

Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities

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.

A. General Framework Agreement for Peace in Bosnia and Herzegovina

[Source: Reproduced *in extenso* in ILM, vol. 35, 1996, p. 75]

Concluded on November 21, 1995 in Dayton (United States) and signed in Paris on December 14, 1995 by the Presidents of the Republic of Bosnia and Herzegovina, the Federal Republic of Yugoslavia and the Republic of Croatia. (This Agreement brought the hostilities on the territory of Bosnia and Herzegovina to an end.)

Annex 1A: Agreement on the Military Aspects of the Peace Settlement

Article IX: Prisoner Exchanges

1. The Parties shall release and transfer without delay all combatants and civilians held in relation to the conflict (hereinafter “prisoners”), in conformity with international humanitarian law and the provisions of this Article.
 - a. The Parties shall be bound by and implement such plan for release and transfer of all prisoners as may be developed by the ICRC, after consultation with the Parties.
 - b. The Parties shall cooperate fully with the ICRC and facilitate its work in implementing and monitoring the plan for release and transfer of prisoners.
 - c. No later than thirty (30) days after the Transfer of Authority [which had to take place on December 19, 1995], the Parties shall release and transfer all prisoners held by them.
 - d. In order to expedite this process, no later than twenty-one (21) days after this Annex enters into force, the Parties shall draw up comprehensive lists of prisoners and shall provide such lists to the ICRC, to the other Parties, and to the Joint Military Commission and the High Representative. These lists shall identify prisoners by nationality, name, rank (if any) and any internment or military

serial number, to the extent applicable.

- e. The Parties shall ensure that the ICRC enjoys full and unimpeded access to all places where prisoners are kept and to all prisoners. The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (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.
 - f. The Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred.
 - g. Notwithstanding the above provisions, 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.
2. In those cases where places of burial, whether individual or mass, are known as a matter of record, and graves are actually found to exist, each Party shall permit graves registration personnel of the other Parties to enter, within a mutually agreed period of time, 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.

B. Tracing Missing Persons in Bosnia and Herzegovina

[Source: Girod C., "Bosnia-Herzegovina: Tracing Missing Persons", in *IRRC*, No. 312, 1996, pp. 387-391]

Every war brings its share of missing persons, whether military or civilian. And every individual reported missing is then sought by a family anxiously awaiting news of their loved one. These families cannot be left in such a state of anguish.

For the truth, however painful it may be, is preferable to the torture of uncertainty and false hope. In Bosnia and Herzegovina civilians were especially affected by a conflict in which belligerents pursued a policy of ethnic cleansing by expelling minority groups from certain regions. Thousands of people who disappeared in combat or were thrown into prison, summarily executed or massacred, are still being sought by their families.

What is a missing person?

International humanitarian law contains several provisions stipulating that families have the right to know what has happened to their missing relatives and that the warring parties must use every means at their disposal to provide those families with information [...]. Taking these two cardinal principles in particular as a basis for action, the International Committee of the Red Cross (ICRC) has set up various mechanisms to assist families suffering the agony of uncertainty, even after the guns have fallen silent.

In any conflict the ICRC starts out by trying to assess the problem of persons reported missing. Families

without news of their relatives are asked to fill out tracing requests describing the circumstances in which the individual sought was last seen. Each request is then turned over to the authorities with whom the person in question last had contacts. This working method means that the number of people gone missing does not correspond to the actual number of conflict victims – a gruesome count which the ICRC does not intend to perform. In Bosnia and Herzegovina, more than 10,000 families have so far submitted tracing requests to the ICRC or to the National Red Cross or Red Crescent Societies in their countries of asylum.

Agreements for Peace in Bosnia and Herzegovina [...]

Prior to the drafting of the General Framework Agreement for Peace in Bosnia and Herzegovina, which the parties negotiated in Dayton, Ohio, in autumn 1995, the United States consulted the main humanitarian organizations. With the ICRC it discussed the release of detainees and the tracing of missing persons. The first of these issues is dealt with in the Annex on Military Aspects of the Peace Settlement, and the second is covered in the Framework Agreement's provisions pertaining to civilians. Thus Article V, Annex 7, of the 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". The terms of this Article take up and confirm the core principles of international humanitarian law.

The Framework Agreement also confers on the ICRC the task of organizing, in consultation with the parties involved, and overseeing the release and transfer of all civilian and military prisoners held in connection with the conflict. The ICRC performed this task in cooperation with the Implementation Force (IFOR) entrusted with carrying out the military provisions of the Framework Agreement.

ICRC action

Despite resistance from the parties, over 1,000 prisoners were returned home. Throughout the operation, which lasted about two months, the ICRC firmly refused to link the release process with the problem of missing persons, just as it had refused to become involved in the reciprocity game the parties used to play during the conflict. The success of the operation was also ensured by the international community, which was convinced that the ICRC was taking the right approach and pressured the parties to cooperate. Since many detainees had been withheld from the ICRC and were therefore being sought by their families, it was important to empty the prisons before addressing the issue of missing persons.

On the basis of the General Framework Agreement for Peace in Bosnia and Herzegovina, the ICRC thus 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 and 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 already met three times in the Sarajevo offices of the High Representative for

Bosnia and Herzegovina[2] in the presence of the ambassadors of the Contact Group on Bosnia and Herzegovina[3], the representative of the presiding member of the European Union[4] and the representatives of Croatia and the Federal Republic of Yugoslavia. These meetings were also attended by IFOR and the United Nations Expert on Missing Persons in the Former Yugoslavia[5].

Despite numerous plenary and bilateral working sessions, it has not been possible to bring the parties to agree on matters of participation and representation (the question under discussion is whether or not the former belligerents are the same as the parties that signed the Framework Agreement) or formally to adopt the Rules of Procedure. However, these Rules have been tacitly agreed on in the plenary meetings, making it possible to begin practical work: more than 10,000 detailed cases of persons reported missing by their families have already been submitted to the parties, which must now provide replies.

In a remarkable departure from the procedure normally followed in such cases, 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. Such a policy of openness is meant to prevent further politicization of the issue and the ICRC intends to pursue it, in particular by issuing a gazette that lists the names of all missing persons and by publishing these names on the Internet. This should prompt possible witnesses to approach the ICRC with confidential information concerning the fate of individuals who have gone missing, which the organization could then pass on to the families concerned.

Indeed, after every war families seek news of missing relatives and the settlement of this question is always a highly political issue. One reason is that for a party to provide information is to admit that it knows something, which may give it the feeling that it is owning up to some crime. Another reason is that the anguish of families with missing relatives is such that they generally band together and pressure their authorities to obtain information from the opposite party, which may be tempted to use these families to destabilize the other side.

The issue of exhumations

As the tragic result of more than three years of conflict, Bosnia and Herzegovina is strewn with mass graves in which thousands of civilians were buried like animals. The graves in the region of Srebrenica are a horrifying example. Displaced families in Tuzla interviewed by the ICRC allege that more than 3,000 people were arrested by Bosnian Serb forces immediately after the fall of the enclave in mid-July 1995. Since the authorities in Pale have persistently refused to say what happened to these people, the ICRC has concluded that all of them were killed.

Families now wish to recover the bodies of their missing relatives in the wild hope of being able to identify them. Before this can be done, however, an ante mortem database[6] must be set up so as to have a pool of

information with which forensic evidence can later be compared. Between the two operations, the bodies must be exhumed, knowing that most of the mass graves in Bosnia and Herzegovina are situated on the other side of ethnic boundaries, which prevents families and the relevant authorities from gaining access to them.

Families are also demanding that justice be done. That is the role of the International Criminal Tribunal for the Former Yugoslavia, set up by the United Nations Security Council while the fighting was still raging in Bosnia and Herzegovina. The Tribunal intends to exhume a number of bodies to establish the cause of death and gather evidence and proof of massacres. However, it is not the Tribunal's responsibility to identify the bodies or to arrange for their proper burial.

Between the families' need and right to know what has become of their missing relatives, and that justice must be done, lie thousands of bodies in the mass graves. While it would probably be unrealistic to imagine that all the bodies buried in Bosnia and Herzegovina could ever be exhumed and identified,[7] the moral issue of their proper burial must still be addressed. Without the cooperation of the former belligerents and of IFOR, however, all discussion remains purely theoretical. Only when people have peace in their hearts and when justice has been done will thoughts of revenge be forgotten and belief in peace and justice be restored in every individual and every community.

Notes: [...]

2. Former Swedish Prime Minister Carl Bildt's appointment to this post was confirmed by the United Nations Security Council shortly before the General Framework Agreement for Peace in Bosnia and Herzegovina was signed in Paris on December 14, 1995. Just as IFOR, which is made up of NATO troops and Russian troops, is entrusted with implementing the military provisions of the Framework Agreement, so it is the task of the High Representative to implement the Agreement's provisions pertaining to civilians.
3. France, Germany, the Russian Federation, the United Kingdom and the United States.
4. Italy at the time of writing.
5. Manfred Nowak, who in 1994 was appointed by the UN Commission on Human Rights as the Expert in charge of the Special Process on Missing Persons in the Territory of the Former Yugoslavia.
6. A database containing all pertinent medical information that can be obtained from families with missing relatives.
7. According to the forensic experts of the American organization, *Physicians for Human Rights*, who exhumed bodies for the International Criminal Tribunal that was set up following the horrific massacres in

Rwanda, the success rate for identifying remains exhumed from a grave containing several hundred bodies is no higher than 10 to 20 percent, providing a detailed *ante mortem* database is available.

Discussion

1.
 - a. In view of its title “Prisoner Exchanges”, does Art. IX of the Dayton Agreement’s Annex 1-A provide for a unilateral obligation to release prisoners? Under IHL, is that obligation unilateral or may it be subject to reciprocity? May the Agreement deviate from IHL by subjecting the obligation to reciprocity? (GC III, Arts 6 and 118; GC IV, Arts 7 and 133) [See also Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B., Art. 2.3(2)]]
 - b. Which provisions of Art. IX(1) go beyond the obligations laid down by IHL? (GC III, Arts 118, 122, 123 and 126; GC IV, Arts 133, 134, 137, 138, 140 and 143)
 - c. Is Art. IX(1)(g) compatible with the obligations laid down by IHL with regard to 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 on war crimes charges except with the permission of the ICTY, compatible with IHL? Can you imagine why the US pressed the Parties to conclude such an agreement? (GC III, Arts 118, 119(5) and 129-131; GC IV, Arts 133 and 146-148)
 - d. Why did the ICRC refuse to link the release of prisoners to the problem of missing persons? Under IHL, is not a missing person for whom a testimony of their arrest by the enemy exists, or who was once visited by the ICRC, a prisoner to be released?
2. Which elements of the ICRC’s activities to trace missing persons in Bosnia and Herzegovina go beyond IHL? Under IHL, does a party to an international armed conflict have an obligation, at the end of the conflict:
 - o to search for persons reported missing by the adverse party?
 - o to provide all information it has on the fate of such persons?
 - o to identify mortal remains of persons it must presume to have belonged to the adverse party?
 - o to inform of the cause of death of a person whose mortal remains it has identified?
 - o to inform unilaterally of the results of such identification?
 - o to return identified mortal remains to the party to which the persons belonged?
 - o to give proper burial to identified and non-identified mortal remains?
 - o to give families belonging to the adverse side access to their relatives’ graves?

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

- a.
 - a. Why does the ICRC only submit cases of missing persons that have been submitted to it by their families? Does IHL support that decision? Does IHL also give a party to a conflict the right to submit tracing requests? Has the ICRC an obligation to accept such requests? (P I, Art. 32; GC I, Art. 16; GC III, Arts 122(3), (4), (6) and 123; GC IV, Arts 137 and 140)
 - b. What are the reasons for, and the advantages and risks of, the solution whereby all tracing requests and replies are to be communicated to all members of the Working Group chaired by the

ICRC? Does that prevent politicization?

1. Does Art. IX(2) go beyond the obligations provided for by IHL? Does this provision place each side under a unilateral obligation to allow the other side's grave registration personnel to have access to graves? May a Party use evidence of war crimes, obtained by its grave registration personnel acting under Art. IX(2), in war crimes trials? (P I, Art. 34)

© International Committee of the Red Cross