian personnel of that side, including deceased prisoners.”

On this basis, the ICRC proposed that the former belligerents set up a Working Group on the Process for Tracing Persons Unaccounted for in Connection with the Conflict on the Territory of Bosnia-Herzegovina – a convoluted title reflecting the nature of the political negotiations that led to the establishment of this body. While the Parties endorsed the proposal itself, they engaged in endless quibbling over the wording of the Rules of Procedure and of the Terms of Reference drafted by the ICRC. Nevertheless, the Working Group, which is chaired by the ICRC, has met ten times in 1996 in the presence of representatives of other international institutions involved, Croatia, and the Federal Republic of Yugoslavia. Most of the tracing requests registered by the families have been submitted, during sessions of the Working Group, to the Party responsible (16,000 to the Bosnian Serbs, 1700 to the Bosnian Muslims, and 1200 to the Bosnian Croats). The Working Group has adopted a rule whereby the information contained in the tracing requests, as well as the replies that the Parties are called on to provide, are not only exchanged bilaterally between the families and the Parties concerned through the intermediary of the ICRC, but are also communicated to all the members of the Working Group, that is, to all the former belligerents and to the High Representative. Since 1996, the ICRC has submitted to the concerned Parties close to 20 000 names of missing persons, requesting them to provide the information necessary to clarify their fate, in conformity with their obligations under the Dayton Agreement. (See <http://www.icrc.org/eng>)

a. Which elements of the ICRC action to trace missing persons in Bosnia-Herzegovina go beyond IHL? Under IHL, does a party to an international armed conflict have, at the end of the conflict, an obligation:

- to search for persons reported missing by the adverse party?
- to provide all information it has on the fate of such persons?
- to identify mortal remains of persons it must presume to have belonged to the adverse party?
- to provide the cause of death of a person whose mortal remains it has identified?
- to inform unilaterally about the results of such identification?
- to return identified mortal remains to the party to which the persons belonged?
- to properly bury identified and non-identified mortal remains?

- to provide families of the adverse side access to graves of their relatives?

(GC I, Arts 15-17; GC III, Arts 120, 122 and 123; GC IV, Arts 26 and 136-140; P I, Arts 32-34; CIHL, Rule 114-116)

- b. Why does the ICRC only submit cases of missing persons registered by their families? Does IHL support that decision? Does IHL also give a party the right to submit tracing requests? Has the ICRC an obligation to accept such requests? (GC I, Art. 16; GC III, Arts 122(3), (4) and (6) and 123; GC IV, Arts 137 and 140; P I, Art. 32; CIHL Rule 116)
- c. What are the reasons, advantages, and risks regarding the solution to communicate all tracing requests and replies to all members of the ICRC chaired Working Group? Does that prevent politicization?
- d. Does Art. IX(2) go beyond the obligations provided for by IHL? Does this provision provide for a unilateral obligation on each side to give the other side's grave registration personnel access? May a party use evidence for war crimes obtained by its grave registration personnel acting under Art. IX(2) in war crimes trials? (P I, Art. 34; CIHL Rules 114-116)

23. During the conflicts in Croatia and Bosnia-Herzegovina, the ethnic Albanian Kosovans spoke out in favour of independence for Kosovo and set up parallel health and educational facilities in the province. Their resistance was essentially non-violent. The Yugoslav authorities kept military control over the whole Kosovo. Repression mainly consisted of short-term detention, administrative and police harassment. The Kosovo Liberation Army (UCK) was formed in the mid-1990s; it urged armed resistance against the Serbs. In 1996, it started to carry out armed attacks against the Serbian police forces in Kosovo, which struck back at UCK militants with violence.

- a. Can this situation be qualified as an armed conflict? If so, is it a non- international or an international armed conflict? Can the UCK be considered a national liberation movement? (GC I-IV, Arts 2 and 3; P I, Art. 1(4); P II, Art. 1)
- b. Can the UCK armed attacks against the Serbian police forces and the police attacks against UCK members be considered as attacks against civilians? (P I, Arts 43, 50 and 51(3); CHIL Rules 1-6)

24. The conflict escalated in February 1998. The UCK wrested temporary control over parts of Kosovo. Serb forces and ethnic Albanian independence fighters clashed chiefly in the Drenica region, where the Serbian police forces and the Yugoslav army bombed several villages, expelling the inhabitants from areas in which the UCK was operating. Nearly 2,000 people died and almost 300,000 fled as a result. In March 1998, the Security Council reacted by adopting resolution 1160 (1998) condemning the excessive use of force by the Serbian police forces against civilians and establishing an arms embargo. On 23 September, it adopted

resolution 1199 (1998), in which it demanded a cease-fire in Kosovo, the withdrawal of Serbian forces and the opening of direct negotiations. The resolution referred to the conflict as a threat to peace and security in the region.

- a. Can this situation be qualified as an armed conflict? If so, is it a non-international or an international armed conflict? Can the UCK now be considered a national liberation movement? Did the Security Council resolutions influence your answer? (GC I-IV, Arts 2 and 3; P I, Preamble para. 5 and Art. 1(4); P II, Art. 1)
- b. Could civilians be expelled on the grounds that UCK fighters had to be isolated? If the deportation was intended to shield them from the fighting? Is deportation a war crime? (GC IV, Arts 49 and 147; P II, Art. 17; ICC Statute, Art. 8(2)(a)(vii) and (2)(e)(viii)) [See The International Criminal Court, [Part A.]]

25. The period between April and August 1998 saw no let-up in the fighting between Yugoslav troops and ethnic Albanian independence fighters on the territory of Kosovo. On 15 May 1998, Yugoslav President Milosevic and Kosovo Albanian leader Ibrahim Rugova met under the auspices of American mediator Richard Holbrooke. Under the threat of NATO bombardments, the mediation resulted in October in President Milosevic's agreement to withdraw Serbian forces, to call a halt to the fighting and to accept the deployment of 2,000 unarmed OSCE monitors in Kosovo. The UCK rejected the agreement. Nevertheless, on 26 October 10,000 Serbian policemen withdrew from Kosovo and NATO suspended its threat to conduct air raids. In December 1998, renewed fighting broke out between the UCK and Serbian forces.

On what principles of IHL can third States or international organizations propose or demand the deployment of monitors? (GC I-IV, Art. I, Arts 8/8/8/9 and 10/10/10/11 respectively; P I, Art. 89) What was the point in dispatching unarmed monitors to ascertain compliance with IHL? What could the monitors do if the Serbian authorities violated IHL? If UCK did so? What would have been the advantages and disadvantages of deploying armed monitors?

26. On 30 January 1999, NATO announced that it would carry out air strikes against the territory of the Federal Republic of Yugoslavia (FRY) if the latter did not meet the demands of the international community. Negotiations were held between the parties to the conflict from 6 to 23 February in Rambouillet and from 15 to 18 March in Paris. The resulting peace agreement was agreed by the Kosovo Albanian delegation. The Serbian delegation rejected it.

NATO considered that all efforts to reach a negotiated political settlement to the crisis in Kosovo had failed and decided to launch air strikes against the FRY, a step announced by NATO Secretary General on 23 March 1999. On the same day, the Federal Republic of Yugoslavia published a decree stating that the threat of war was imminent; the next day it declared a state of war.

[See Federal Republic of Yugoslavia, NATO Intervention]

- a. Was there an international armed conflict between Yugoslavia and NATO? Between Yugoslavia and each of the NATO member States? Between Yugoslavia and each of the States participating in the air strikes? Was there a declaration of war? Is a declaration of war needed for international humanitarian law to apply?
- b. Was the law of international armed conflict applicable to NATO forces, even though their objective was to protect Kosovo Albanians from Serbian repression? Would the answer be the same on the hypothesis that the bombings were the only means of protecting the Kosovans from genocide? (GC I-IV, Arts 1 and 2; P I, Preamble para. 5)
- c. Does the disputed lawfulness of NATO air strikes, without any armed aggression on the part of Yugoslavia, and of Security Council authorization make the applicability of IHL to those attacks open to question? (P I, Preamble para. 5)

27. The air strikes lasted a little less than three months, from 24 March to 8 June 1999. They gave rise to several controversial incidents, some of which are described below.

A. On 12 April, a train transporting civilian passengers was destroyed as it came out of a tunnel on a bridge near Grdelica; 10 civilians were killed and at least 15 wounded. The United States said that its intention had been to destroy the bridge, which was part of Serbia's communications network, and that the pilot would not have seen the train while aiming at the bridge.

B. On 14 April, a convoy of ethnic Kosovo Albanians fleeing to Djakovica was attacked (according to the Yugoslav authorities, between 70 and 75 civilians were killed and more than one hundred wounded). NATO explained that the British pilot, who was flying at high altitude to avoid Yugoslav anti-aircraft guns, thought he was attacking a convoy of armed and security forces that had just destroyed a number of Albanian villages to the ground.

C. The Pancevo petrochemical complex was bombed on 15 and 18 April, with no loss of life.

D. Electricity-generating and transmitting stations were repeatedly attacked, the aim being, according to some NATO officials, to cut off power to Yugoslavia's military communications system; according to others, it was to stir civilian unrest against President Milosevic by depriving the population of electrical power.

E. The bridge over the Danube in Novi Sad (located hundreds of kilometers from Kosovo) was destroyed.

F. The Chinese embassy in Belgrade was destroyed (3 civilians killed, 15 wounded). The United States explained that this was a mistake caused by their intelligence services failing to accurately situate the Yugoslav government's supply office, which was the intended target of the attack.

G. On 23 April, just after 2 a.m., NATO deliberately bombed a Radio Television Serbia building in Belgrade; 16 people died and another 16 were seriously wounded. Certain NATO representatives justified the attack on the grounds that the building was also used for military transmissions. Others, including the British Prime Minister, said that Yugoslav media propaganda enabled President Milosevic to stay in power and encouraged the population to take part in the violence against the Kosovans.

a. Analyze each of the above attacks so as to determine whether the controversy they gave rise to refers to whether they were aimed at a military objective, whether collateral civilian losses were admissible or whether the necessary precautions had been taken in the attack. Where different versions of the facts or different explanations have been given, deal with each separately. (P I, Arts 51, 52(2) and 57; CIHL Rules 14-24)

b. Can an attack that “mistakenly” (contrary to the attacker’s intent) targets or affects civilians violate IHL? Can it constitute a grave breach of IHL? A war crime? (P I, Arts 57 and 85(3); ICC statute, Arts 30 and 32; CIHL Rules 15-24)

c. Given that there was no international armed conflict between the United States and China, were the Chinese diplomats in Belgrade protected under IHL? Were they protected persons? (GC I-IV, Art. 2; GC IV, Art. 4; P I, Art. 50)

28. Furthermore, throughout the campaign, NATO forces used projectiles containing depleted uranium and fragmentation bombs against military objectives. After the conflict, the remnants of those munitions were deemed to put the civilian population and NATO’s international staff and troops deployed in Kosovo in danger.

Are such munitions prohibited by IHL? Can the use of a means of warfare be prohibited against military objectives or combatants because of its long-term effects on the combatants? On the region’s civilian population? On the environment? (P I, Arts 35, 36, 51(4)(a) and (5)(b) and 55; CIHL Rules 44-45, 70)

29. During NATO air strikes, three US soldiers stationed in Macedonia fell into the power of Yugoslavia. It was not known whether they were abducted in Macedonia or had mistakenly crossed into Kosovo. The ICRC was able to visit them only after four weeks of intense representations.

Are the US soldiers prisoners of war? Do doubts about the circumstances of their arrest in any way affect their status? When should they have been repatriated? If they were abducted in Macedonia, should they have been released before the end of the hostilities? (GC III, Arts 2, 4, 118 and 126(5); CIHL Rule 128)

30. With the launch of air strikes, the forces of the Federal Republic of Yugoslavia and of the Republic of Serbia stepped up their attacks against the Kosovo Albanians; in the following months they forcibly expelled over 740,000 ethnic Albanian Kosovans, about one third of the total ethnic Albanian population. An

undetermined number of ethnic Albanian Kosovans were killed during operations conducted by the Yugoslav and Serbian forces. A smaller number were killed in NATO air strikes.

- a. Was it unlawful for the Yugoslav and Serbian forces to forcibly expel the population of Kosovo? (GC IV, Arts 49 and 147; P II, Art. 17; ICC Statute, Arts 8(2)(a)(vii) and (2)(e)(viii))
- b. If so, was the forced displacement of the population a war crime or a crime against humanity? (ICC Statute, Arts 7(1)(d), (2)(d), 8(2)(a)(vii), (2)(e)(viii))
- c. Can it be said that acts of genocide were committed against the population of Kosovo? (ICC Statute, Art. 6)
- d. Can deportation be justified by NATO air strikes and by the fact that UCK was allied with NATO and that the Albanian population of Kosovo wanted to be liberated by NATO? Since the massacres and population displacements intensified when the air strikes started, can NATO be partly held responsible for the plight of the civilian population?
- e. Does IHL also protect the Kosovans against NATO? (P I, Arts 49(2) and 50)

Paragraphs 31 to 37

31. The ICRC withdrew its 19 representatives from Kosovo on 29 March 1999 because of the worsening security situation brought about by the Serb paramilitary forces. It remained active, however, in the neighboring republics, assisting Kosovan refugees. After having negotiated its return to Kosovo with the Serbian authorities and following a survey on security conditions, the ICRC re-opened its office and resumed its humanitarian activities in the province in late May 1999.

- a. Was the ICRC entitled to be present in Kosovo? In Belgrade? (GC I-IV, Art. 3, Arts 9/9/9/10 respectively; GC III, Art. 126(5); GC IV, Art. 143(5))
- b. Was the ICRC entitled to be in Kosovo by virtue of IHL or by virtue of a bilateral agreement with Yugoslavia? Was Yugoslavia obliged to ensure adequate conditions of security for ICRC delegates? (GC III, Art. 126(5); GC IV, Art. 143(5))
- c. Was the ICRC mission in Kosovo a failure because it withdrew? Should the ICRC have withdrawn from all of Yugoslavia? In what circumstances does the ICRC withdraw from a country?
- d. If the ICRC had been able to stay in Kosovo throughout the conflict, what could it have done to help the Albanian population?

32. On 27 May 1999, the Chief Prosecutor of the ICTY, Ms Louise Arbour, issued an indictment against Slobodan Milosevic, charging him with crimes against humanity and violations of the law and customs of war in Kosovo. (See ICTY web site: <http://www.icty.org>)

- a. Why was Slobodan Milosevic not indicted for grave breaches of the Geneva Conventions in Kosovo? (GC IV, Arts 2, 4 and 147)
- b. Given that Slobodan Milosevic in person did not necessarily commit crimes against humanity and violations of the laws and customs of war, by virtue of what principle was the ICTY Chief Prosecutor able to indict him for those crimes? (ICTY Statute, Art. 7) [See UN, Statute of the ICTY [Part C.]]
- c. As head of State, didn't Slobodan Milosevic benefit from immunity for acts committed while he was in office?

33. On 3 June 1999, the Serbian parliament agreed to an international plan that brought an end to the conflict in Kosovo. The plan provided for the deployment of an international force under United Nations auspices, the withdrawal of Serbian forces from Kosovo and the return of refugees. On 10 June 1999, the Serbian forces that left Kosovo were replaced by an international NATO force of 35,000 men mandated by United Nations Security Council resolution 1244 (1999): KFOR. The Security Council resolution also established the United Nations Interim Administration Mission in Kosovo (UNMIK) to administer the territory on a provisional basis. Kosovo was thus placed under international administration but remained under Yugoslav sovereignty. On 21 June, an agreement to demilitarize the UCK was signed between the prime minister of the "provisional government" and the KFOR Commander. All legislative and executive authority relating to Kosovo, including the administration of justice, was conferred on UNMIK and exercised by the Secretary-General's Special Representative (initially Bernard Kouchner, then Soren Jessen-Petersen, and at present [in 2010] Lamberto Zannier).

The end of the bombings did not spell the end to the climate of political violence in Kosovo. Non-Albanians were the victims of acts of violence referred to by some people as "reverse ethnic cleansing". It was in this context that the bodies of 14 murdered Serbs were discovered in the village of Gracko, on 23 July 1999. Although almost 800,000 ethnic Albanian refugees were able to return to their homes, about 200,000 Serbs and Roma people had to leave.

- a. How would you qualify the situation in Kosovo after the withdrawal of the Serbian forces? (GC I-IV, Arts 2 and 3; P I, Art. 1)
- b. Did the "reverse ethnic cleansing" violate IHL? (GC IV, Arts 3, 27 and 32; P II, Arts 4(2)(a) and (b) and 17; CIHL Rules 87 and 90)

c. Does the fact that the Serbian victims of “reverse ethnic cleansing” previously tolerated much harsher abuse of the Albanian population justify the abuse to which they were subjected? Justify a degree of understanding on the part of KFOR and UNMIK for that subsequent abuse? (GC IV, Arts 3, 27 and 33(3); P II, Art. 4(2)(a) and (b))

d. Is Kosovo a territory occupied by KFOR? Even though its deployment was provided for in a Security Council resolution? Even though that deployment was in the interests of the local population? Even though it was agreed to by Yugoslavia? (GC IV, Art. 2; P I, Preamble para. 5)

e. What rules of the Fourth Geneva Convention on occupied territories are incompatible with the objectives of the KFOR and UNMIK presence? What rules might UNMIK find useful? If IHL were applicable, would UNMIK be obliged to prevent the attacks against the minorities in Kosovo? In that case, could all legislative and executive authorities relating to Kosovo, including the administration of justice, be conferred on an international civil servant? (HR, Arts 42 and 43; GC IV, Arts 64-66)

34. At the end of 2000, ethnic Albanians in Presevo Valley (southern Serbia) formed the Ushtria Clirimtare e Presheva, Medvegja e Bujanovc (UCPMB), an armed movement that mirrored the UCK. The movement sought to make Presevo Valley, a 5-kilometer-wide strip of land bordering Kosovo, a part of the province. Although the valley was situated in Serbia, the Yugoslav army had had to withdraw from it under the agreements with KFOR. The population was about 80 per cent Albanian. The UCPMB launched a guerrilla war pitting its forces against those of Serbia.

What is the status of this situation under IHL? What would be its status if the allegations that the UCPMB was equipped and financed by the UCK were true? If the UCK had overall control on the UCPMB? What were KFOR's and UNMIK's obligations towards the UCPMB? (GC I-IV, Arts 1-3; P II, Art. 1)

35. In the Former Yugoslav Republic of Macedonia, the Albanian minority considered that it was not equitably represented on State bodies. There were few Albanian-speakers, for example, in the security forces, even in areas where Albanian-speakers lived in majority. On 16 February 2001, the UCKM (the Macedonian faction of the UCK) started to occupy a few Albanian-speaking villages situated near the borders with Kosovo and Serbia. In March 2001, it started to promote the secession of the north-western part of Macedonia and its Albanian majority. On 14 March 2001, during an Albanian demonstration on the streets of Tetovo, a dozen UCKM members dispersed among the demonstrators shot at the police. The next day, the UCKM shelled the centre of Tetovo, which was controlled by Macedonian forces.

a. How would you qualify this situation under IHL? How would it be qualified if the allegations that the UCKM was equipped and financed by the UCK were true? If the UCK had overall control on the UCKM? (GC I-IV, Arts 2 and 3; P II, Art. 1)

b. Does IHL prohibit UCKM members from mixing with the demonstrators? From attacking, thus scattered among the demonstrators, the Macedonian police forces? (P I, Arts 37 (1)(c), 44(3) and 51(7); CIHL Rule 65)

36. Civilians suffered during hostilities, in particular in the Tetovo region, where it was extremely difficult to obtain food, medicines and other basic necessities. Hundreds of people were forced by the fighting to flee their homes. Issuing an ultimatum, the Macedonian security forces encouraged the Albanian-speaking civilians to leave the villages controlled by the UCKM so that they could attack the combatants without endangering the civilian population. The UCKM often prevented the civilians from leaving.

a. Were the Macedonian authorities obliged to allow supplies into the villages controlled by the UCKM? What prior conditions could they set? Would those conditions have been realistic? (GC IV, Art. 23; P I, Art. 70; P II, Art. 18(2))

b. Were the authorities' efforts to make civilians living in the villages controlled by the UCKM flee lawful under IHL? (GC IV, Arts 49 and 147; P II, Art. 17)

c. Can the UCKM prevent civilians from leaving the villages it controls? (P I, Arts 51(7) and 58; CIHL Rules 22-24)

37. On 13 August 2001, after seven months of clashes between the UCKM rebels and the security forces, all the parties concerned signed a peace agreement that provided for enhanced rights for the Albanian-speaking minority, the disarmament of the UCKM and an amnesty for the rebels. On 22 August, the first NATO contingents were deployed in Macedonia as part of Operation "Essential Harvest", to collect the rebels' weapons. The first UCKM weapons were collected on 27 August 2001.

[The length of this case study reflects the endless waves of conflict that ravaged the Balkans for many years. The authors are hopeful that future events will not add to it.]