International humanitarian law and the Kosovo crisis

by
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The objective of this study is to discuss some issues concerning the situation in Kosovo in the period from the so-called Drenica events, i.e. approximately from February or March 1998, to the end of March 1999. It should be noted that the events in the Drenica area marked the onset of the armed conflicts between the Kosovo Liberation Army (KLA) and the security forces. These conflicts gradually escalated into a real "small war" waged between the police, in some cases also the army, and the KLA. After getting militarily organized (uniforms, distinctive signs, command structure, etc.), the KLA seized hold of some territories, secured complete control over them and went even further, creating its own organs of

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power. In the early nineties the sequence of events known as the "Kosovo crisis" started to develop into a situation whose legal definition depends on the answer to a key question, namely, are these confrontations to be seen as acts of terrorism, or are they combat activities that can be classified as armed conflicts? The definition chosen will determine the answers given to issues normally arising in such situations, namely questions as to the legal status, in the event of capture, of the participants in the fighting; the reciprocal rights and duties of the belligerents; the responsibility for violations of the rules; etc.

This study was practically complete when NATO launched its armed attack on the Federal Republic of Yugoslavia (FRY). Given that the war is now over, it has been fairly easy to add a few pages, but it would not have served the purpose — in my view — to keep to the framework of the previous concept.

The events as from March 1998 caused the situation in Kosovo to escalate into an internal armed conflict, at least in my opinion. This could in fact be a matter of dispute — our media kept talking about "terrorism" — but I shall explain later what facts lead me to this conclusion. In view of the current analysis, it is essential to bear in mind that if this is a case of an "armed conflict", as I believe it is, then international humanitarian law in armed conflicts, or — in the old terminology — the law of war, applies. More specifically, those of its provisions that relate to civil war apply. Because it should never be forgotten that even when crushing an armed rebellion, an insurrection or similar riots, one cannot simply place rioters "outside the law"; in civil wars, generally speaking, the belligerent parties have always been, and are especially nowadays, bound to show at least a minimum of respect towards the adversary. Such minimal consideration is imposed by the rules of warfare.

NATO's aggression against Yugoslavia established a state of war between the FRY and the attacking countries — or as modern terminology would have it — a situation of international armed conflict. The fact that nobody is using the word "war" or that there is no "declaration of war" as such (this was pointed out by some western media, as well as by some official spokesmen from the countries of the Alliance, in their efforts to avoid use of the concept "armed conflict" with reference

to the military intervention against the FRY) is of no relevance when it comes to the legal definition. It is clear that this case corresponds exactly to an "armed conflict" as defined in Article 2 common to the 1949 Geneva Conventions relative to the protection of victims of war, and in such a situation the application of the law of armed conflicts is obvious and undisputed. NATO's attack on the FRY evidently did not bring an end to the fighting in Kosovo — just the opposite — and the very conflict grew by itself and by way of foreign interference from an internal into an international one. I mean international in the sense that parties to the conflict were then obliged to implement the rules applicable in an international, not in an internal, armed conflict; those rules are more severe and impose more obligations on the belligerent parties (I shall come back to this issue later, but for now I only wish to stress that the definition has no political implications).

This paper is divided into three main chapters. The first chapter gives an overview of what is currently referred to as international humanitarian law applicable in armed conflicts, and of its basic features. The next two chapters then analyse, in the light of rules of that law, the situation in Kosovo before and during the NATO aggression against our country. An examination will thus be made of the rights and duties of all involved in the conflicts, of the problem of responsibility and of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY). The concluding remarks evaluate the implementation of international humanitarian law and list possible action to be taken in order to eliminate the consequences of the violations perpetrated during the conflict.

Contemporary humanitarian law: emergence, evolution and main characteristics

(...)

Situation in Kosovo after the skirmish in Drenica (March 1998): a non-international armed conflict

It is not possible to pinpoint exactly when the the so-called KLA was constituted or when it started to get organized militarily, but this is in any case of little relevance to the present analysis. The crucial

factor is that at the end of February and the beginning of March 1998 a certain region evidently held and controlled by Albanian rebels was established in the Drenica region. I say evidently, since the security forces had to wage real armed battles with the rebels for several days before they could regain control of the territory. The rebels retreated from the area, but were neither routed nor destroyed. Throughout the year prior to NATO's aggression they managed to maintain, whether in reduced or expanded form, the areas over which they had *de facto* authority, including inhabited areas, to control the population and to sever communications. They used familiar guerrilla strategy and tactics, the same methods that had been adopted by Tito during the national liberation war and that were well known and promoted under previous regimes through the systems of general national defence and civil defence. All these facts are undisputed, since they were also reported by our press as well as by Serbian radio and TV. Witnesses, not only foreign journalists but also our own citizens, mainly Serbs and Montenegrins detained by the KLA, confirmed in their testimonies or in public statements that the rebels possessed a relatively well-structured organization and hierarchy and that their organization had set its own "rules" which served as the basis for rulings by its "courts". Consequently, in addition to the military component the organization contained an embryonic civil authority; its "commanders" were in contact and negotiations with members of the OSCE mission and also with American diplomats, for instance Ambassadors Holbrooke and Hill, all of which was broadcast via the electronic media. In brief, our security forces, sometimes also the army, obviously had to deal with forces which could hardly be defined — as was regularly the case in our press — as simply "terrorists".[1]

1 There is no doubt that KLA members behaved in certain circumstances as terrorists, and they undoubtedly undertook terrorist activities (e.g., during the period analysed here, about 140 Serbs were abducted and the majority of them were killed, although they were ordinary citizens, Serbian houses were burnt down, etc.). Yet this certainly cannot mean that all members of the organization (or the organization itself) can be treated simply as terrorists or that somebody who really is a terrorist, because he participates in a terrorist act, can be treated as "outside the law" and, for instance, executed on the spot. Thus, even a terrorist who has laid down his arms and wants to surrender has the right to have his life spared, regardless of whether or not the terrorist act was carried out in a situation

It could on the contrary be said that these formations were organized in the same way as rebel movements have always been organized. They managed to resist for a longer time, to control a certain territory and to conduct combat operations against the legal authorities. These facts and objective indicators show that this situation was one of "non-international armed conflict" as defined in the 1977 Protocol II additional to the Geneva Conventions of 1949, under which all parties to conflict are bound to respect international humanitarian law.[2] This obligation is clear and unambiguous for both parties: on the one hand, the Socialist Federal Republic of Yugoslavia (SFRY) had ratified Protocol II, and the FRY "inherited" this obligation as a successor State; on the other, the KLA is a rebel movement composed of nationals, i.e., Yugoslav citizens who are bound, both as individuals and as an organization, to respect the obligations taken over by the State whose citizens they are. The fact that they might not "recognize" the FRY as their State is evidently irrelevant.

that is understood as an armed conflict in the sense of the law of armed conflicts. After all, even an ordinary robber caught during an armed robbery cannot be killed by the police if he indicates his wish to surrender. Such an act would be especially prohibited in an armed conflict. This is because such a person has the right to have his life spared, while the court decides upon the nature of his act and his possible responsibility, and metes out a penalty according to the law. Finally, even a regularly constituted and internationally recognized army — the best example is that of the German Wehrmacht during the Second World War — or its individual members may undertake terrorist acts which are otherwise prohibited by the law of armed conflicts, but this does not mean that the army as a whole is of a terrorist nature. I particularly emphasize all this because the reporting by our media could give the impression — and public opinion shares this view to a large extent — that terrorists can be treated as "rabid dogs" and are simply "outside the law", and that they can therefore simply be killed without any formalities when captured by the authorities.

2 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): According to Article 1 thereof, internal or non-international armed conflicts are those "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". See, in general, Y. Sandoz/C. Swinarski/B. Zimmermann (eds), *Commentary on the Additional Protocol of 8 June to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, pp. 1,347 ff. (hereinafter: *ICRC Commentary*).

The reasons why our authorities did not themselves declare a state of "non-international armed conflict" in Kosovo (the practice is that governments of countries issue such a proclamation in an appropriate form) remain unclear. A possible explanation would be that there was some fear that such an "admission" might enhance the rebels' status in a political sense, as they would then achieve some sort of "international recognition", or limit the authorities' options for crushing the rebellion. If that was the predominant consideration in our government's decision-making centres, the reasoning was totally wrong. But even more wrong and contrary to our interests as a country was, I believe, the refusal to see the real facts and to make certain moves of a formal and legal nature.

The point is that, as we have seen, the purpose of international humanitarian law is to reduce as much as possible the suffering of people in armed conflict, to spare human lives as far as the circumstances of warfare will allow, and to avoid the unnecessary and barbaric destruction of civilian objects. Humanitarian law is applied so to say "automatically", i.e. it is applicable as soon as circumstances *objectively* indicate the existence of a situation that corresponds to the legal definition of armed conflict. Therefore, its implementation does not depend on the political will of the parties to the conflict, each of which is separately bound to apply the rules and to fulfil its obligations, regardless of the adversary's behaviour.[3]

A country on whose territory a civil war has broken out gains no advantage in hiding the situation by referring to it with euphemisms such as "riots", "acts of terrorism" and the like. It is not up to the country itself to assess whether or not (legally speaking) the situation on its territory constitutes an internal armed conflict. This is done by Contracting Parties to Protocol II, their press and their public opinion. If the majority of States in the world deem — as happened in our

3 A characteristic of the law of armed conflicts is the unilateral acceptance of obligations, not reciprocal as is normally the case in international law where non-compliance with obligations by one side automatically exempts the other side from having to respect its commitments. The fact that the adversary violates the rules or commits war crimes or crimes against humanity does not allow the other side to respond in the same way; if it did so it would itself be breaking the rules and committing a crime.

case — that a civil war has broken out somewhere, whereas the country concerned persistently refuses to acknowledge what has become obvious, such a stance can only be politically harmful for that country. Conversely, formal recognition of the situation as an internal armed conflict, which certainly and clearly entails the obligation of implementing humanitarian law, increases the degree of protection of all persons caught up in the conflict. It especially affects the rebels by reminding them directly of their duties in this respect, as well as of the risks they run in violating them, i.e. prosecution for crimes against humanity.

In both types of conflict, internal and international, the principle of the equality of belligerent parties with regard to the law of war is applicable. This means that parties to conflict are obliged to implement the rules because of the objective fact that a conflict has occurred. The parties are under this obligation regardless of the motives behind the use of force, the objectives each of them wants to achieve or the legal or political definition used by one or the other party ("attacking party" or "victim of the attack" in the event of an international armed conflict; "legal authorities" or "rebels", "secessionists", etc., in an internal conflict). This is one of the principles of the "classical" law of war, and came into existence as a reaction to the medieval concept of "just" and "unjust" wars according to which a sovereign who started a war contrary to law or who was fighting for unjust goals was placed "outside the law" together with his army and his people, and had no rights nor was owed any respect. The Hague law rejects this concept together with the theory of just war, emphasizing the principle mentioned above whereby all belligerents are under the same obligation to implement the law of war. It has been said that a ban on the use of force leads to discrimination against the aggressor with regard also to implementation of the law of armed conflicts.

Such ideas, however, were rejected as senseless and harmful. They would only result in further outbursts of violence and cruelty, since all participants from the "aggressor's" side would be deprived of every legal protection by the very fact of belonging to its armed forces or civilian population. That, too, would be unjust, since they cannot all be "guilty" of aggression. The same rule also applies in the event of an internal conflict, as it would be unjust and inhumane to

deprive of all protection all those who found themselves, voluntarily, but maybe also involuntarily, on the rebel side.

Finally, the application of humanitarian law in an internal conflict in no way means the abolition of the laws of the State, nor does it exclude the criminal or other responsibility of rebel leaders or anyone else who committed crimes of any kind or other violations of humanitarian law. During a conflict, and particularly after its end, all such individuals can be brought to court and held responsible in accordance with the law. In other words, the application of international humanitarian law by no means prevents a country and its legal authorities — the legal ones being those which were in place at the beginning of the conflict — from acting as described specifically in Article 3 of Protocol II, namely: "...by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State". The same provision emphasizes that the application of humanitarian law shall by no means be invoked as a justification for foreign intervention nor considered as a form of "recognition" (political, international, legal, etc.) of rebels.[4]

All that has been said on the situation in Kosovo between March 1998 and 24 March 1999, when the FRY was attacked, points to the obvious conclusion that these events constituted a non-international armed conflict as defined in Article 1 of Protocol II additional to the Geneva Conventions. The parties to the conflict, which were equally bound by the rules set by the Protocol, were under an obligation to act in accordance with those rules.

After having discussed the principles governing the conduct of belligerents in any armed conflict, regardless of its character, I now intend to examine how those general principles have been transformed into firm rules by Protocol II itself.

First, all persons who are caught up in a conflict (both non-combatants and combatants who have laid down their arms or have been captured[5]) are considered by Protocol II to be "protected

4 *ICRC Commentary*, pp. 1,361 ff.

5 Protocol II does not refer to a captured combatant by the usual term "prisoner of war" nor does it give special protection to such persons, since in a civil war it is difficult to distinguish civilians from soldiers. Article 4 uses the terms "persons who do not take a direct part or who have ceased to take part in hostilities", giving the same degree of protection to both groups.

persons". Under Article 4 they enjoy fundamental guarantees when they are in the power of the adversary; in particular they must be treated humanely and their person, including their physical and moral integrity, must be respected, as well as their honour, convictions (also their political convictions) and religious practices. In other words, it is prohibited to kill, ill-treat or humiliate protected persons, or to threaten that "there shall be no survivors". The same provision explicitly enumerates the acts that are contrary to the humane treatment required, and which therefore "shall remain prohibited at any time and in any place whatsoever", in particular murder, cruel treatment, mutilation or any other violence to their physical or mental well-being, as well as any form of corporal punishment. There follows a prohibition of all collective punishments, taking of hostages, acts of terrorism, outrages of any kind upon personal dignity, including rape and enforced prostitution, and any form of pillage.

All protected persons who are wounded or sick must be provided with medical care and attention by the adversary. The parties to the conflict are also obliged to protect medical personnel and grant them help for the performance of their duties.[6]

Protected persons who are in the hands of the adversary and who are deprived of their liberty, for whatever reason, must be provided with certain living conditions and facilities during their detention or internment. These conditions, laid down in Article 5 of Protocol II, include adequate accommodation, food and medical care, the right to send and receive correspondence and the right to receive humanitarian assistance. The article thus mentions the normal conditions in prisons of civilized States, taking into account the specific features of civil war. The conditions are similar to those provided for by the Third and the Fourth Geneva Conventions with reference to prisoners of war

6 Protocol II, Arts 7-12. Article 10, on the general protection of medical duties, is of particular importance. It stipulates that no person may be punished for having carried out medical activities and services, regardless of the person benefiting therefrom; doctors or nurses may not be compelled to perform acts contrary to the rules of medical ethics; doctors have no obligation to give information to authorities concerning the wounded and the sick, nor may they be penalized in any way for failing to give that information.

and civilian internees.[7] In the event of penal prosecution or indictment of a person whose liberty has been restricted for reasons related to the armed conflict, during the whole procedure that person will be granted, in accordance with Article 6 of the Protocol, the usual guarantees with regard to penal procedure that are in force in every civilized State. In other words, any form of court-martial or exceptional trials, any "summary" proceedings or similar "measures" of an ostensibly "legal" nature, used by parties in civil wars simply to liquidate the opponents, yet maintaining the illusion of legality, are prohibited. Any deviation from the guarantees mentioned above (especially when resulting in serious consequences for the protected person) can easily turn into an international crime, a crime against humanity.[8]

We can conclude from the above that the rules cited so far aim at protecting individuals from the dangers present in any war for persons who fall into the hands of the adversary. Unlike Protocol I (on international armed conflicts), Protocol II contains no provision on means and methods of warfare or the conduct of hostilities. Though agreeing that the standard rules on the conduct of hostilities should be binding in civil wars too, States party to Protocol II did not reach an agreement on including the prohibition of certain methods and means of warfare in the text.[9] Nonetheless, Part IV (Articles 13 to 16) concerning the general protection of the civilian population contains rules for the belligerent parties to follow in order to protect civilians as much as possible against the effects of military operations.

According to Article 13, paragraph 3, of Protocol II, civilians are persons who do not, and for such time as they do not, take a

7 *ICRC Commentary*, pp. 1,383 ff.

8 *ICRC Commentary*, pp. 1,395 ff.

9 During negotiations on Protocol II, States showed great reticence, as well as a certain amount of "inhumanity", when formulating rules that could in any way be seen to help rebels gain political affirmation or international recognition, or obtain some sort of "equal footing" in relation to State authorities. The majority of delegations present in Geneva were in favour of this approach, even if the price for it was often less protection for victims. Defining the concept of "combatant" and setting the rules on the conduct of hostilities were seen as possibilities for rebels to get automatic recognition as a party to an armed conflict if the Protocol were applied, and for that reason the ICRC proposals to give an exact definition of the prohibited means and methods of warfare were rejected.

direct part in hostilities.[10] Such persons enjoy "general protection against the dangers arising from military operations" (Article 13, paragraph 1). The civilian population and individual civilians may not be the object of attack nor may they be terrorized by threats that they will be attacked (paragraph 2). Other provisions of Part IV — Articles 14, 15 and 16 — regulate the protection of objects indispensable to the survival of the civilian population (foodstuffs, water, cattle, etc.), the protection of works and installations containing dangerous forces (nuclear plants, dykes, etc.) and, finally, the protection of cultural objects and places of worship. To sum up, even in a non-international armed conflict it is prohibited to conduct hostilities in an indiscriminate and brutal way, and in particular to attack the civilian population deliberately. Protocol II is perfectly clear and precise in this respect. Finally, Protocol II contains a very important provision, especially relevant in the context of the Kosovo crisis: any forced movement of the civilian population is strictly prohibited. This means that civilians may not be compelled to leave their own territory for reasons connected with the conflict.[11]

As I mentioned above, I believe that it was wrong and contrary to our country's interests not to proclaim "a situation of non-international armed conflict" in Kosovo as soon as that situation objectively existed. This was wrong in the sense that an objective situation cannot be hidden, especially in the presence of foreign journalists. Furthermore, the very fact that authorities try to hide a serious or even dramatic situation puts them in a worse political position internationally. The impression created is that there might be serious reasons behind such concealment. On the other hand, a legally clear situation produces the opposite effect. It reinforces the authorities' position and opens up more possibilities for penal prosecutions of the rebels, not only for the act of rebellion based on internal law, but for violations of the law of armed conflicts based on international legal standards which

10 *ICRC Commentary*, p. 1,453. Protocol II contains no definition of combatant. Persons who "take a direct part in hostilities", logically, do not benefit from the protection against dangers arising from military operations. But even such fighters who have laid down their arms may not be attacked, since they are considered to be civilians.

11 *ICRC Commentary*, 1,471 ff.

were, after all, included in our criminal law. A proclaimed situation of "non-international armed conflict" and a declared obligation to apply the Protocol (without it members of armed forces of both sides are often not even aware they are carrying out acts prohibited by law) undoubtedly represent for the parties involved a powerful deterrent to committing violations. In brief, by legally clarifying the situation as an "internal armed conflict", the authorities involved not only improve their political position within the country, since both their followers and adversaries realize that they are ready to act decisively, but also signal that they will rigorously apply the national and international rules relevant to such situations. Second, such behaviour simultaneously reinforces the international position of the given country, since most countries have always shown understanding for authorities which are seriously combating internal problems, yet respecting the law while doing so. Finally, and significantly, such a procedure ensures that international humanitarian law is better respected in the conflict itself; this is especially useful for the direct victims of war.

It is of course possible to respect humanitarian law even if the above-mentioned formal and legal steps are not taken, as was the case in our country. During the whole period under consideration, many allegations concerning violations of humanitarian law were levelled against our authorities and the KLA. Given that propaganda is powerful in any war and will use any means to accuse the opponent of all kinds of crime, it is difficult to give a reliable answer to the question whether and to what extent there were serious violations of humanitarian law, i.e. crimes against humanity.[12] I shall not pursue this question, but can only emphasize that the definitive answer can be given

12 In an internal conflict there is no war crime, only crimes against humanity, which, in reference to the context of a criminal act, means practically the same. For the reasons behind this distinction, which are of an exclusively political nature, see Vladan Vasilijeć, "Međunarodni krivični tribunal za bivšu Jugoslaviju i kažnjavanje za teške povrede međunarodnog humanitarnog prava" [International Criminal Tribunal for the former Yugoslavia and sanctions for severe violations of international humanitarian law], *Humanitarno pravo — savremena teorija i praksa* [Humanitarian law — contemporary theory and practice], Belgrade, pp. 380 ff.

only by a competent tribunal. Nonetheless, judging from what has been written in the press, from the reports of various non-governmental organizations such as the Fund for Humanitarian Law in Belgrade, and from some other sources, I conclude that there is sufficiently strong evidence to confirm that such acts did indeed occur. In other words, to use the language of criminal law, there are "grounds for suspicion" that such acts have been perpetrated and that they have been committed by both sides, the government and the KLA. For instance, as soon as the Drenica operation was over, there were about 40 corpses left on the spot, most of them women and children who — at least at first glance — would hardly be classified as combatants. It would have been essential, in this and in numerous similar instances, to carry out a thorough investigation in order to determine exactly under what circumstances the deaths occurred, and to inform the public accordingly. Evidently, if crimes had been committed by members of the police or other forces under the responsibility of the State, it would be necessary to bring them before our courts and pronounce severe penal sanctions. I wish to stress that our legislation is very detailed in this respect and in full agreement with our international obligations, especially with provisions contained in the 1949 Geneva Conventions.[13]

On the other hand, Albanian rebels have kidnapped — they have never even denied this — numerous Serbs and Montenegrins, mostly civilians, whom they kept in detention as hostages; some were killed, others simply disappeared. It seems that there were cases of expulsion of Serbs and other non-Albanians, of burning of Serb houses and similar offences which are all violations of humanitarian law. In not one of these cases did the the rebel "authorities" start an investigation, although they were obliged to do so. On the

13 The four Geneva Conventions contain common provisions for the suppression and prosecution of "grave breaches", i.e. war crimes or crimes against humanity. See Convention I (Arts 49-54), II (Arts 50-53), III (Arts 129-132) and IV (Arts 146-149). Contracting parties must provide in their legislation for measures to repress such criminal acts and penal sanctions for possible perpetrators. Yugoslavia has defined under Chapter XVI of its Federal Criminal Law these breaches as severe criminal acts which are to be prosecuted *ex officio*.

other hand, — as might appear strange at first sight — our authorities also failed to launch any criminal investigation into violations of humanitarian law.[14]

The reason could lie in our authorities' stubborn refusal to "admit" that there was indeed an internal armed conflict and to proclaim the consequent applicability of Protocol II. It is also interesting to note that Albanian rebels from the KLA never insisted that a situation of armed conflict did exist, and accordingly never demanded that international humanitarian law be applied, nor did they ever use for propaganda purposes the fact that Yugoslav and Serbian authorities kept talking about "terrorism", although it was evident there was an armed conflict going on. Although it is always in the interest of rebels to have an "internal armed conflict" declared, because in such an event they and the population are protected more effectively and more completely, the KLA did not take these steps, most likely because they did not know the legal situation. In any case, the issue of investigating grave breaches of humanitarian law has remained virtually unresolved.

I recall, however, that at the beginning of this year the International Criminal Tribunal for the former Yugoslavia (ICTY) decided to extend its mandate to the "Kosovo situation", in order to investigate alleged violations of humanitarian law and to prosecute whenever "well-founded suspicion" existed that such violations or crimes had taken place. The Chief Prosecutor of the Tribunal, Louise Arbour, intended to visit Kosovo personally. Yet our authorities denied her a visa, and the same happened to the Tribunal's investigating bodies, so that the investigation was never carried out.

The main reason for the refusal to cooperate with the Tribunal is of a political nature, is well known, and was already present at the time of the Tribunal's establishment. Indeed, our public opinion largely held that the Tribunal was "anti-Serbian", and some of our lawyers, experts on international and criminal law, took the stance that

14 According to data available to me, but which have not been officially confirmed, about two to three thousand Albanians were deprived of liberty during the period analysed. In cases where indictments were issued, they referred to rebellion, the endangering of the State's territorial integrity, terrorism and similar criminal acts, yet neither war crimes nor crimes against humanity were mentioned.

the UN Security Council exceeded its mandate by adopting resolution SC 827(1993) and that the ICTY was therefore illegitimate.[15] Sharing these views, our authorities supported this position for some time, emphasizing that the FRY did not "recognize" the Tribunal and was not willing to cooperate with it. The position was later tacitly revised, so that an office of the ICTY was even opened in Belgrade. Yet in the Kosovo situation, the Tribunal's mandate was seen as inapplicable. These events were considered to be "an internal Yugoslav affair", since there was no armed conflict going on.

As regards the view which holds that the Tribunal was illegitimately established, I believe it to be incorrect and indefensible.[16] An argument in favour of my view is the position of United Nations member States, the majority of which accepted the ICTY as a legally and legitimately created international judicial body. Nonetheless, even if the opposite view can be defended in theory, the following position is totally untenable, namely that there was no "non-international armed conflict" in Kosovo and that the ICTY therefore had no jurisdiction to prosecute persons for violations of international humanitarian law.

First, as I have mentioned above, there are objective elements pointing to the unequivocal conclusion that the situation in Kosovo completely corresponded to the definition provided in

15 For arguments in favour of this view, see e.g. Smilja Avramov, "Međunarodno krivično pravo i Povelja UN" (International criminal law and the UN Charter), *Archives of Legal and Social Studies*, No. 5, 1994, pp. 479 ff.; Milan Bulajić, "Međunarodni sud za krivično gonjenje odgovornih za ratne zločine u bivšoj Jugoslaviji" (International Tribunal for the prosecution of persons responsible for war crimes in former Yugoslavia), Collection of documents, Belgrade, 1993, or M. Kokolj, "Međunarodni sud za krivično gonjenje odgovornih lica za ozbiljne povrede međunarodnog humanitarnog prava" (International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law), *Yugoslav Journal of Criminology and Criminal Law*, No. 1-2, pp. 87 ff.

16 See my article, "O pravnoj osnovi konstituisanja ad hoc međunarodnog krivičnog suda za bivšu Jugoslaviju" (On the legal basis for the establishment of the *ad hoc* International Criminal Tribunal for the former Yugoslavia), *Herald of the Bar Association of Vojvodina*, Year LXVI, Book 54, No. 110, 1994, where arguments in favour of this position are put forward. Besides, this position is shared by the majority of the world's international law experts and by a number of our own experts. See, for example, Vladan Vasilijević, *Zločin i odgovornost* (Crime and responsibility), Belgrade, 1995, with an extensive bibliography.

Article 1 of Protocol II additional to the Geneva Conventions. That the FRY did not "admit" this fact in any way had, of course, no effect on the objective reality. Let me emphasize again that humanitarian law in armed conflicts automatically applies whenever there is a corresponding "objective reality". This is what all States party to the Geneva Conventions and the two Additional Protocols agreed to, including the FRY, so it is not possible "not to admit" the existence of such a situation or to try to avoid the application of international humanitarian law in some other way.

On the other hand, given that the FRY had agreed to cooperate with the Tribunal, be it tacitly, it is illogical to deny the latter's jurisdiction over Kosovo, since Article 8 of the ICTY Statute clearly indicates that the Tribunal's mandate extends as of 1 January 1991 over the whole territory of the former Yugoslavia. Since the Tribunal's competence will cease only after the Security Council adopts a resolution to that effect, and since, from the viewpoint of *ratione loci*, Kosovo is undoubtedly a part of the former SFRY, it makes no sense, either logically or legally, to deny the Tribunal's competence. Besides, I should like to say that I do not consider such a move politically very wise; if our authorities did not commit any violations, and even less so any crimes, as is officially maintained, then there can in my opinion be no valid reason to reject the Tribunal's investigations. Referring to sovereignty as an obstacle to conducting an objective investigation seems to me totally inappropriate. On the contrary, as such an investigation would have been international, it would have brought to light more convincingly the crimes perpetrated by some KLA members than did the declarations made by our authorities. It is also certain that taking hostages or killing civilians are international crimes and grave breaches of international humanitarian law.

NATO's attack on Yugoslavia: an international armed conflict

The armed attack against Yugoslavia, started by air strikes on 24 March 1999, certainly established a state of international armed conflict within the meaning of Article 2 common to the four 1949 Geneva Conventions, as reconfirmed by Article 1, paragraph 3, of

Additional Protocol I. Consequently, all parties to the conflict and all members of those parties must fully respect the Conventions and Protocol I (for States having ratified that treaty); in other words, they have to apply humanitarian law, given that its crucial provisions are contained in that code.

I recall that the question was raised in Yugoslavia, but also abroad, as to whether this was a "real war", given that none of the attacking countries had declared a war, nor had any of them declared a state of war or a state of armed conflict with the Federal Republic of Yugoslavia.[17] Another question concerned the rules regulating the behaviour of the belligerents in such an unclear situation. If we take a closer look at the definition, we see that the elements mentioned are of no relevance to the obligation of the parties to the conflict to apply the law of armed conflicts — this obligation cannot be avoided under any circumstances.

Article 2 common to the 1949 Conventions says in its first and second paragraphs that "...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

The aim of Article 2 is to define the material scope of application of humanitarian law, i.e. any situation which constitutes

17 Since the attack on Yugoslavia was started without a corresponding resolution by the Security Council, which according to Chapter VII of the Charter would authorize the use of force against the FRY in the sense of Art. 42 of the Charter, the governments of the Western Alliance did not clearly indicate their position with respect to the situation they were in, given that they had carried out an armed attack on an independent country. They tried to declare the action a "humanitarian intervention" legally justified by the necessity to protect human rights, and also by Security Council resolutions 1199 and 1203, which indeed mention Chapter VII. In brief, there were obvious efforts to avoid the term "armed conflict", delicate in this political context, in order to exclude the possibility of being accused of aggression. But, as we shall soon see, the obligation of the parties to apply humanitarian law in armed conflicts remains the same in any case, however the situation is defined.

an armed conflict according to objective criteria. In other words, countries are obliged to apply humanitarian rules regardless of their own definition of the conflict, regardless of their motives for the use of armed force and regardless of any other elements in connection with the conflict. I stress once again that both sides, the attackers and the attacked, are equally obliged to implement the law of armed conflicts — in conformity with the principle of equality of belligerents before the law of war mentioned earlier — and regardless of the attitude of the adversary. Thus, the aim of that wording is to stop one or more parties to conflict from avoiding the obligatory application of international humanitarian law, whether through pretexts or otherwise.

As for protected persons, these are all persons whose situation corresponds in actual fact to the definition of a prisoner of war, of a wounded, sick or shipwrecked member of the armed forces, or of a civilian, in accordance with the Conventions and Protocol I. All protected persons enjoy the protection of humanitarian law from two sources of danger: from military operations themselves and from arbitrary treatment by the adversary if they happen to fall under his authority. This protection applies equally to aliens and to nationals, at least as far as fundamental rules of humanitarian law are concerned.[18] In terms of duration, the "code" is applicable for as long as protected persons are subject to the potential danger of arbitrary treatment. It is thus logical that the Conventions and Protocols cease to apply in the event of a peace treaty or any other corresponding legal and political solution

18 The rules were evidently made in favour of citizens or members of the adverse side. Yet the rules that ensure basic and minimal protection are applicable to any person in accordance with the general objective of humanitarian law, which is to protect any individual as a human being, whatever his or her nationality. Thus, humanitarian law forbids bombardment of inhabited areas, destruction of the population's food supplies or taking of hostages among civilians. In addition, it equally forbids the brutal, indiscriminate bombardment of a town in occupied territory for some "higher" strategic or tactical reasons, e.g. because the occupant has consolidated his position there. The same applies to destroying food supplies before the advancing enemy so that these do not fall into enemy hands, in spite of the danger of starvation for the occupied territory's population; or to taking hostages among the domestic population because, for instance, the population of a specific area has favoured the enemy.

adopted at some international conference or by an international body, such as the Security Council. This is so in principle. However, persons under the enemy's control, such as prisoners of war or interned civilians, remain under the protection of humanitarian law until repatriation. The population of an occupied territory remains under the protection of the Fourth Geneva Convention until the withdrawal of foreign troops, as occupation may sometimes continue after the peace treaty has been signed. In brief, a whole series of provisions remains valid after the end of hostilities, if this is necessary to ensure the most complete protection of war victims.

Any breach of the law of armed conflicts is an international offence, in the same way as any violation of any international obligation in any area of international law; to be more precise, it is an internationally wrongful act which entails the international responsibility of the State party to the conflict that committed the violation, and makes it liable to pay compensation or reparations to the victim thereof. Grave breaches of the Conventions and Protocols, which indeed are war crimes, entail not only the responsibility of the State to which the perpetrator belongs, but also the criminal responsibility of the perpetrator and his accomplices.

Furthermore, the rules regulating international armed conflicts are more detailed and precise than those applicable in a non-international conflict. Although the basic principles are the same, victims of war are more comprehensively protected in an international conflict than in an internal one.

From the viewpoint of international law, NATO's armed attack against Yugoslavia is a violation of Article 2, paragraph 4, of the UN Charter, namely of the peremptory norm prohibiting the threat or use of armed force, and thus can certainly be qualified as aggression. But within the context of this analysis, the issue is irrelevant since both parties are equally obliged to implement the law of armed conflicts. However, the conflict at issue is of a specific nature insofar as the attack against the FRY was carried out exclusively from the air, so that there was no physical contact between the belligerent parties. Hence there were no prisoners of war or wounded, sick or shipwrecked military personnel. No civilian of one side could have come under the control

of the adversary.[19] Therefore, during the conflict, only the rules governing the conduct of hostilities, and in particular those on air warfare, were relevant.

As the FRY armed forces did not conduct any military operation outside the national territory, various actions that occurred on the territory of the FRY between 14 March and 9 June 1999 must now be analysed from the viewpoint of humanitarian law. The term "analyse" is used because I can only respond in the abstract to whether grave breaches of the law of armed conflict took place or not, i.e. on the basis of general and public data on the conduct of military operations and their effects. A specific evaluation of each individual action could only be given on the basis of verified and well-established data concerning the behaviour of the attacker and the defender, i.e. following a procedure similar to that of a judicial or arbitral body. These differences between the "abstract" and the "specific" will be made clearer below as we examine the rules that the belligerents had to observe.

The Kosovo conflict was transformed into an international one by NATO's attack because the general rule — according to prevailing legal opinion — is that an internal conflict becomes an international armed conflict as soon as there is actual interference from abroad. Another and contrary legal view considers that active outside help to the insurgents is the essential element that turns an internal conflict into an international one. If there is no such help, two conflicts can exist in parallel — an internal and an international one. It is difficult to determine where our case should be classified. I believe it would be correct to accept the first approach, all the more so because NATO most probably did help the KLA actively, although proof is lacking. Apart from more extensive protection for all persons in the conflict,

19 The Yugoslav side has stated that it had shot down about 70 Alliance aircraft, yet, surprisingly, none of the pilots was captured. However, three members of American land forces were captured. They were found, in circumstances that remain unclear, within the territory of the FRY near the Macedonian-Yugoslav border and were going to be prosecuted by the FRY. It also remains unclear on what grounds they could have been brought to court, but the idea was abandoned anyway and the men were released while the conflict was still going on. The Alliance apparently did not have any members of the Yugoslav army in captivity.

there are no significant differences in the legal position of the KLA, especially not on a political level: the fact that the conflict became international did not make the KLA more "legitimate" than it had been before, and had no bearing on the political, and even less on the international legal status of the insurgents.

I shall first examine the rules that the parties to the conflict were obliged to respect during the 78-day-long military intervention by NATO against the Federal Republic of Yugoslavia. These rules are contained in Protocol I, Part IV, Articles 48 to 58.[20] Under the heading "Basic rule", Article 48 reads: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall *at all times* distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." (Emphasis added). This provision confirms the classical rule, in fact the fundamental principle of the traditional law of war codified by the 1907 Hague Regulations, that a clear distinction must be made between civilians and civilian objects, on the one hand, and combatants and military objectives, on the other, only the latter being a possible target for military operations. The rule is of an absolute nature (that is why I have highlighted *at all times*), exceptions being admitted only when explicitly allowed for by a specific provision.

Article 50, paragraph 1, defines the concept of a civilian. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A of the Third Geneva Convention and in Article 43 of Protocol I (rules defining the notion of combatant), i.e. any person who cannot be considered a combatant according to the law of armed conflicts. The scope of protection is increased by the second sentence of Article 51, paragraph 1, stipulating that in case of doubt, namely when it is not easily and immediately possible to judge

20 Not all NATO members who attacked us have ratified Protocol I. However, even those that were not bound by the Protocol, but only by the Hague Regulations of 1907, were obliged to interpret the latter's provisions in the spirit of contemporary positive law, i.e. Protocol I. For more details concerning the relationship between the provisions of the Hague Regulations and the provisions of Protocol I, *see ICRC Commentary*, pp. 585 ff.

whether a person is a soldier or a civilian, that person shall be considered a civilian and shall not be the object of attack. On the other hand, if soldiers mingle with civilians (for instance, when isolated parts of the army are retreating together with civilians, the latter evidently in greater numbers), the presence of combatants "...does not deprive the population of its civilian character", i.e. its immunity from attack. In other words, the attacking side must be absolutely sure that the intended target is indeed a military objective and, in case of doubt, must abstain from attacking.

How are military objectives to be distinguished from civilian objects? Article 52, paragraph 1, answers this question by giving a negative definition: all objects which are not military objectives are civilian. According to its paragraph 2, military objectives are "those objects which by their *nature, location, purpose* or *use* make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" (emphasis added).

At first sight, the definition in Article 52 seems very simple, making it easy to tell what is a military objective and what is not. But it really all depends on specific circumstances. The distinction between civilians and combatants, and also between civilian objects and military objectives, has to be made at all times, in accordance with the general rule that civilians must be given maximum protection from the effects of hostilities. Hence it is clear that the above definition contains two essential elements: a) the object under attack must make "an effective contribution to military action"; and b) its destruction "in the circumstances ruling at the time" must offer "a definite military advantage". These particular elements determine when the attack is admissible and when not, and their interpretation depends on the actual circumstances.

For instance, a military barracks is certainly a military objective, but if it is deserted or if there are only a few soldiers in it, and it is situated in the middle of a town, its bombardment would represent no significant "military advantage" for the attacker, as it does not make any "effective contribution" to the adversary's war effort. The situation is even more sensitive for the attacker in the case of bridges, railway

lines, transport facilities, electric plants or similar objects. These can be the object of attack, but everything depends on the specific circumstances. For example, it would be very difficult to classify the bridge at Varvarin as a military objective that had effectively contributed to the war effort of the Yugoslav army, nor did its destruction give NATO forces any "definite military advantage". That this interpretation of the above provision is correct is confirmed in paragraph 3 of Article 52. It stipulates that where an object normally dedicated to civilian purposes (a house or a dwelling, a school, a bridge, etc.) is suspected of being used for military purposes in such a way that it makes an effective contribution to military action of the adversary, but the suspicion cannot be confirmed, then it should be presumed to be a civilian object, and the attacker should abstain from attacking it. The final conclusion, therefore, is that even if an object can clearly be qualified as a "military" objective, the belligerent has to abstain from the attack unless "military necessity" demands it.

We have seen that Article 48 provides for a strict distinction between combatants and civilians, offering maximum protection to the latter. Within the framework of this distinction, Article 51 gives more details as to prohibited attacks on civilians and civilian objects. First, paragraph 2 imposes a general ban on attacks directed against the civilian population and civilian objects; it also prohibits acts or threats of violence whose primary purpose is to spread terror among the civilian population.[21] Paragraph 4 of the same article prohibits indiscriminate attacks which are not, or cannot, be directed at a specific military objective or which employ a method or means of combat which cannot be limited to a specific military objective. Going even further, paragraph 5 prohibits even a basically legitimate operation against a military objective if such an attack may be expected to cause what is now referred to as "collateral damage" — a term so often used in this war — whose victims are civilians and civilian objects.

21 It is well known that during the Second World War residential areas of big cities were being bombed (Rotterdam, 1940, to force the Netherlands to capitulate; London and Coventry during the Battle of Britain; Dresden and Leipzig in February 1945), in order to spread terror among the population and thus make the government surrender. These and similar negative experiences led to this prohibition.

More precisely, it is prohibited by Article 51, paragraph 5 (b), to carry out an 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" (emphasis added). In other words, this provision puts the principle of proportionality to the fore. During a military operation the use of force must be proportionate to the expected military advantage. If the latter is considerable, the risk of collateral damage among civilians may be taken. On the contrary, if the expected advantage is small, or non-existent, a disproportionate number of victims among civilians is inadmissible. Such an injudicious military operation can become a violation of international law or a war crime, even if the chosen military objective is a legitimate target.

To avoid such mistakes, Article 57 stipulates that general precautionary measures must be taken in the conduct of any military operation. First, the attacking side must do "everything feasible" to verify that the objective to be attacked is really a military objective within the meaning of Article 52, paragraph 2. Second, those who plan or decide upon an attack must "...take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects". Finally, they must "...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". In addition, the same provision stipulates that an attack must be immediately cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection[22] or that the injury to civilians and damage to civilian objects will be excessive.

22 The law of armed conflicts provides for specially protected zones (undefended localities, open towns, hospital zones, safety zones, etc.) which, provided they fulfil the required conditions, should not be the object of attack, on any grounds whatsoever. See *ICRC Commentary*, pp. 697 ff.

Certain civilian objects enjoy special protection: cultural objects and places of worship, works and installations containing dangerous forces (nuclear plants, dams, etc.), objects indispensable to the survival of the civilian population (supplies of foodstuffs, water, etc.), as well as the natural environment.[23]

All these obligations have to be respected by the defending side as well. Thus, they have to place military objectives as far away from densely populated areas as possible, in order to avoid the danger of civilians being attacked. They must take all necessary precautionary measures to protect, to the maximum extent feasible, the civilian population under their control against the dangers resulting from military operations. It is especially forbidden to use the population as a shield against enemy attack.[24]

If we examine the air operation against the FRY in the light of the provisions set out above, there is no doubt that the attacking side, maybe also the defending side,[25] violated some of these rules, despite the great precision of NATO's air attacks and a relatively small number of victims among the civilian population. Violations committed by NATO forces were obviously more frequent and, which is an aggravating circumstance, had more serious consequences. For instance, the buildings of Radio and Television Serbia in Belgrade or Novi Sad could never have been classified as military objectives as defined in Article 52 of Protocol I. As for the attacks on an Albanian refugee convoy, on civilian objects in Nis or Aleksinac, or on passenger trains, it is obvious that adequate precautionary measures, indispensable in any attack, were not taken and that the nature of the objective was not checked seriously enough. Similarly, it is very difficult to find justification for the attacks on oil refineries, although these could be in principle considered as military objectives. In particular, it would not be easy

23 Protocol I, Arts 53-56. See *ICRC Commentary*, pp. 639 ff.

24 Protocol I, Art. 58. *ICRC Commentary*, pp. 691, with reference to other provisions.

25 It is generally known, for instance, that in Belgrade soldiers were located in some schools, inside densely populated areas, and that anti-aircraft defence was operational from the town proper, all of which certainly violated the Protocol, because the civilian population was put in danger. It is difficult to judge how widespread this practice was, but there is no doubt that such acts are prohibited.

to defend the claim that these attacks provided a "definite military advantage"; the fact that the Yugoslav Army seemingly did not encounter any serious difficulties due to a lack of fuel shows that this was not very important for the defenders. In addition, a legitimate question arises with regard not only to proportionality, but also the consequences for the human environment. Finally, the attacks on oil refineries and sources of electric power could also be interpreted as prohibited terrorist attacks. In brief, numerous NATO actions could certainly become objects of investigation by the ICTY,[26] which undoubtedly, according to its Statute, is competent to prosecute all grave breaches of international humanitarian law on the territory of the former SFRY, regardless of who committed them.

It is well known that even before the conflict and especially after it broke out, very serious allegations of persecution of the Albanian population, of crimes against humanity and even genocide, were made against our authorities in Kosovo, mostly in the western media. These allegations are backed by the fact that several hundred thousand Kosovo Albanians left the country during the war and found refuge in Macedonia, Albania and Montenegro. Given that it would be highly unusual to ascribe such a mass exodus of the population only to the dangers posed by the bombing, the claim that these people were forced by local authorities to leave their homes seems quite convincing. If the allegations are correct, this is undoubtedly a case of crimes against humanity (if the situation is qualified as a non-international armed conflict), or war crimes (if it is a conflict between States).

Such acts are prohibited and, whatever their qualification, they certainly constitute international crimes. This is so well known that I believe it hardly necessary to quote the corresponding provisions of the Geneva Conventions or Protocol I. As for the provisions of Protocol II applicable in such cases, I have discussed the issue earlier in

26 A group of American and Canadian international affairs experts and lawyers have submitted a proposal to the ICTY's Chief Prosecutor to bring charges against named persons (politicians and high-ranking military personnel of NATO countries) for specified violations of humanitarian law during this conflict. The proposal has been expertly prepared, unlike a similar proposal by a professor at the Faculty of Law in Belgrade, and can be found on the Internet. It will be interesting to see the Prosecutor's reaction, as it seems quite difficult to ignore this proposal.

the text, in support of the above affirmation. However, as in the case of violations committed by NATO forces, without an impartial investigation it is difficult for anyone, especially a legal expert, to draw any conclusions. Such an investigation would establish the facts and submit them to a judicial or arbitral body. The latter, in turn, would judge each individual case separately, examine the facts, accept or reject the evidence collected and decide whether or not a war crime or a crime against humanity has been committed. These are the reasons for my earlier remark, according to which this study can only provide an abstract analysis of the attitude of the parties to the conflict in the light of international humanitarian law. A concrete evaluation of any military act by the NATO forces, by the Yugoslav army or by Serbia's security forces can only be based on facts established by a body which enjoys general confidence with regard to its objectivity and impartiality.

Closing remarks

The analysis of facts leads me to the conclusion that there are very strong indications or — to use the terminology of our criminal law — grounds for suspicion that all sides in these armed conflicts, i.e. the FRY, KLA and NATO member States, have violated humanitarian law. Moreover, some of these violations could be qualified as grave breaches, namely as crimes against humanity or war crimes. There are general and incontrovertible legal principles, fundamental to any legal order, including the international legal order, that the law and the obligations deriving from it must be respected, and that every violation entails the responsibility of those who committed it, as well as the obligation to compensate the victims. It is thus obvious that all these indications should be examined in the course of an appropriate procedure and that, once the facts are established, the problem of responsibility should be brought before a competent international judicial or arbitral body.

The issue of responsibility arises, as we know, at two levels: as responsibility of the State for a violation (an internationally wrongful act), and as criminal responsibility of individuals, provided the violation committed by them can be qualified as a crime under international law. However, current political circumstances in the international

community give little hope that there will be an examination of responsibility at the two levels mentioned; this is also partly due to the incompleteness or imperfection of contemporary international law. I shall nonetheless give a reminder of the possibilities that exist to determine responsibility at both levels.

The responsibility of the State is naturally not the same in internal and in international armed conflict. More specifically, as long as the Kosovo conflict was a non-international one, all damage and injuries caused by the activities of security forces came within the responsibility of the State of Serbia, since those forces were an organ of it. If individuals, organized in militias, paramilitary organizations, etc., in Serbia also acted in the name and on behalf of the State (allegedly there were such cases), Serbia would also bear the responsibility for their acts; litigation would be dealt with by national courts, according to the appropriate subject-matter and territorial jurisdiction. The courts would act on the basis of private claims instituted by damaged or injured parties. They would deliberate on which rules of internal or international law were violated, on the nature of the damage or injury suffered by individuals, and on the type and form of compensation or reparation owed (which need not always be of a material kind). As for damage or injury caused to individuals by the KLA, if the insurgency were stopped and the resistance movement completely disappeared, the KLA's responsibility would be extinguished, and the victims of injury or damage could not obtain any compensation.

The situation is slightly different in the event of grave breaches of international humanitarian law or of crimes against humanity. Any individual is personally responsible for his or her acts, first of all at the domestic level before a national court (over which the ICTY has a supervisory right[27]) or directly before the Hague Tribunal,

27 It is correct that the ICTY has so-called "precedence" over national courts, i.e. it can *ex officio* take over any case, provided it establishes during the procedure or even after the final judgment that the trial was not fair, either because it was to the accused person's disadvantage or advantage. However, it is not correct to reduce this precedence to a practically exclusive competence of the Tribunal, as some believe. This would be neither logical nor feasible: assuming that several thousand crimes were committed during the "Yugoslav wars" from 1991 on, and that there may be as many perpetrators, the Tribunal would have to work for several decades to solve only some of these cases.

if for any reason national courts are unable to function. The State is responsible only if it is established that the perpetrator acted officially, under superior orders or according to a general plan of action, in which case the State is obliged to pay compensation to the victim. Conversely, if the court establishes that the perpetrators acted on their personal initiative, so to speak "on their own", there is no responsibility of the State.

Another point is worth emphasizing: if the rebels survive, i.e. if they win the conflict and come to power in the country, they would bear responsibility for all the unlawful acts committed by them during the civil war from the very beginning. This would also include acts committed by the previous authorities, since owing to their victory the insurgents will have assumed the position of legal authorities, whereas the previous ones would no longer exist. Applied to the specific situation of Kosovo, if the KLA manages to achieve secession and one day takes over power in an independent "State of Kosovo", this State will be responsible for all violations committed by the KLA since March 1998, i.e. from the moment when the situation of internal disturbances and tension became an internal armed conflict within the meaning of Protocol II.

With regard to the responsibility of States in international conflicts, the issues are considerably more complicated. It is well known that one of the reasons for the "imperfection" of international law lies in the absence of a compulsory jurisdiction. Thus, unlike an individual or a legal body within an internal legal order, States are not bound to submit themselves to a judicial or arbitral procedure unless it is provided for by an international agreement to which they are bound. The Geneva Conventions have not established a compulsory jurisdiction for dealing with a breach of an obligation under the Conventions or the Protocols by one of the Contracting Parties thereto. However, under Article 90 of Protocol I a body has been set up to establish the facts (fact-finding).[28] The competence of the Commission must be accepted

28 The full name of this body is: International Fact-Finding Commission. See *ICRC Commentary*, pp. 1,038 ff.

by means of a special declaration, similar to that given by States which have accepted the competence of the International Court of Justice (I.C.J.), i.e. on the basis of a so-called optional clause. The majority of NATO member States taking part in the conflict against the FRY had accepted the Commission's mandate, but Yugoslavia had not. So our country does not even have the possibility to make a fact-finding request concerning each case of bombing that we believe breached the law. Though our country did accept the competence of the I.C.J. on the basis of the optional clause during the armed conflict, it will be very complicated to bring the members of the NATO Alliance before the court. *Admittedly, our country has already brought a case before the* I.C.J., on several grounds, one of them being violation of the law applicable in armed conflict. To sum up, I believe that in practice it will be difficult to have our case dealt with by an international jurisdiction, in particular with respect to claims for compensation against individual members of the Alliance on account of the damage and losses that resulted from their violations of the law applicable in armed conflict.[29]

However, if a jurisdiction could be established, our country could make claims against those countries whose aircraft participated in a specific action, and only for that action. For instance, it would be worth finding out whose airplanes bombed the radio and television building in Belgrade (or from whose ship missiles had been launched), then ask a tribunal or an arbitral body to establish which provision of humanitarian law was violated. If a breach is confirmed, the type of compensation or the amount of money due needs to be determined, because in such cases war reparations are normally of a material nature. The claim can be filed only by the State of the FRY, given that it is a subject of international law and, as such, can legally and legitimately seek redress through international litigation or arbitration. If the view prevailed that, owing to the military operations against the FRY the war in Kosovo became an international conflict, the FRY could, in

29 Our public opinion seems to confuse two issues: on the one hand, the responsibility of NATO member States for the aggression and, on the other, the responsibility for violations of the law applicable in armed conflicts. In this brief study I do not examine responsibility for the aggression, but only for the second category of acts.

principle, also be taken to court for alleged breaches of the law of armed conflict committed by its forces[30] vis-à-vis the Albanian population in Kosovo (e.g. murder, destruction of property, expulsion of inhabitants from their homes, etc.). This option exists, however, only as a matter of principle, i.e. in the abstract, because all persons concerned are Yugoslav citizens. Foreign States have no legal right to file a complaint on their behalf with an international judicial body; and individuals could not initiate proceedings because they have no access to such international bodies which resolve exclusively disputes between States. The only possibility left to them is to claim compensation before domestic, i.e. Yugoslav, courts.

Concerning the international criminal responsibility of individuals, the situation is fairly clear and even simple, at least from a legal viewpoint. In the following I speak of war crimes and make no distinction whether members of NATO forces or of Yugoslav units (army, police, volunteers, etc.) are concerned, or whether rules governing the conduct of military operations or the protection of persons in the power of the adversary are involved. All States party to the Geneva Conventions are obliged to prosecute before their own courts any alleged perpetrators under their control, or to transfer them to a country that is determined to prosecute them (application of the principle *aut dedere, aut judicare*), if there is substantial evidence against them. I should like to stress that this obligation was accepted with the adoption of the Geneva Conventions, i.e. half a century ago, and is unequivocal. States primarily have the duty to prosecute their own citizens, but also prisoners of war and other foreigners who are under their control.

Of course, all procedural and other guarantees established by the Geneva Conventions and Protocol I in favour of the persons accused of such acts have to be respected. The procedure has to begin with an indictment, made at the request of the country whose citizens have been victims of the war crime. That country can also ask the authorities of countries where suspects happen to be to extradite them.

30 In addition to the Yugoslav army, the existing security forces and paramilitary units of the Republic of Serbia would also be covered, because Serbia (not being a subject of international law) cannot be held internationally responsible.

Alternatively, any individual can file a charge against a suspect with the competent authorities in his/her own or in any other country, provided he/she has information about the suspect, his/her whereabouts, etc., as well as knowledge that the person in question had committed a war crime or a crime against humanity. Thus, in law, the utmost has been done to ensure that persons who have committed such odious acts do not escape just punishment. The underlying reason for this is public awareness that this type of crime affects the *general interest of the international community, and not only the interest of the State whose citizens have been victims of the crime in question.*

As in the case of an "ordinary" criminal act, persons other than those who have committed the crime may also be held criminally responsible: helpers, instigators, people in positions of command and others. As established by the Nuremberg Tribunal after the Second World War, such responsibility may go right up to the commander-in-chief of the armed forces or the highest political body of a State, provided it has been proven that the violations committed were not mere individual acts of individual persons, but part of a definite criminal plan. In such a case the accused can be brought either before a national court of a State party to the Geneva Conventions or the International Criminal Tribunal for the former Yugoslavia. The latter has the competence to prosecute members of armed forces of NATO countries, including those at the highest echelon.

We may therefore conclude that rules concerning individual responsibility are well established in law and that it is certainly possible to implement them. However, it remains a moot question as to whether political circumstances in the international community will make it possible to follow the rules consistently and with regard to all parties in this conflict. If the Chief Prosecutor of the ICTY in The Hague does not take into serious consideration the charges brought against NATO and does not initiate proceedings, or does not convincingly explain why that was not done, the Tribunal's already weakened credibility will be finally eroded.

With regard to international humanitarian law itself, it seems that none of the parties to this conflict has respected it. This confirms the view shared by many, that without mandatory verification of

compliance with the law and in the absence of mechanisms to enforce provisions dealing with responsibility for violations, it remains very difficult, if not impossible, to ensure that humanitarian law is implemented consistently and comprehensively in an armed conflict.

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Résumé

Droit international humanitaire et la crise du Kosovo

par KONSTANTIN OBRADOVIĆ (1939-2000)

Dans sa dernière contribution académique à une matière dont il était un expert reconnu, Konstantin Obradović examine la crise du Kosovo sous l'angle du droit international humanitaire. Se référant d'abord à la situation au Kosovo avant le début des opérations militaires de l'OTAN contre la République fédérale de Yugoslavie, il conclut qu'il s'est agi d'un conflit armé non international au sens du droit humanitaire et non seulement de troubles qui relèvent uniquement du droit interne. L'intervention des forces de l'OTAN en a changé le caractère juridique, et le droit international relatif aux conflits internationaux est devenu applicable. Différents incidents survenus pendant ces opérations sont examinés à la lumière des Conventions de Genève et de ses Protocoles additionnels. L'auteur conclut avec un appel à mieux faire usage des procédures internationales de contrôle de la mise en œuvre du droit international humanitaire.

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