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**YUGOSLAVIA WAR CRIMES PROJECT**

*DOES AN ACT OF IMPEDING HUMANITARIAN AID SHIPMENTS TO NON-COMBATIVE  
CIVILIANS CONSTITUTE A VIOLATION OF THE LAWS AND CUSTOMS OF WAR ?*

## **I. Introduction and Summary of Conclusions**

There is an international legal question with regards to whether warring parties who impede humanitarian aid to non-combative civilians are guilty of committing a war crime. This is by anyone's terms a moral wrong, yet is it actually understood to rise to the level of a war crime punishable by imprisonment of those who commit this act? The references to free passage of humanitarian aid in the negotiating records of both the Fourth Geneva Convention and the International Tribunal persuade an answer in the affirmative. The question of "should" is supplanted by "clearly intended" after viewing these records.

## **II. Factual Background**

With respect to impeding humanitarian aid, there exists three groupings of factual categories: 1) attack of land convoys of humanitarian aid, 2) actual theft of relief supplies, and 3) sniper attack on individuals attempting to retrieve humanitarian supplies which have been air-dropped. The most frequent method of attack on humanitarian aid supplies is the direct attack on relief truck convoys through use of artillery, mines, etc.<sup>1</sup> Attackers hide in the mountainous terrain and shell clearly labeled UN relief trucks with impunity. An insult to denial of allowing humanitarian aid to freely pass includes converting the supplies for one's own use.<sup>2</sup> Finally the most distasteful form of denial of humanitarian assistance occurs once aid shipments have been air-dropped. The civilians then approach the shipments in order to retrieve supplies personally and

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<sup>1</sup> N.Y. Times, January 18, 1993 at A,9:1.

<sup>2</sup> N.Y. Times, February 22, 1993 at A,1:6.

then to bring them back to their homes, yet they come under the threat of sniper attack.<sup>3</sup>

### III. Legal Discussion

#### A. EXAMINATION OF NEGOTIATING RECORD OF THE GENEVA CONVENTION

Jean Pictet compiled the authoritative negotiating history of the Geneva Conventions of 1949 rationale.<sup>4</sup> There is no outright claim of the right to unimpeded humanitarian aid. Yet there are numerous hints by Pictet that such a right should be recognized.

##### 1. Article 21

Under Article 21,<sup>5</sup> which deals with land and sea transport of wounded civilians, Pictet exclaims that "to protect medical convoys means to insure that they are respected...It also means giving them help in case of need."<sup>6</sup> Certainly wounded civilians deserve to be free from attack, yet Pictet suggests that these convoys additionally deserve assistance by the enemy if a situation arises where these convoys are incapable of completing their mission. To propose that the relief convoys should be actively assisted if necessary presupposes that relief convoys should be left

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<sup>3</sup> N.Y. Times, March 4, 1993 at A,1:6.

<sup>4</sup> Jean Pictet, Commentary on Geneva Convention IV: Relative to Protection of Civilian Persons in Time of War, International Committee of the Red Cross (1958)..

<sup>5</sup> Article 21- Land and Sea Transport. Convoys of vehicles or hospital trains on land... conveying wounded and sick civilians... shall be respected and protected ...

<sup>6</sup> Pictet at 171.

alone to accomplish their original work.

## 2. Article 23

Article 23 which deals with the consignment of medical supplies, food, and clothing states that "each contracting party shall allow free passage of all consignments of medical and hospital stores .... intended only for civilians ... even if the latter is its adversary. [Each shall additionally] permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases." Pictet says that this distinction of the two classes results from military considerations which "might be [used to] reinforce the economic potential of the enemy."<sup>7</sup>

The second paragraph of Article 23 lists conditions which must be met in order for one belligerent party to accede to free passage. These conditions include "no serious reasons for fearing that (a) consignments may be diverted, (b) ineffective control, and (c) no definite advantage to military efforts of economy of the enemy." Pictet believes that this language is vague, that it "leaves too much to the discretion of the blockading powers" and that "there is a danger that it may seriously jeopardize the principle set forth."<sup>8</sup>

Since the primary purpose of disallowing free passage of medical supplies, food, and clothing is to deny the intended recipients their benefits, the justification of paragraph two is fair in requiring certain conditions of delivery. That civilians will not turn over supplies to military personnel is not unreasonable a precondition to receiving the supplies. In Bosnia there appears to be no transfer of such supplies to assist the military resistance and any implication is disingenuous

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<sup>7</sup> Pictet at 180.

<sup>8</sup> Pictet at 182, 183.

without proof. Television has satisfactorily recorded the situation that exists and apparently medical supplies, food, and clothing are vitally necessary for the civilian population who is expected to be sole users of such supplies.

### 3. Article 53

Article 53 of the Geneva Convention deals with 'Prohibited Destruction' and states that "Any destruction by the occupying power of real or personal property belonging ...to co-operative organizations is prohibited, except where such destruction is rendered absolutely necessary by military operations." As to this article, Pictet states:

In the very wide sense in which the Article must be understood, the prohibition covers destruction of all property (real or personal) .... The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Article 46 and 56 according to which private property and the property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected.<sup>9</sup>

The military necessity requirement against the destruction of real or personal property suggests that there exists certain property which may be destroyed simply due to their value to the opposing side.

Protection of property which does not pose a threat of immediate harm to the enemy is specified by Pictet to include property which propagates art, science, religion, and charity. The claim that humanitarian aid poses an immediate threat to the enemy and justifies destruction via military necessary falls both short and disingenuous in its reasoning. That the use of humanitarian aid by enemy troops will inevitably occur is too broad a rationale. Even if isolated incidents occur where enemy troops do assume use of humanitarian aid, the international relief agencies operate in

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<sup>9</sup> Pictet at 301.

open view of the world community. The purpose of humanitarian relief destined for the civilian population is not an international ploy to serve combatants on one side of a conflict. Since humanitarian aid poses no threat to either side of a conflict it is a logical reading of Pictet's extension of property which should be protected to include humanitarian assistance to civilians.

#### 4. Article 147

Article 147 of the Geneva Convention defines grave breaches as "involving...willful killing...inhuman treatment...willfully causing great suffering..." As to each of the three definitions which comprise a grave breach, Pictet's comments accuse those who impede humanitarian aid to civilian populations.

Pictet states that "willful killing would appear to cover cases where death occurs through a fault of omission. Of course, the omission must have been willful and there must have been an intention to cause death by it."<sup>10</sup> Since humanitarian aid comprises food, clothing, and medical supplies, those who act to sabotage humanitarian aid attempt to either bring about or hasten the death of individuals to whom the aid is destined. A commission on the part of the saboteur results in the omission of an humanitarian exchange function. Commissions are willful by definition. Since death is a likely result of actions by a saboteur who seeks to deny items which are basic and essential to human existence to non-combative populations, a likelihood of death satisfies Pictet's intent requirement. By leaders turning a blind eye to acts of impeding humanitarian aid, they are committing an act of omission. The resulting deaths due to this omission satisfy the willful killing arm of the grave breaches definition.

In his comment on the second example of grave breaches, Pictet states that "certain

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<sup>10</sup> Pictet at 597.

measures which might cut the civilian internees off completely from the outside world ... or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment." <sup>11</sup> The first part of Pictet's understanding of this grave breach in a literal view easily includes the action of impeding humanitarian aid. The act is an obstacle which might deny the final attempt to reach those civilians isolated due to the conflict at hand. Opponents will argue over the intended meaning of the definition of 'internee' and the use of the nonspecific 'might' which open-endedly could encompass nearly every action taken. The final part of Pictet's analysis which includes the causation of a grave injury to human dignity should not be hard to defend. Assuming that the necessity of shipping humanitarian aid depends upon a population who urgently requires those goods since this population lacks or will soon lack items of need, grave injury to human dignity likely follows persons living on the verge of subsistence. Injuries to human dignity could result from inappropriate language directed towards a person, but for this injury to be considered grave, the scent of death needs to be looming nearby.

The final example of what may constitute a grave breach is "willfully causing great suffering." The act of impeding humanitarian aid does cause physical suffering in the form of pain resulting from personal medical conditions, hunger, and related problems in light of cold temperatures resulting from inadequate warmth in winter. Pictet furthers the proposition that willfully causing great suffering constitutes a grave breach by exclaiming "since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering, also." <sup>12</sup> This extension should validly cover impeding humanitarian aid as the

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<sup>11</sup> Pictet at 598.

<sup>12</sup> Pictet at 599.

obstruction of final means of existence by non-combative civilians forms the ultimate insult as directed to the self worth of these civilians.

In summary, Jean Pictet's Commentary suggests that impeding humanitarian aid constitutes a war crime. He feels that medical convoys should be actively aided -a step beyond being unimpeded- in the event that these convoys are unsuccessful in attempting their mission. By viewing humanitarian assistance in terms of possessing the ability to perpetuate the culture [existence] of the civilian population, Pictet's interpretation of the 'prohibited destruction' article of the Geneva Convention applies to the impediment of humanitarian aid. Finally, according to the definition of grave breaches, Pictet extends suffering to include moral in addition to physical suffering, and impeding humanitarian assistance adversely affects human dignity.

## B. EXAMINATION OF ADDITIONAL PROTOCOL 1

The status of Additional Protocol I to the Geneva Convention was shown to be accepted in 1991.<sup>13</sup>

Two articles in Protocol I deal with the aspect of humanitarian aid impediment. The first is Article 54, entitled " Protection of Objects Indispensable to the Survival of the Civilian Population." It states that:

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects foodstuffs, agricultural areas for the production of *such as* foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying for their

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<sup>13</sup> 30 International Legal Materials 397, 1991; Case No. IT-94-1-T / Defendant: Mr. Dusko Tadic, (1995).

sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

An outright prohibition of the use of starvation against civilians is unique to Protocol I.

Subsection two uses the catch-all phrase, "or for any other motive" tied in with a prohibition against attack of food supplies. Humanitarian aid shipments are understood to sometimes and often include food as its cargo. The situation in Bosnia reached desperate conditions often and certainly the knowledge that food was being stopped from reaching non-combative civilians must have been known. The only way that opponent may rebut this accusation is by claiming knowledge by omission.

A second section of Protocol I which applies to impeding humanitarian aid is Article 70-Relief Action. Article 70 claims:

1. *If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts....[deleted priority of distribution to persons]*
2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
3. The Parties...
  - (c) shall in no way whatsoever divert relief consignments from the purpose for which they are intended nor delay forwarding, except in cases of urgent necessity in the interest of the civilian population.
4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.
5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international coordination of the relief actions referred to in paragraph 1.

These items as a whole make it very clear that unimpeded humanitarian aid is the rule and not the exception. Opponents will say that the conditions may only be met once there exists an actual agreement of both Parties as spelled out in section one of Article 70, yet the very next sentence softens this insistence by making it clear that relief will in no form constitute any interference in the armed conflict. Armed conflict may naturally continue uninterrupted while humanitarian aid attempts to civilian populations should be insulated from their surroundings. Subsection two, by stating that civilians of the adverse party are due the right of unimpeded relief consignments, puts warring parties on notice that what is thought to be policy during international conflicts, actually is.

Subsections four and five take the proactive step of requiring opponent factions to take initiative and assist humanitarian relief. The understanding of non-intervention as one of a passive role by simply allowing aid shipments uninterrupted progress takes a backseat to further action such as protecting relief consignments, presumably from their own troops in addition to outsiders wishing to attack, rescue personnel, or simply to usurp aid for their own use. "Facilitation" is used twice in the second requirement for hostile forces to take an effective step in securing relief aid to unarmed civilians.

### C. EXAMINATION OF CUSTOMARY INTERNATIONAL LAW AS REFLECTED IN THE WRITINGS OF SCHOLARS

Charles Allen, then Attorney-Advisor for Political-Military affairs at the United States Department of State, has written an impressive article which is a statutory construction of

pertinent language with respect to building a legal foundation for human rights extension to the right to food and humanitarian assistance to civilians during conflict.<sup>14</sup> Allen analyzes the Geneva Convention IV, touches on the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, nonderogable rights of civilians during war, and the emerging right to food for the distinction of civilians as opposed to military personnel, and finally analyzes Protocol I. The extension of protection of food as vital to the interests of non-combatant civilians is a logical progression of protecting civilians from direct attacks of genocide and the principle right of all- the civilian right to life.<sup>15</sup> Allen quotes Howard Levie of the Naval War College in The Code of International Armed Conflict as saying that the focus on civilian starvation "undoubtedly could be one of the most humanitarian provisions ever adopted as part of the law of war."<sup>16</sup>

Allen bases humanitarian law as the cornerstone for protection of civilians and includes the labeling of impeding humanitarian aid as not only immoral, but also wasteful of limited resource and overkill if viewed in terms of being required by a "military necessity."<sup>17</sup> He also credits Menghistu as exhorting that "it is meaningless to differentiate killing by an act of state and by starving a person to death, because both forms of behavior constitute the worst forms of

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<sup>14</sup> Charles Allen, Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law, 19 Georgia Journal of International and Comparative Law 1 (1989).

<sup>15</sup> Allen at 9.

<sup>16</sup> Allen at 12.

<sup>17</sup> Allen at 15.

cruelty." <sup>18</sup>

A new perspective to the validity of criminalizing the impediment of humanitarian aid rests on the principle of 'unnecessary suffering' <sup>19</sup> This notion has its roots in Article 35 of Protocol I, which in part "prohibits employment of weapons... to cause superfluous injury or unnecessary suffering." The scope widens beyond weapon control to include civilian protection. <sup>20</sup> This may be judged "by applying the rules of proportionality and discrimination." Proportionality refers to a level of only that military force which is necessary for submission of the opponent, while discrimination refers to target selection, especially locales of civilian immunity such as safety zones. <sup>21</sup>

One is hard pressed to validly assert that military necessity requires a level of force directed against civilians who are not combatants such that a blockage of relief aid is necessary. Relief aid implies civilian desperation. Discrimination regulation against target locales like safety zones is fair, humane, and asks warring parties to give up very little, if anything. Yet this is diametrically opposed to the goal of ethnic cleansing. Unnecessary suffering and ethnic cleansing are relatives. Relief aid blockage is simply a means to an end of unnecessary suffering. The greater good asks that in conflict which is dangerous that no needless pain should be inflicted upon humans.

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<sup>18</sup> Allen at 54.

<sup>19</sup> Yvonne van Dongen, The Protection of Civilian Populations in Time of Armed Conflict, 206 (1991).

<sup>20</sup> van Dongen at 206.

<sup>21</sup> van Dongen at 206

#### D. EXAMINATION OF NEGOTIATING RECORD OF THE YUGOSLAVIA TRIBUNAL

In the Pretribunal Proposals and Debates<sup>22</sup> there are found numerous references that point towards this memo's thesis that impeding humanitarian aid constitutes a war crime.

The delegate from Venezuela said:

Nor must we forget that the UN Convention on the Prevention and Punishment of the Crime of Genocide clearly states that genocide means inflicting on a group of human beings *conditions of life calculated to bring about its physical destruction on whole or in part* [emphasis added]. Article 54 of the 1977 Additional Protocol to the Geneva Conventions also prohibits the destruction of infrastructures basic to life, such as

electricity, drinking water, sewage and other basic public services.<sup>23</sup>

A second example is US representative Madeline Albright stated in the proposals sessions that:

Warren Christopher, speaking on the President's behalf explained why the United States believes that this and other actions are urgently required. As the Secretary said: We cannot ignore the human toll. Serbian ethnic cleansing has been pursued through mass murders; systematic beatings and the rapes of Muslims and others; prolonged shellings of innocents in Sarajevo and elsewhere; forced displacement of entire villages; inhumane treatment of prisoners in the detention camps; *and the blockading of relief to the sick and starving civilians* [emphasis added]. Atrocities have been committed by other parties as well. Our conscience revolts at the idea of passively accepting such brutality.<sup>24</sup>

That relief blockade is grouped with other atrocities such as rape and even murder intimates a kinship of sorts between heinous acts and actions which appear benign in light of comparison, yet

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<sup>22</sup> Reproduced in Virginia Morris and Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia (1995).

<sup>23</sup> Reproduced in Morris and Scharf supra at 150.

<sup>24</sup> Reproduced in Morris and Scharf supra at 166.

may result in death.

Thirdly in the Pretribunal Proposal and Debates, UK representative Mr. Richardson stated:

We have been receiving for many months now continued reports of massive breaches of international humanitarian law and human rights in Bosnia. I want to mention in particular the abuse of women, *the deliberate obstruction of humanitarian relief convoys*, the forcible movements of population, the forcible surrender of property and the deliberate targeting of civilian populations.".....Those who have perpetrated these shocking breaches of international humanitarian law should be left in no doubt that they will be held individually responsible for their actions.<sup>25</sup>

Mr. Richardson's 'less than death' list of international law breaches which includes impeding aid shipments is intended to imply that actions producing results other than death are understood by the international community as carrying punitive consequences.

Fourthly, UK representative Sir David Hannay exclaimed:

The United Kingdom Government has been horrified at the continued evidence of massive breaches of international humanitarian law and human rights in the former Yugoslavia, the abuse of women, *the deliberate obstruction of humanitarian relief convoys*, forced population movements, forcible surrender of property and the deliberate military targeting of civilian populations.<sup>26</sup>

Mr. Hannay's reiterates that relief impediment takes the special status of a breach of international law. That this breach is considered 'massive' suggests that certain acts are either undertaken on a grand scale or that these actions are especially egregious. Regardless, the "obstruction of relief convoys" in a deliberate manner is duly noted as being unacceptable in the international community.

The above list concludes all relevant interpretative statements by members of the Council.

There appears to be an implied assumption that obstruction of relief supplies destined for non-

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<sup>25</sup> Morris and Scharf at 167.

<sup>26</sup> Morris and Scharf, at 189.

combative civilians is not to go unpunished since this rises to the level of denial of a right of humanity. It is no surprise that this right, although not specified in the Geneva Conventions, was intended to be considered in the future in a manner which would formalize the right. That time is now and the implications of the above-mentioned representatives allude to this contention.

#### E. UNITED NATIONS CONVENTION AGAINST GENOCIDE

In the United Nations' Convention Against Genocide, Article 2 proclaims that "in the present convention, genocide means any of the following acts committed with intent to destroy , in whole or in part, a national, ethnic, racial, or religious group, as such: *(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.* Civilians in need of humanitarian assistance pose no threat to hostile forces who surround and / or subjugate them. In tying together a prior statement in which I suggested that the act of impeding humanitarian aid is intimately tied in with genocide, one cannot accept that impeding humanitarian aid is anything less than purposefully attempting to bring about conditions of life which would eventually result in decimation of the population. Their non-presence is exactly the intended result. Genocide, in addition to being a horrible act, can also be understood as being a result. This would eliminate less dramatic actions leading up to population extirmination from being counted as genocide in and of themselves. The act of impeding humanitarian aid often results in a conclusion of the act of death of non-combative civilians by prior deliberations. To tie this in with the definition of genocide is not a far stretch.

The Allied Control Council Law # 10 defines crimes against humanity without limitation

imposed by Nuremberg Charter as "atrocities and offenses, *including but not limited to* murder, extermination, enslavement, deportation, imprisonment, torture, rape, *or other inhumane acts committed against any civilian population* or persecutions on political, racial, or religious grounds..." [emphases added].<sup>27</sup> The open-ended language of "other inhumane acts" along with a current sweeping in the direction of intolerance of relief aid obstruction suggests that in 1946 that criminal liability would extend beyond what was accepted as such during their time.

#### F. STATUTE OF THE INTERNATIONAL TRIBUNAL

As to actual language of the ratified Statute of the International Tribunal there exists repetitions of prior discussed language. For example, Article 2, reiterates the acceptance of the grave breaches provision of the Geneva Conventions of 1949, by claiming that "namely the following acts against persons or property under the provisions of the relevant Geneva Convention: ... (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" are considered illegal. The military necessity requirement is a higher threshold to sustain if trying to avoid the labeling of relief convoy destruction from consideration as a grave breach. Spite and intolerance are not justifications of military necessity.

Next, Article 3- Violations of the Laws and Customs of War says that the International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, *but not be limited to*:

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<sup>27</sup> Reproduced in Morris and Scharf supra at 422.

- (b) wanton destruction of cities, towns, villages or devastation not justified by military necessity
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historical monuments and works of art and science.
- (e) plunder of public or private property

Again, a list of destructive acts does not include relief aid seizures, yet leaves open the possibility that the list is not all-inclusive.

Article 4 of the Tribunal deals with the definition of genocide.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

This definition reiterates a previous notion that to set in motion acceptance of certain acts which will assist in destroying certain populations is considered genocide. Impeding humanitarian aid should be considered one of those acts.

Finally, Article 5 deals with Crimes Against Humanity and also includes open-ended language which gives the benefit of the doubt to the side of greater inclusion in the list of atrocities by stating "the International Tribunal shall have the power to prosecute persons responsible for ... (i) other inhumane acts."

The need for inclusion of impeding humanitarian aid as constituting a war crime rests upon real suffering. It was implied to exist since the time of the Geneva Conventions and numerous references and citations in international gatherings suggest that formal recognition is a reality and therefore should be applied today.