

l'ONU des autres charges que lui impose sa responsabilité principale du maintien de la paix.¹³⁵

¹³⁵ Voy. à ce propos MALHURET (Claude), "L'action humanitaire alibi de l'inaction politique ?", *Le Monde*, 20 août 1992, p. 4.

NEW TYPES OF WAR CRIMES AND CRIMES AGAINST HUMANITY: VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

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1. INTRODUCTION

The city of Geneva has long been the heart of the development of international humanitarian and human rights law. It was in Geneva that the principal instruments of humanitarian law were adopted nearly a half-century ago, and here in Geneva, today, that efforts are being made to prevent the continuing massive and systematic violations of human rights occurring in the former republic of Yugoslavia, to put an end to the human tragedy in parts of its territory and in particular in the republic of Bosnia and Herzegovina and to achieve a peaceful just, viable and lasting political settlement of the conflict in the former Yugoslavia.

In this context the present paper attempts to present certain considerations, views and data on the new types of war crimes committed in the former republic of Yugoslavia and the grave breaches of international humanitarian and human rights law.

II. NEW TYPES OF WAR CRIMES AND CRIMES AGAINST HUMANITY

The armed conflict² in the former Yugoslav republics and in particular in the republic of Bosnia-Herzegovina, since March-April 1992, has been marked

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² In the present paper the term "armed conflict" will be used in order to denote "armed conflicts" which are not formally defined as "wars".

by grave breaches of "international humanitarian law"³ or "law of Geneva", and gross, massive and systematic violations of human rights law.

Indeed, serious violations of the rules of international humanitarian law are being committed with cruelty and barbarism throughout the country of the former Yugoslavia. Unspeakable atrocities and the extent of the violence inflicted on the civilian population by all parties is appalling.⁴

Inhuman treatment in the camps and prisons of detention, rapes of women, forced transfer and relocation of the people, the taking of hostages, the looting and destruction of civilian property are some of the every day crimes committed throughout Bosnia-Herzegovina.

A. "Ethnic Cleansing"

The appalling policy and practice of "ethnic cleansing", has led to rape and sexual abuses, summary execution, disappearances, arbitrary detention, deportation and forcible displacement of hundreds of thousands of people on the basis of their religion or national origin and destruction of religious and cultural sites.

The extent of the violence, the intention of the perpetrators and the fact that it is targeted along ethnic and religious groups raises the question of whether the crime of genocide is taking place.

Under Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),⁵ "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war is a crime under international law, which they undertake to prevent and to punish; according to Article II of the Convention "genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical,

³ "Humanitarian law" or "Law of Geneva" is designed to ensure respect, protection and humane treatment of war casualties and non-combatants. D. Bindschedler Robert, A reconsideration of the Law of Armed Conflicts, Report of the Conference on Contemporary Problems of the Law of Armed Conflicts, Geneva 15-20 September 1969, Carnegie Endowment for International Peace, New York, 1971, p. 6.

⁴ A Helsinki Watch Report, Human Rights Watch, War Crimes in Bosnia-Herzegovina, New York, Washington, Los Angeles, London, 1992, p. 1. Also, the resolution 994 (1993) of the Parliamentary Assembly of the Council of Europe, ERESO994, WP, 1403-3/2/93-10-E "on the massive and flagrant violations of human rights in the territory of former Yugoslavia."

⁵ For an analysis of the provisions of the Genocide Convention, see E-I. A. Daes, Protection of Minorities under the International Bill of Human Rights and the Genocide Convention, Xenion, Festschrift fuer Pan, J. Zepos, Athens-Freiburg B/R - Koeln, CH. Katsikalis Verlag, 1973, voll, pp 43 ff. Also the revised and updated "Report on the question of the prevention and punishment of the crime of genocide", elaborated by B. Whitaker, Special Rapporteur of the Sub-Commission, F/CN.4/Sub. 2/1985/6 of 2 July 1985, pp. 1-12, 16-27.

racial or religious group"; further in accordance with Article III of the Convention the following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide, and under Article IV persons committing genocide or any of the other acts enumerated in the aforementioned Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

After an area is occupied by Serbian forces a policy and practice of "ethnic cleansing" often follows. Such a policy and practice is to remove involuntarily all non-Serbs from the occupied area, thereby creating an ethnically homogeneous region to be administered by Serbian authorities.

In some cases residents of villages in particular in northern and eastern Bosnia, were coerced into signing away their property; in others, villages were destroyed and residents were either killed or rounded up to be sent to detention camps.

The Special Rapporteur of the Commission on Human Rights, shares the view of other observers that the principal objective of the military conflict in Bosnia and Herzegovina is the establishment of ethnically-homogenous regions. "Ethnic cleansing" does not appear to be the consequences of the war, but rather its goal. That goal, to a large extent, has already been achieved through killings, beatings, rape, destruction of houses and threats. Such practices have intensified in recent weeks and there is less and less resistance on the part of the non-Serbian population, increasing numbers of whom are ready to abandon everything and to flee their homeland. Late events observed in the region of Prijedor, Doboj and Kotor Varos prove that Serbian leaders in Bosnia and Herzegovina are not ready to desist in their plans. The Muslim and Croatian populations, in the territory controlled by Serbian authorities, live under enormous pressure and terror. Hundreds of thousands of people are being forced to leave their homes and to abandon their belongings in order to save their lives.⁶

The methods used to implement "ethnic cleansing" in several areas vary according to time and place. Some of those persons interviewed by the aforementioned Special Rapporteur, reported that they left due to harassment,

⁶ Report by the Special Rapporteur of the Commission on Human Rights, (CHR) Mr. T. Mazowiecki, A/47/635, S/24766, 6 November, 1992, p. 4.

discrimination and fear, without having personally experienced or witnessed atrocities.⁷

"Ethnic cleansing" was not always carried out at gun point or under direct threat. The general atmosphere of violence, horror and intimidation obliged many people, whose ethnic group was not dominant in a given area, to flee.

Although such atrocities are being committed on a wide scale in Bosnia-Herzegovina, they are by no means restricted to that region. There is evidence and documented cases of "ethnic cleansing" of non-Serbs in Croatia and in the Serbian province of Vojvodina and, in a different manner, in the province of Kosovo. Such practices are followed in many Serbian controlled areas, are premeditated and systematically executed. Most of the civilian authorities in the aforementioned areas have not taken steps to stop or prevent such practices. It has been said that in some instances, they have condoned and encouraged such expulsions.

In this respect, the Helsinki Watch is of the opinion that Serbian civilian and military authorities, as well as paramilitary forces, are implementing a broader policy aimed at the expulsion or extermination of non-Serbian populations in areas under their control.⁸

Although the Serbs have been recognized as the instigator and perpetrators of the policy of "ethnic cleansing" these crimes against humanity are not the monopoly of any one side in the conflict.⁹ Thus, there are reliable reports of violence against Serbs, arbitrary arrest increased and more and more Serbs sought to flee Bosnia.

In defiance of Security Council resolutions the Serb forces in Bosnia and Herzegovina have undertaken a savage campaign of military aggression "ethnic cleansing" and the persecution and torture of civilians. The renewed attacks of Sarajevo are clearly part of a systematic campaign to seize territory and cities.¹⁰

The international community must also be resolute in condemning the odious policy of "ethnic cleansing". According to the view of the present author, the abhorrent practice of "ethnic cleansing" for the reasons mentioned above, should

be considered among the acts defined by Article II as genocide,¹¹ in particular paragraph (c) which states: "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".

B. Rape of women as a war crime

An alarming number of allegations of the widespread occurrence of rape have been made particularly in the context of the conflict in Bosnia and Herzegovina.

Rape is non-consenting sexual relations with another person obtained through physical force, threat or intimidation, in the territory of the former Yugoslavia.

Also rape is an abuse of power and control in which the rapist seeks to humiliate, shame, degrade and terrify the victim. According to one view, rape is one of the methods used to achieve "ethnic cleansing". In this context rape has been used not only as an attack on the individual victim, but intended to humiliate, shame, degrade and terrify the entire ethnic group.

Before 2 April 1992 raping occurred within the occupied parts of Croatia, especially in the present United Nations Protection Forces (UNPROFOR) Sectors East, West and North. The major sites of raping of captured women were private camps held by local Serbian paramilitaries but it should be noted that women from the Vukovar area were raped in the concentration camps of Begejci and Stajicevo situated in Vojvodina, Serbia, during the autumn and winter 1991, in which almost 2000 civilians from the Vukovar were imprisoned. After April 1992, i.e. after the outbreak of the war in Bosnia and Herzegovina mass rapings of predominantly Muslim women became a widespread phenomenon in Bosnia and Herzegovina. Among the most unfortunate consequences of those brutal violations of women's rights are advanced pregnancies and deliveries of unwanted babies.

Numerous reports point to the systematic gang-rape of women and children and to the organized and planned use of these rapes as a commonplace in military measure intended to totally humiliate the enemy and drive it into exodus.¹²

According to reliable information public rapes took place in front of a whole village, designed to terrorize the population and force ethnic groups to flee.

⁷ For the objectives of the "Ethnic cleansing" the methods used to implement it, and the substantial body received describing it, see the Report by the Special Rapporteur Mr. T. Mazowiecki, op. cit. pp. 8-10.

⁸ Helsinki Watch Report, Human Rights Watch, War Crimes, op. cit., pp. 11 and 12.

⁹ Council of Europe-Parliamentary Assembly, Recommendation 1205 (1993), Assembly Debate on 3 February 1993 (26th sitting), p. 1.

¹⁰ Sir David Hannay (United Kingdom) statement on behalf of the European Community and its Member States, A/47/PV.87, 13 Jan. 1993, pp. 27-33.

¹¹ S/RES/780 (1992) preamble paragraph 4, General Assembly Resolution XXVI/47th session, 11 Dec. 1992 and Human Rights Commission resolution L.16/49th session, 17 February 1993 in particular the statement by A.J. Iacovides before the General Assembly, A/47/PV.87, 13 Jan. 1993, pp. 60-63.

¹² E.L. Fleetwood, written question No. 349.ADOC.6776, 18 Feb. 1993, Parliamentary Assembly, Council of Europe, Strasbourg.

Many women had been locked up for months in hotels, gymnasiums and factories. They have been gang-raped and released only when they have become pregnant to ensure maximum chaos and hatred. Thus, the rape of women, has become a weapon of the deliberate destroying of minority groups.

It has been also stated, that the systematic rape of women, and children as a means of humiliating them had contributed to ethnic cleansing through enforced procreation. Subsequently, it is one of the numerous aspects of war tragedy in Bosnia-Herzegovina.¹³

According to an opinion rape was being used as an instrument of "ethnic cleansing".¹⁴ Specific cases which have been investigated by impartial sources such as UNPROFOR Civilian Police (UNCIVPOL), the Office of the United Nations High Commissioner for Refugees (UNHCR), Helsinki Watch and Amnesty International demonstrate that rape is a serious problem in the armed conflict in the former Yugoslavia.

The identity of the victims, who have included even children, young girls, old women and members of religious orders, and the circumstances in which these crimes have been committed indicated that rape is deliberately practiced as yet another method of expressing contempt and hatred for the ethnic group which the unfortunate victims are made to symbolize.

The European Community's (EC) investigating mission, the first official effort to collect evidence for a Nuremberg-like war crimes tribunal, which might be established by Security Council resolution, was assigned its task by the EC's 12 government leaders, who issued a harsh condemnation of these "acts of unspeakable brutality" at their summit meeting in Edinburgh December 1992.

The EC investigators¹⁵ spent five days in Croatia in late December interviewing Muslim refugees. They also collated other eyewitness accounts, first gathered by the Red Cross and other humanitarian aid groups on the scene.

According to initial findings of the aforementioned EC's investigating mission, rape cannot be considered in isolation from other atrocities which are

a feature of this armed conflict. Life and property are being destroyed on a massive scale, with violations of the most basic human rights.

Also, the aforementioned mission was aware, in examining the issue of rape against muslim women, that rape and sexual abuse are neither nationality nor gender restricted issues. Muslim women undoubtedly form the vast majority of rape victims. However, there are also disturbing reports of Croat and Serbian women as well as sexual abuse of men in detention camps.

All the women, men and children, who are victims of the appalling conflict must be the object of concern of the international community

According to the report¹⁶ of the aforementioned mission, there are serious constraints on scientific analysis in the conditions prevailing in the former Yugoslavia. Approximately 70 percent of Bosnia territory is in Serbian control and it is extremely difficult for the international agencies to work in these areas.

Given the massive displacement of people - 3 million persons are thought to be involved, over 500,000 of them in Croatia and the intensity of the ongoing conflicts, accurate statistics on killings, disappearances, and other atrocities - including in particular rape - are not available. The inherent difficulties involved in compiling statistics on rape and other sexual abuse have been hugely accentuated in the current chaotic conditions, states, among others, the aforementioned report.

The general view expressed by interlocutors whom the above-mentioned mission considered responsible and credible was that a horrifying number of Muslim women had suffered rape and that this was continuing. While a precise figure for the number of victims involved cannot be given, the mission accepts, on the basis of evidence available to it, that it is possible to speak of many thousands. The most reasoned estimate suggested to the mission indicated a figure in the region of 20,000 victims.

The indications are that at least some of the rapes are being committed in particularly sadistic ways, so as to inflict maximum humiliation on the victims. There are also reliable and important information, strongly suggesting that many women, and more particularly children, may have died during or after rape.¹⁷

¹³ O. Cath. Lalumière, Secretary-General of the Council of Europe, statement on former Yugoslavia, Press release. 15 01 93, Strasbourg.

¹⁴ See the Report of the team of experts on their mission to investigate allegations of rape in the territory of the former Yugoslavia from 12 to 23 January 1991. Doc. E/CN.4/1993/50, Annex II, p. 73.

¹⁵ The team was headed by Dame Anne Warburton (UK) and included Mme. Simone Veil (France) and experts in a number of fields: Forensic Psychiatry, Clinical Psychology, Law, Social Development and Social Anthropology. The Foreign Minister of Ireland, Mr. David Andrews, participated in the Geneva meetings.

¹⁶ Report by the "EC Investigating Mission into the Treatment of Muslim Women in the former Yugoslavia - Initial findings of Mission of 18-24 December 1992". Although this report is officially unpublished parts of it have been published in some newspapers.

¹⁷ See the Report of the EC's investigating mission, op. cit., paragraphs 10 and 11. Also, the Article by B. Hewson, "Rape is a war crime too" - The world remains silent over reports of violations of women in war in Bosnia-Herzegovina, The Times, 8 Sept. 1992. Further, the article by Linda Grant, "Rape Babies: what do we know", in Independent on Sunday, 10 Jan. 1993. Furthermore, the comprehensive statement by Ms. Graf (International League for the Rights and

A high incidence of rape is commonly associated with conflict situations. Accordingly the above-mentioned mission examined the hypothesis that rape in Bosnia should be viewed as a by-product of war rather than as a 'systematic' abuse taking place on the instructions of or under the direction of the commanding authorities.

Throughout its work, however, the mission frequently heard including from some individual witnesses that a repeated feature of Serbian attacks on Muslim towns and villages was the use of rape, or the threat of rape, as a weapon of war to force the population to leave their homes. Probably in most cases, other forms of physical and mental violence to persons were associated with rape, accompanied or followed by the destruction of homes, mosques and churches.

Overall, the aforementioned mission accepted the view that rape is part of a pattern of abuse, usually perpetrated with the conscious intention of demoralising and terrorising communities, driving them from their home regions and demonstrating the power of the invading forces. Viewed in this way, rape cannot be seen as incidental to the main purposes of the aggression but as serving a strategic purpose in itself. While the mission was in no doubt that the conflict provides a cloak for criminality of all sorts, it felt that the type and scale of rapes being reported point towards a deliberate pattern.¹⁸

More than fifty five states have cosponsored and submitted to the Commission on Human Rights an important resolution, entitled: "The Rape and Abuse of Women in the Territory of the Former Yugoslavia".¹⁹

The Commission on Human Rights by this resolution, which was adopted without a vote, *inter-alia*: (a) Strongly condemns the abhorrent practice of rape and abuse of women and children in the former Yugoslavia which, in the circumstances, constitutes "a war crime"; (b) Expressed its outrage that the systematic practice of rape is being used as a weapon of war against Muslim women and children and as an instrument of the policy of ethnic cleansing carried out in the Republic of Bosnia and Herzegovina by the Serbian forces, and that rape has also been used as an instrument of ethnic cleansing in Croatia; (c) Demands that those involved immediately cease these outrageous acts, which are in gross violation of international humanitarian law, including the Geneva

Liberation of Peoples), Commission on Human Rights, 49th session, E/CN.4/1993/SR.15, 7-8.

¹⁸ The report of the EC's investigating mission, op. cit., paragraphs 15-17. See also, An article by William Drozdiak on "EC Study Puts Bosnia Rapes at 20,000" in International Herald Tribune, 9-10 January 1993.

¹⁹ Doc.E/CN.4/1993/L.21, of 22 February 1993, Commission on Human Rights, Forty-ninth session.

Conventions of 1949 and the Additional Protocols thereto of 1977, and take immediate action to ensure the enjoyment of human rights and fundamental freedoms in accordance with their obligations under these instruments and other applicable international human rights instruments; (d) Reaffirm that all persons who perpetrate authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and that those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable along with the perpetrators; (e) Urges States Members of the United Nations to exert every effort to bring to justice, in accordance with internationally recognized principles of due process, all those individuals directly or indirectly involved in these outrageous international crimes; (f) Invites in this context the Security Council to consider establishing an international criminal tribunal to try cases involving violations of international humanitarian law occurring within the territory of the former Yugoslavia.

Also, the Committee of Ministers of the Council of Europe, adopted a significant and comprehensive declaration on "the rape of women and children in the territory of former Yugoslavia",²⁰ by which it has *inter-alia*, recalled its Declaration of 9 Dec. 1992 on the practice of systematic rape in Bosnia-Herzegovina and stated that "such a degree of barbarity, rarely seen, is intolerable ..." and that "those who perpetrate such crimes must realise that they shall not go unpunished".

Further, the aforementioned Committee of Ministers, demand that those concerned put an end to the aforementioned flagrant violations of human rights and appeals to Member States and of the Council of Europe and the international community at large, to ensure that these atrocities cease and that their instigators and perpetrators are prosecuted by an appropriate national or international penal tribunal.

According to the opinion of the present author rape constitutes an attack on the physical and mental integrity and on the dignity of the victims and as such is a grave violation of human rights and constitutes a new type of war crime.

Furthermore the present author believes that, the practice of rape is an abhorrent instrument of warfare and within the context of a strategy of ethnic cleansing, is a new type of a crime against humanity.

²⁰ Declaration of the Committee of Ministers on the rape of women and children in the territory of former Yugoslavia, Press Release, Ref. 77 (93), dated 18.2.93, Council of Europe-Directorate of Information, Strasbourg.

Accordingly, the crime of rape is a breach of article 27, paragraph 2, of the Fourth Geneva Convention, which states: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault" and of the relevant provisions of the Additional Protocol I of 1977.²¹

It is of vital importance that women of the world community, make the list move, by putting aside their own political and social differences and setting up an international dynamic protest movement against the untold brutality of the odious crime of war rape.

C. Situation of human rights in particular areas under Government and/or Bosnian Croat Control

Threats, arbitrary detention and ill-treatment or torture of prisoners contribute to the flight of Serbs from Bosnia and Herzegovina. The detainees during their detention suffered beatings. Such abuse of Serbian detainees is commonplace. Arbitrary detention of Serbian civilians is also practised. The release of detained persons often takes the form of an "exchange of prisoners". Consequently, the detention of Serbs in Bosnia and Herzegovina appears to be motivated, at least in part by the need to obtain prisoners who can be exchanged for Muslim and Croatian prisoners held by the Serbs. The Serbian forces exchanged 400 persons, all of whom were combatants. The Croatian forces also brought 400 persons, of whom some 300 were children, women or elderly persons.²²

Arbitrary detention of Serbs by Muslim and Croats is a response to ethnic cleansing. Collective execution of Serbs, summary execution of Serbian Civilians and razing of Serbian village do occur. They do not appear to be regular practices, however, and in any event are certainly far less widespread than in Serbian-controlled areas. In the area now under the control of the "Croatian Community of Herzeg-Bosna", some cases of burning of Serbian homes have been reported and the Special Rapporteur of the CHR viewed one destroyed Serbian village near Tomislavgrad. In Central Bosnia, under the control of the governmental Territorial Defence (TO) and the Croatian Defence Council (HVO), international observers informed the Delegation under the Special Rapporteur of the CHR of the razing of two Serbian villages.

²¹ Article 27, paragraph 2 and Article 147 of the Fourth Geneva Convention in conjunction with the relevant provisions of the Additional Protocol I. International Red Cross Handbook, twelfth edition 1983, pp. 146, 185 and 264 to 269.

²² Report by the Special Rapporteur of the CHR Mr. T. Mazowiecki, A/47/665, S/24809, of 17 Nov. 1992, p. 11.

III. OTHER BREACHES OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS STANDARDS.

A. *Suffering of children*

It is reported by reliable sources the particular suffering of children and the gross violations of their rights especially in Bosnia Herzegovina.

Children have been killed and wounded in attacks against civilian population. They have witnessed the death and injury of others including close family members and neighbours and have seen their homes destroyed. They have been arbitrarily imprisoned in inhuman conditions and there are reports of rape of children in and out of detention camps.²³

The children are in the greatest danger from war, displacement and the cold of a Bosnia winter. Children are being left without parents in refugee camps. Their parents are dead, or they and surviving family members have run off into the countryside. The war in the former Republic of Yugoslavia has created thousands of orphans and a generation of refugees.

At least 350 babies have died in the past two months from starvation and infection in the besieged Bosnian town of Zepa, according to local doctors. The sudden rise in the death rate among the new born is blamed on the long-term effects of the siege, with starving mothers giving birth to sickly babies prone to infection. Intense cold and the lack of clean water has compounded the problem.²⁴

B. *Summary executions*

A large number of reliable reports confirm arbitrary executions by the armed forces of all sides, which took place when new towns and villages are taken. It appears that prominent members of the community are targeted in particular.

It is reported that many villages around Foca, in south-east Bosnia and Herzegovina, suffered large scale summary executions by Serb forces around March 1992. Mostar is the second largest city of Bosnia and Herzegovina. In June 1992 a number of arbitrary executions are reported to have taken place in

²³ This inhuman treatment and suffering of children, constitutes grave violations of the Convention on the Rights of the Child. The text of the Convention is published in World Campaign for Human Rights, Fact Sheet No. 10. See also the recommendations adopted by the UN Committee on the Rights of the Child, "Children in armed conflicts" in the Report of the Third session of the Committee on the Rights of the Child, 29 January 1993.

²⁴ Article "Hundreds of Babies dying as Bosnia mercy airport starts", by Louise Branson, (Belgrade), in the Sunday Times, 28 Feb. 1993, p. 1 and 2.

the parts of the town then controlled by Serb forces. Mass graves have reportedly been discovered since Croat forces took these areas June, 1992.

Certain reports refer to the alleged summary execution of Serb combatants by Muslim forces in the village of Bradina on 26 May 1992. Between 85 and 100 Serbs reportedly surrendered after 30 hours of fighting at the predominantly Serb village and were immediately executed.²⁵

C. *Arbitrary arrest, detention and the treatment of prisoners*

From July until the end December 1992 the International Committee of the Red Cross (ICRC) registered approximately 10,800 detainees in more than 50 places of detention in Bosnia and Herzegovina. During the same period a total of 5,534 prisoners were released under the auspices of the ICRC and all were transferred to safe areas, except 115 who decided to remain in Bosnia-Herzegovina. The practice of exchanging prisoners encourages all sides to engage in the arbitrary and unlawful rounding-up of civilians.²⁶

The ICRC does not have unfortunately access to all parts of the territory of Bosnia and Herzegovina due to the failure of the parties to guarantee the security of ICRC delegates. Also the parties to the armed conflict consistently refused to notify the ICRC of all places of detention as well as the names of all detained. It is alleged that in some camps in August 1992, some prisoners whose appearance would have revealed to clearly ill-treatment and under-feeding, were executed. It became the practice for prisoners to be transferred from camps as soon as the ICRC announced they would be visited.

In many cases, the detention of Serbs in Bosnia and Herzegovina appears to be motivated, at least in part, by the need to obtain prisoners who can be exchanged for Muslim and Croatian prisoners held by the Serbs. The Serbian forces exchanged 400 persons, all of whom were combatants. The Croatian forces also brought 400 persons, of whom some 300 were children, women or elderly persons. It is arguable that in Bosnia and Herzegovina arbitrary detention by Serbs is used as an instrument of ethnic cleansing, while arbitrary detention of Serbs by Muslims and Croats is largely a response to ethnic cleansing.

On October 1992 the parties signed an Agreement on the Release and Transfer of Prisoners, which the time committed them to liberate all detainees including the small percentage of combatants detained except those who were

accused of committing great breaches of international humanitarian law. It is important that internationally recognized fair trial standards be applied in all such cases.

It was expected by the competent humanitarian organizations that by now all detainees should have been released, but unfortunately the relevant process has come to a standstill. As of January 22 1993, the release are blocked with 2,757 persons still detained in 19 known places of detention.

Torture and ill-treatment of prisoners are common characteristics of the treatment of prisoners in places of their detention.

Cases were reported, according to which a number of civilians have been kept by the community authorities in order to be protected by their opponents. This is the case of 95 Serb civilians and 1 child, which have been kept in Stupari, central Bosnia, since May 1992. According to the Mayor of Kladanj, this is a measure "for their own security, to protect them from retaliation by the Muslim population". A team from the European Community Monitoring Mission (ECMM) has visited the three buildings in Stupari where the detainees are held. Their own homes were burnt by Muslim forces. They are guarded by soldiers and allowed to go outside for one hour a day. Their food consists of rice and some bread, but that sometimes they have nothing to eat for three days. The detainees stated that the guards were frequently violent towards them and no medical care is offered. They appeared to the aforementioned visiting team to be "psychologically worn out and very weak". The ICRC registered these detainees in December 1992.²⁷

In addition to instances of mass detention in particular in the area of Sarajevo, there were a number of cases of detention of prominent individuals for political purposes. On numerous occasions in Sarajevo, local police on their own initiative detained prominent citizens of Serbian nationality for questioning.

D. *Hostages-taking*

All sides in the Bosnian war hold civilians for subsequent exchanges for combatants captures by opposing party. In other instances, armed forces have held civilians to extract military concessions from the opposing side.

Five thousand women, children and elderly persons were held hostage by Serbian forces in Mid-May in a Sarajevo suburb. Approximately three thousand Serbian civilians were held hostage in a tunnel near Sarajevo by Bosnian forces

²⁵ Report by the Special Rapporteur of the CHR, Mr. T. Mazowiecki, Situation of human rights in the territory of the former Yugoslavia, Doc.E/CN.4/1993/50,p.11, paragraph 43.

²⁶ Report by the Special Rapporteur of the CHR, Mr. T. Mazowiecki, E/CN.4/1993/50, op.cit., p.12.

²⁷ Report by the Special Rapporteur of the CHR Mr. T. Mazowiecki, op. cit., E/CN.4/193/50,p.17, paragraph 74.

in May 1992. It has been considered by some observers that Serbs placed under house arrest or confined to certain villages mainly in areas under Government and/or Bosnian Croat control, are in effect hostages, retained in hope that their present may deter shelling of civilians population centres.²⁸

E. Forced transfer of populations and forced displacement

Other serious crimes which were systematically committed include: the forced transfer of population and the forced displacement of people. Women, children and aged people from the villages in the area of Korzac were detained in camps and then forcibly transferred towards government lines in cattle trucks during June 1992. About 1800 people were the first obliged to leave the village Trnopolje. During the journeys there had nothing to eat or to drink. Many aged people and children passed away mainly from suffocation.

About 3500 Serbs lived in the Muslim town of Kladanj, in central Bosnia and Herzegovina before the conflict. On 22 January 1993 RCMM team visited the mayor of the town who said that all but 100 had left the town voluntarily, while others had left under pressure or even violence from Serbs extremists.²⁹

More than 2.3 million people have been displaced by the wars in Bosnia-Herzegovina and Croatia. The Bosnian war has left one-third of Bosnia's population homeless. Many of the refugees have fled to Croatia while others have fled to other former Yugoslav republics and to Western Europe. Many refugees from Bosnia-Herzegovina were displaced, not as a result of the fighting in the area, but rather because they were forcibly deported or expelled by Serbian forces. In several instances, persons working for international organizations were killed in what appeared to be deliberate attacks.³⁰

F. Disappearances

In the chaos that accompanied the Bosnian war, the number of missing people reached into the tens of thousands, and only rough estimates of the total were possible. Bosnia Government figures as of early October put the number of missing at 57,000 of whom about 8500 were said to be children.

²⁸ Report by the Special Rapporteur of the CHR, A/47/666, S/24809, op.cit., p. 11, paragraph 23.

²⁹ Report by the Special Rapporteur of the CHR, Mr. T. Mazowiecki, E/CN.4/1993/50, op. cit., p. 23.

³⁰ Among others, the ICRC delegate in Sarajevo, Fr. Maurice, was killed, in June when his convoy came under fire as it entered the city. In August 1992, an American journalist Dav. Kaplan was killed by a sniper while travelling in a motorcade in Sarajevo with "Yugoslav" Prime Minister M. Panic. By October 1992, five members of the UNPROFOR contingent in Sarajevo had been killed.

G. Torture and other cruel, inhuman or degrading treatment or punishment

In prison camps operated by each faction the Serbian SDS, the Croatian HVO, and the predominantly Muslim Bosnia Government inmates were subjected to beatings, sometimes leading to death, intimidation, and other forms of inhuman treatment. In Serb-run camps, many prisoners were subjected to the most brutal forms of torture.

Refugee accounts indicate that the mistreatment of prisoners in SDS camps extended to beating and egregious forms of torture and mutilation, as well as killing.

In Livno and Tomislavgrad, Croatian paramilitary forces, which took over from civilian authorities in April 1992, forbade Serbian residents to leave. In September the Thomson mission of the Conference on Security and Cooperation in Europe (CSCS) inspected two sites in Livno where a total of 79 Serbs were incarcerated and apparently subjected to beatings. The Thomson mission also visited the village of Rascani, in Tomislavgrad district, where about 250 Serbs, mostly women and children, were held prisoners and subjected to abuse by Croatian nationalists.

Bosnia government authorities operating a prison in the Victor Bubanj barracks in Sarajevo subjected Serbian prisoners to beatings, the facility also held a number of female prisoners, including some elderly women and one pregnant woman.

Under article 3 paragraph 1 of the Fourth Geneva Convention and article 4, paragraph 2 (a) of Protocol Additional to the Geneva Conventions of 1949 (Protocol II) provide that, violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment shall remain prohibited at any time and in any place whatsoever.

According to article 1 paragraph 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)³¹ the term "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or of an reason based on discrimination of any kind, when such pain or

³¹ See the text of the Convention against Torture in Human Rights, A Compilation of International Instruments, UN Publication Sales Nr. E.88 XIV 1, New York 1988, pp. 212-226

suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

H. Human shields

International humanitarian law forbids the use of human shields in warfare. Thus, under article 51 paragraph 7 of Protocol I, the presence or movements of the civilians population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

I. Destruction of religious sites as feature of ethnic cleansing

During the armed conflicts many churches, mosques and other religious sites, including monasteries and cemeteries, have been destroyed or profaned. All faiths have suffered such damage, including Orthodox Christians, Catholics, Protestants, Muslims and the Jewish community. The systematic destruction of such holy sites suggests a deliberate effort not only to expel the Muslim and Catholic population, but also to erase the traces of their present and to destroy their cultural identity.

Serbian Orthodox clergy based in Zagreb reported several incidents of the destruction of Church Property in the Republic of Croatia.³²

J. Freedom of Religion

All speaking the same language, the Serbs, Croats, and Muslim Slavs of Bosnia and Herzegovina are distinguished most obviously by their religion (Orthodox Christian, Roman Catholic and Muslim respectively). All parties to the armed conflict indoctrinated their forces to believe that they were fighting a religious war. Serbian forces destroyed mosques and catholic churches in many of the towns they captures.

In Tulza, the residence of the Serbian Orthodox bishop was attacked and considerable damage inflicted, by Muslim or Croatian nationalists. Serbian

Orthodox churches were damaged or destroyed in the fighting and appear to have been deliberately targeted. The Serbian Orthodox bishop of Herzegovina declared in September 1992 that 15 churches in his diocese had been destroyed in the districts of Mostar, Tomislavgrad and Konjic, and that many Serbian villages in Herzegovina had been destroyed and their inhabitants imprisoned or killed by regular Croatian army unit, ethnic Croatian forces from Western Herzegovina, and Bosnian Muslim forces.

Leaders of the three principal religious condemned the violence but were unable to rally their congregations for forgiveness and reconciliation.

K. Denial of Fair Public Trial

In the context of the war, there was no guarantee of a fair public trial for the accused anywhere in Bosnia, regardless of whose forces were in control. The civil justice system had collapsed in many areas, including the city of Sarajevo, Corazde and Bihac, along with civil government generally, and effective power rested largely in the hands of Bosnian military authorities or militia, and the Bosnia Government's ability and inclination to protect the rights of citizens, particularly ethnic Serbs, declined steadily.

L. Violation of right freedom of speech and press

Individual journalists suffered reprisals from local authorities who did not approve of their reporting or of their employer. The *Oslobodjenje* correspondent in Zvornik was murdered in April 1992 after Serbian paramilitary forces took control of the town. In Banja Luka, Sarajevo television journalists were expelled from their offices, which were taken over by Serbian nationalists for a local television studio.

Reporters faces great risks in covering the Bosnian war. At least 20 domestic and foreign journalists were killed in Bosnia during 1992, including American Broadcasting Corporation news producer David Kaplan, who was shot by a sniper in Sarajevo in August 1992. Western journalists covering the war stated that some combatant forces targeted reporters.

Schools and universities could not function normally in Bosnia towns under siege. In Sarajevo, many ethnic Serbian Professors fled, some because of harassment due to their ethnic identity or political views, although many who left were harshly critical of SDS terrorism. In Banja Luka, many professors were fired or removed from administrative positions because they were ethnic Muslims or Croats, and in June the local newspaper frankly proclaimed that the university in Banja Luka was to be "a Serbian university".

³² Report by the Special Rapporteur of the CHR, A/47/666/5/24809, of 17 Nove. 1992, op.cit., p. 23, paragraph 71.

M. Indiscriminate use of Force

Military forces have indiscriminately bombed, shelled and otherwise attacked towns, cities and villages. Such indiscriminate use of forces often serves no military purpose; it appears aimed at terrorizing the civilian population, thereby inducing its surrender or flight from a besieged area.

In other instances, military forces appear to have attacked medical establishments, cultural monuments and places of worship. Civilians, including children, displaced persons and refugees also have been attacked deliberately. A refugee camp on the Croatian and Bosnian border has been targeted for attack by Serbian forces stationed in northern Bosnia.

Domestic and international relief convoys and medical personnel have been attacked, hijacked or obstructed throughout Bosnia-Herzegovina. In most cases, Serbian forces are responsible for such attacks but in other cases, the identity of the attacker cannot clearly be established.

Convoys organized by the International Committee of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR) have been attacked on numerous occasions in Bosnia-Herzegovina.

IV. SOME CONSIDERATION OF APPLICABLE LAW

The new types of war crimes and crimes against humanity "Ethnic cleansing" and "rape of women" violate fundamental principles and rules of international law, and in particular humanitarian and human rights law.

Reference should be made, among others, to the principles embodied in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Prevention of the Crime of Genocide (Genocide Convention), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention relating to the Status of Refugees and the Convention on the Rights of the Child. In the practice of "ethnic cleansing" and "rape of women" constitute grave breaches of international humanitarian law, including in specifically the Third and Fourth Geneva Convention, the two 1977 Protocols Additional to those Conventions and the customary laws of war.

International humanitarian law distinguishes international and non-international (internal) armed conflicts. The rules governing each type of conflict differ. Under Article 2 Common to the four Geneva Conventions, an international armed conflict must involve a declared war or any other armed

conflict which may arise between two or more of the "High Contracting Parties" to the Convention.³³

In particular the "ethnic cleansing" that is being practised by military forces and directed particularly against certain groups on the basis of their religion and ethnicity constitutes undoubtedly one form of the crime of genocide, as it is defined by the Convention on the Prevention and Punishment of the crime of Genocide (Genocide Convention). The victims of such "ethnic cleansing" have been expelled from their homes and villages, rounded up and held arbitrarily in detention camps, deported, killed in indiscriminate attacks, and summarily executed.

Article 146 of the Fourth Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War provides *inter-alia*, that the High Contracting Parties undertakes to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the aforementioned Convention.

Article 147 of the above-mentioned Convention states that "grave breaches" to which Article 146 of the Convention relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces or a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".³⁴

Articles 129 of the Third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, also provides for effective penal sanctions for persons committing or ordering to be committed, any of grave breaches of the present Convention defined in its Article 130.

According to Article 130 grave breaches shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power, or

³³ Op. cit., paragraph 3 and footnote 1.

³⁴ Fourth Geneva Convention in International Red Cross Handbook, twelfth edition, Geneva, July 1983, pp. 136 to 187.

wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Also of great importance are the relevant provisions of the Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts. This Protocol was adopted on the 8 June 1977. Article 85, of Protocol I, which is relating to the repression of breaches of the Conventions and of this Protocol and which modifies and supplements the relevant provisions of the aforementioned Conventions, provides *inter-alia* that the acts described as "grave breaches" in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

Among these acts are the following:

- (a) making the civilian population or individual civilians the object of attack;
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, or a combination thereof, as defined in article 57, paragraph 2 (a iii). Article 57 of this Protocol I, is relating to the precautions in attack and specifically its paragraph 2 subparagraph (a iii) provided that those who plan or decides upon an attack shall "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated";
- (c) launching an attack works or installations containing dangerous force in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in the above-mentioned provisions of Article 57, paragraph 2 (iii);
- (d) making non-defended localities and demilitarized zones the object of attack;
- (e) making a person the object of attack in the knowledge that he is "hors de combat";
- (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the Red Cross, Red Crescent or Red Lion and sun or of other protective signs recognized by the Conventions or this Protocol. Protect of attack.

In addition to the grave breaches mentioned in the aforesaid provisions, paragraph 4 of Article 85 of the Protocol I states that the following acts should be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

- (a) the transfer by the Occupying Power of parts of its own civilian population into all territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (d) making the clearly-recognized historic monuments, works of Art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of Art and places of worship are not located in the immediate proximity of military objectives;
- (e) depriving a person protected by the Convention or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

Paragraph 5 of the above-mentioned article 85 of Protocol I states that without prejudice to the application of Conventions and of this Protocol "grave breaches" shall be regarded as war crimes. Mention should also be made of the provisions of article 86 of the Protocol I, which paragraph 1 provides that the High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

Further, article 87 provides for the duty of the commanders and in this connection it states in its paragraph 1 that the High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent under their command are aware of their obligations under the Conventions breaches of the Conventions and of this Protocol. Furthermore, the same article in its paragraph 3 it provides that the High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have

committed a breach of the Convention or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violator thereof.

It is now accepted that war crimes constitute international crimes under customary international law. There is widespread agreement that crimes are subject to universal jurisdiction. The principle of universal jurisdiction to try war crimes was recognized in the establishment of the Nuremberg Tribunal and the International Military Tribunal for the Far East.³⁵

In connection with the Protocols Additional to the Geneva Conventions of 12 August 1949 (Protocol I and II)³⁶ should briefly underline the following:

- (a) Protocol I contains rules, which should be considered as reaffirmations or clarifications of existing customary law, which implement the customary principle that a distinction should be made between combatants and the civilian population and between civilian objects and military objectives and accordingly the Parties shall direct their operations only against military objectives; and
- (b) Protocol II develops and supplement Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application. This Protocol does not apply only to situations of internal disturbances and tensions, such as riots, isolates and sporadic acts of violence and other acts of similar nature, as not being armed conflicts.

It should be reaffirmed that war crimes can be defined as violations of the laws and customs of war. The Charter annexed to the Agreement concluded in London on August 1945 concerning the creation of the International Military Tribunal in Article 6 (b) lists the most grave war crimes as "murder, ill-treatment or deportation to slave labour or for any other purpose or civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the sea, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity".

³⁵ Erica-Irene A. Daes, Status of the Individual and Contemporary International Law, World Campaign for Human Rights, UN Study Series 4, UN publication, ISBN92-1-1-154084-4, February 1992, Geneva, p. 40 and 41.

³⁶ In connection with the four Geneva Conventions of 1949 and in particular the Protocols Additional to Geneva Conventions of 12 August 1949 and their importance in international humanitarian law, see Y. Sandoz, La place des protocoles additionnels aux Conventions de Genève du 12 août 1949 dans le droit humanitaire: Revue des Droits de l'Homme, Paris, vol. 12, No. 1/2, 1979, pp. 135, 161.

The rules concerning war crimes presuppose that these crimes be committed by persons acting in their official capacity as officers and soldiers or personnel of prisoners of war camps, that is to say by persons acting as organs of State.

In practice, a number of war crimes have been committed by persons acting in such official capacity in the former republic of Yugoslavia. Also, in connection with the basic issue of the applicable law by international criminal court, reference should be made to Article 38 of the Statute of the International Court of Justice, which states:

- *(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall, apply;
 - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.³⁷
- (2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto*.

The issues of the jurisdiction and the applicable law by the international tribunal,³⁸ which has been decided to be established for the prosecution of persons responsible for serious violations of international humanitarian law, committed in the territory of the former Yugoslavia since 1991, are very complex and need to be duly studied.

The general principles of criminal law, in particular the principle of legality "*nullum crimen sine lege, nullum poena sine lege*" should be observed. Also, it is important that all defendants are given a fair trial in conformity with the existing international standards.

³⁷ Article 59 provides that the decision of the Court has no binding force except between the parties and in respect of that particular case.

³⁸ Security Council Resolution 808 (1993).