

## American University Washington College of Law

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# No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia

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# No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia

*Based on a Mission of the Women in the Law Project of  
the International Human Rights Law Group\**

## PREFACE

The Women in the Law Project of the International Human Rights Law Group (Law Group) sponsored a delegation to the former Yugoslavia from February 14 to 22, 1993. The delegation, which was also endorsed by the Bar Association of San Francisco, had two principal objectives.

First, the delegation provided training in human rights fact-finding methodology to local organizations documenting rape and other violations of international law committed in the context of the armed conflict in Bosnia-Herzegovina (Bosnia) and in Croatia. This part of the delegation's activities, undertaken in consultation with the United Nations Commission of Experts,<sup>1</sup> sought to enhance the thoroughness of local documentation

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\* Delegation Members: Laurel Fletcher, Esq.; Professor Karen Musalo; Professor Diane Orentlicher, *Chair*; Kathleen Pratt, Esq. With the assistance of the law firm of Heller, Ehrman, White & McAuliffe. Washington, D.C., June, 1993.

The International Human Rights Law Group is a nonpartisan, advocacy organization that mobilizes the special skills of the legal community to empower locally-based human rights advocates and to promote and protect human rights around the world. The Law Group is affiliated with the International Commission of Jurists (ICJ) in Geneva, and has worked in more than 80 countries since 1978. The Law Group's Women in the Law Project (WILP) seeks to promote women's rights in the United States and abroad by strengthening international standards and procedures for protecting women's rights.

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1. The Commission was established pursuant to U.N. Security Council Resolution 780 of October 6, 1992, which requested the Secretary-General "to establish, as a matter of urgency, an impartial Commission of Experts" to gather, examine, and analyze information related to war crimes committed during the conflict in the former Yugoslavia "with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia." S. Res. 780, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/47 (1992).

efforts undertaken with the ultimate aims of securing redress for survivors of rape and other war crimes, and bringing the responsible parties to justice.

Second, the delegation assessed how the international community can more effectively respond to the legal and humanitarian needs of the survivors of these violations, including refugees, and support the efforts of local organizations and individuals seeking to address those needs.

The delegation was led by Diane F. Orentlicher, Associate Professor of Law at the American University in Washington, D.C. and a member of the Advisory Councils of the Law Group and of its Women in the Law Project. The delegation included Professor Karen Musalo, Director of the Refugee and Human Rights Clinic at the University of San Francisco; Kathleen Pratt, an attorney with the San Francisco law firm of Heller, Ehrman, White & McAuliffe and member of the Executive Committee of the Bar Association of San Francisco International Human Rights Section; and Laurel Fletcher, also with the firm of Heller, Ehrman and former executive editor of the *Harvard Human Rights Journal*. Professor Anica Mander, a Professor of Gender and Women's Studies at New College in San Francisco and a native of the former Yugoslavia, served as a logistical consultant for the team in Croatia.

The delegation traveled to Zagreb and Karlovac<sup>2</sup> in Croatia, and Belgrade, Serbia.<sup>3</sup> In Zagreb, the delegation met with officials of the International Committee of the Red Cross (ICRC), the United Nations High Commissioner for Refugees (UNHCR) and the World Health Organization (WHO), representatives of women's groups, medical professionals, and others who are documenting gender-based violence and providing health and other services to women survivors of abuses committed during the conflicts in Croatia and Bosnia. The delegation also met with representatives of various governmental and non-governmental organizations (NGOs) documenting human rights abuses in the region. The delegation conducted two training sessions with several women's groups, focusing on human rights documentation techniques.

In Belgrade, the delegation met with representatives of the UNHCR and ICRC, women's groups, human rights organizations, medical professionals,

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2. The delegation visited a refugee transit camp at Karlovac, approximately 40 minutes outside of Zagreb, administered by the United Nations High Commissioner for Refugees (UNHCR). In addition, the delegation attempted to visit an unofficial refugee camp at Resnik, a suburb of Zagreb, on February 16, 1993. Croatian officials, however, had closed the camp earlier that day because the refugees staying there were unregistered. The delegates nonetheless were able to speak with several residents at Resnik who inadvertently had been left behind.

3. Although the delegation had hoped to visit Bosnia, it was unable to do so because of the state of the conflict at the time of the visit (the UNHCR was unable to enter Bosnia during the period of the delegation's visit, and in fact temporarily suspended operations there while the delegation was in Croatia).

governmental documentation centers, and others documenting rape and gender-based violence. The delegation also met with Biljana Plasvić, Vice President of the self-proclaimed Serbian Republic of Bosnia-Herzegovina. The delegation conducted a training session with a number of organizations engaged in human rights documentation efforts.

The mission was initiated by Laurel Fletcher and Kathleen Pratt, and would not have been possible without the support of their law firm, Heller, Ehrman, White & McAuliffe. Particular thanks are due to Patrick Merloe of Heller, Ehrman for his guidance in this project. The mission also would not have been possible without the generous contributions of the Esprit Foundation, the van LoebenSels Foundation, the Wallace Alexander Gerbode Foundation, the Gilmore Foundation, Public Media Center, the law firms of McCutchen, Doyle, Brown & Enersen, Farella, Braun & Martel, Bronson, Bronson & McKinnon, and Kecker, Brockett & Van Nest.

This report was written by Laurel Fletcher, Karen Musalo, Diane Orentlicher, and Kathleen Pratt, and was edited by Donna Sullivan and Reed Brody. The authors are grateful for comments on earlier drafts of this report and for other contributions by Professor Robert K. Goldman, Harlan Levy, and Dr. Shana Swiss, Director, Women's Program, Physicians for Human Rights. We are especially indebted to Abigail Abrash, former Senior Program Director at the Law Group, for her tireless efforts and guidance throughout this project. Finally, we wish to thank all those in the former Yugoslavia who helped the delegation in its mission and whom we cannot acknowledge by name.

Reed Brody, Executive Director

International Human Rights Law Group

Donna Sullivan, Director, Women in the Law Project

Washington, D.C., June 1993.

## I. INTRODUCTION

Throughout the past year, Bosnia has been racked by a war in which acts of incomprehensible brutality have been carried out on a massive scale. Estimates range from twenty thousand civilians killed<sup>4</sup> to one hundred thirty seven thousand killed or missing;<sup>5</sup> by all accounts, the human toll has been staggering. As the principal aggressors, Serb forces have been responsible for the overwhelming number of documented violations, but

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4. See Jonathan C. Randal, *Serbs, Muslims Sign U.N. Cease-Fire Around Srebrenica*, WASH. POST, Apr. 18, 1993, at A38.

5. See Charles Lane, *Last Rites for Bosnia*, NEWSWEEK, May 10, 1993, at 30. See also Phil McCombs, *At the Bosnia Crossroads*, WASH. POST, May 5, 1993, at B8 (Bosnian Foreign Minister estimating two hundred thousand Bosnian civilians killed).

grave violations of human rights and humanitarian law have been committed by all sides to the conflict.

Serb forces, both military and paramilitary, have committed such abuses in furtherance of "ethnic cleansing," a cynical euphemism used by Serb leaders to describe their campaign to establish homogeneous Serb control over geographic areas by using violence and intimidation to remove non-Serb residents.<sup>6</sup> Pursuant to this policy, Serb forces have operated detention camps in which Muslims, as well as Croats, have been tortured, mutilated, starved and killed. Serb forces have also torched the homes and confiscated the property of non-Serbs, and have carried out summary executions of Muslims and Croats.

Muslim and Croat forces in Bosnia also have summarily executed both civilians and combatants placed *hors de combat*, and have subjected detainees to severe mistreatment. Muslim and Croat military, paramilitary and police forces, as well as civilians, have also looted and destroyed villages, including cultural monuments.<sup>7</sup> While most of these abuses have been directed against Serb victims, fierce fighting has periodically erupted between Croat and Muslim forces, at times involving savage violations.

In April 1993, for example, brutal violence erupted between Muslims and Croats, nominal allies against Serb forces, in Central Bosnia. According to the *Washington Post*, this fighting reached "a level of savagery that U.N. officials say rivals anything seen so far in the [Bosnian] republic's three-sided factional war."<sup>8</sup> A recent report by the U.N.'s Special Rapporteur on the former Yugoslavia, Tadeusz Mazowiecki, blames Croatian forces for "a deliberate and systematic policy of ethnic cleansing" against Muslims in the central Bosnian region of Vitez and in the southern Bosnian town of Mostar.<sup>9</sup>

#### A. REPORTS OF RAPE

As 1992 drew to a close, reports emerged that rape was being used as a weapon of war on a massive scale.<sup>10</sup> While all sides in the Bosnian conflict have committed rapes, Serb forces appear to have used rape on the largest scale, principally against Muslim women.<sup>11</sup> Available evidence

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6. The term "ethnic cleansing" is misleading in the sense that Croats, Bosnian Muslims, and Serbs all share a Slavic "ethnicity" and are divided more by religious and national identity.

7. See HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERCEGOVINA, VOLUME II*, (1993), at 14-19 [hereinafter WATCH REPORT, VOL. II].

8. Jonathan C. Randal, *Croat-Muslim Combat in Bosnia Reaches New Ferocity*, WASH. POST, Apr. 21, 1993, at A21-26; see also John F. Burns, *Vicious 'Ethnic Cleansing' Infects Croat-Muslim Villages in Bosnia*, N.Y. TIMES, Apr. 21, 1993, at A1.

9. Rod Nordland & Charles Lane, *'Kill All the Muslims': While the world focuses on Serb atrocities, the Croats get away with murder*, NEWSWEEK, June 7, 1993, at 28.

10. See, e.g., Tom Post, *A Pattern of Rape: War Crimes in Bosnia*, NEWSWEEK, Jan. 4, 1993, at 32.

11. Jeri Laber, *Bosnia: Questions of Rape*, N.Y. REV. OF BOOKS, Mar. 25, 1993, at 4.

suggests that rape has been used to humiliate women as direct targets and to humiliate their communities, thereby inducing members of the local non-Serb population to leave their homes. Frequently, rapes have been committed in front of others — sometimes close relatives, such as parents and children — often in front of neighbors. A team of medical experts that investigated allegations of rape at the request of the U.N. Special Rapporteur on the Situation of Human Rights in the Territory of the former Yugoslavia cites the following pattern in Vukovar, Croatia to illustrate this strategy:

. . . Serb paramilitary units would enter a village. Several women would be raped in the presence of others so that word spread throughout the village and a climate of fear was created. Several days later, Yugoslav Popular Army . . . officers would arrive at the village offering permission to the non-Serb population to leave the village. Those male villagers who had wanted to stay then decided to leave with their women and children in order to protect them from being raped . . .<sup>12</sup>

Reports indicate that some rape survivors may have been subjected to forced pregnancy and forced maternity. Typically, these accounts allege that rape survivors who became pregnant were deliberately detained by Serb captors beyond the point when they could obtain a legal abortion. Numerous accounts of rapes indicate that Serb perpetrators have taunted their victims with words to the effect, "Now you'll have a Serb baby."<sup>13</sup>

Reported accounts also make clear that rapes have been condoned by commanding officers, and some reports indicate that commanders have at times even ordered soldiers to commit rapes.<sup>14</sup> A number of testimonials of rape survivors identify commanders as among the perpetrators.

Although the reported cases of rape typically involve female victims — ranging from young children to elderly women — there is evidence that Serb forces have also subjected Muslim men to various forms of sexual assault, sometimes forcing male detainees to perform acts of sexual violence and genital mutilation on each other. While the Law Group delegation focused upon violence against women, reports of sexual violence against men clearly warrant further attention.

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12. *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992*, U.N. ESCOR, 49th Sess., Annex II, Agenda Item 27, at 71 ¶ 48(a), U.N. Doc. E/CN.4/1993/50 (1993) [hereinafter *Medical Mission Report*].

13. See, e.g., *id.*, para. 41.

14. See Roy Gutman, *Rape Camps: Evidence in Bosnia Mass Attacks Points to Karadzic's Pals*, N.Y. *NEWSDAY*, Apr. 19, 1993, at 7, 31.



Although most reported rapes have been attributed to Serb forces, rapes have been committed by Muslim and Croat forces against Serb women.<sup>15</sup> The Law Group is also aware of reports alleging acts of sexual violence, such as crude circumcisions, committed by Bosnian Muslims against Serbian men.<sup>16</sup>

#### B. LEGAL CONSEQUENCES OF RAPE AS AN INTERNATIONAL CRIME

These acts are prohibited by international law, which also establishes a duty to punish those who are responsible. Rape is explicitly prohibited in the Geneva Conventions of 1949 and the two Protocols thereto.<sup>17</sup> Rape is also encompassed in language of the Geneva Conventions designating as a "grave breach" of the Conventions, *inter alia*, "torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health . . ."<sup>18</sup> when committed against "protected persons;"<sup>19</sup> significant-

15. See Laber, *supra* note 11, at 4; see also WATCH REPORT, VOL. II, at 21.

16. U.S. DEP'T OF STATE, FOURTH U.S. REPORT TO UNITED NATIONS PURSUANT TO PARAGRAPH 5 OF SECURITY COUNCIL RESOLUTION 771 (1992), Dec. 7, 1992.

17. Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention], which applies to international armed conflicts, provides: "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault." This provision applies to women who are "protected persons," which Article 4 of the Convention defines as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Article 76(1) of Protocol I, which also applies to international armed conflicts, similarly provides: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 (*entered into force* Dec. 7, 1978). Article 4(2)(e) of Protocol II, which applies in situations of non-international armed conflict, prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" when committed against persons who do not take a direct part or who have ceased to take part in hostilities. Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 (*entered into force* Dec. 7, 1978).

18. Fourth Geneva Convention, *supra* note 17, art. 147. These provisions apply only to situations of international armed conflict. Various resolutions of the United Nations Security Council and other U.N. documents relating to ongoing violations in Bosnia apparently assume these violations to be governed by provisions of the Geneva Conventions that are applicable in situations of international armed conflict. See, e.g., S. Res. 771, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/47 (1992); S. Res. 780, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/47 (1992); S. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); *Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., at 1, U.N. Doc. S/25274 (1993); *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 48th Sess., Annex I, at 3, U.N. Doc. S/25274 (1993); INTERNATIONAL COMMITTEE OF THE RED CROSS, AIDE MEMOIRE, Dec. 1992; see also WATCH REPORT, VOL. II, *supra* note 7, at 20; AMNESTY INTERNATIONAL, JUSTICE &

ly, the Security Council has repeatedly referred to these provisions as applicable to the situation in Bosnia.<sup>20</sup> Forced pregnancy and forced maternity resulting from rape constitute additional violations of the grave breach provisions. Parties to the Geneva Conventions, including the successor states to the former Yugoslavia, are required to punish all "grave breaches."<sup>21</sup>

Rapes of civilians committed on a mass scale as a tool of "ethnic cleansing" also constitute crimes against humanity, as defined under customary international law. That law, applied at Nuremberg and subsequently affirmed by the U.N., requires punishment of those who are responsible for the crimes.<sup>22</sup>

To the extent that rapes have been committed as part of a campaign "to destroy, in whole or in part," a national, ethnic, racial or religious group "as such," they also constitute genocide as defined under the Convention on the Prevention and Punishment of the Crime of Genocide and under customary international law.<sup>23</sup> Under this body of law, individuals who

FAIRNESS IN THE WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA, Apr. 1993, at 15.

19. For definition of "protected persons," *see supra* note 17.

20. *See supra* note 18.

21. Article 146 of the Fourth Geneva Convention provides, in part:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Fourth Geneva Convention, *supra* note 17, art. 146.

22. As interpreted by the International Military Tribunal and U.S. Military Tribunals in Nuremberg, "Crimes Against Humanity" as defined in the Nuremberg Charter and Control Council Law No. 10 consisted of inhumane acts on the same level of severity as murder and torture, committed on a mass scale against civilians, particularly when carried out as part of a pattern of persecution or discrimination. *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2587-2588 (1991).

23. Adopted Dec. 9, 1948, G.A. Res. 260 A (III), 78 U.N.T.S. 227 (*entered into force* Jan. 12, 1951). On April 8, 1993, the International Court of Justice adopted a provisional order that implied, without actually finding, that Yugoslavian Serbs were committing acts in violation of the Genocide Convention by virtue of their involvement in "ethnic cleansing" in Bosnia. The Court indicated, by a vote of 13 to 1, that:

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should . . . ensure that any military, paramilitary or irregular armed units which may be directed or may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnic, racial or religious group . . .

are responsible for acts of genocide must be punished, and any court that has jurisdiction over the perpetrators can try them for genocide.<sup>24</sup>

Some measure of accountability may be sought through national courts in the territories of the former Yugoslavia. Indeed, following trials that have been criticized for their lack of procedural fairness,<sup>25</sup> a court in Sarajevo recently convicted two Serb soldiers, who had confessed to committing several rapes and murders of Bosnian Muslims, and sentenced the two to death.<sup>26</sup> Such trials may be rare, however,<sup>27</sup> and in any event would take place under conditions in which the independence of the trial court may be in doubt.<sup>28</sup>

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugo. (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Report 1993, at 3, para. 52.A.(2).

24. See Attorney Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 39 (Isr. Dist. Ct.-Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, reporters' note 1 (1987). Rape also violates the prohibition of "torture and other cruel, inhuman or degrading treatment or punishment," which is set forth in both the *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), reprinted in 6 I.L.M. 368 (1967) [hereinafter ICCPR], and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/37/51 (1984), reprinted in 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1984), [hereinafter Torture Convention]. The former Yugoslavia was a party to both of these conventions, and the successor states have recognized that they are bound by these treaties' provisions. See Statement on respect of humanitarian principles made by the Presidents of the six republics in the Hague on 5 November 1991; Memorandum of Understanding, dated 27 November 1991, signed in Geneva by representatives of the Republic of Croatia, Federal Republic of Yugoslavia and Republic of Serbia; Addendum to the Memorandum of Understanding of 27 November 1991, signed by representatives of the Federal Republic of Yugoslavia and the Republic of Croatia; Agreement reached under ICRC auspices on 28 & 29 July 1992, signed by Prime Minister of Federal Republic of Yugoslavia and Vice-Prime Minister of Republic of Croatia; Agreement signed on 22 May 1992 by representatives of the Presidency of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, the Party of Democratic Action and the Croatian Democratic Community. U.N. Doc. A/Conf.157/PC/60/Add.4, ¶ 37 (1993). The Torture Convention explicitly requires that those responsible for torture be brought to justice (art. 7), while the ICCPR has authoritatively been interpreted to require the same. See Orentlicher, *supra* note 22, at 2572-73.

25. See AMNESTY INTERNATIONAL, EXTERNAL NEWS RELEASE, March 30, 1993.

26. One of the defendants, Borislav Herak, confessed to killing 35 people and raping 16 women, twelve of whom he later killed. See John F. Burns, *2 Serbs to Be Shot for Killings and Rapes*, N.Y. TIMES, March 31, 1993, at A6; David B. Ottaway, *Bosnia Convicts 2 Serbs In War Crimes Trial*, WASH. POST, March 31, 1993, at A21.

27. Serbian authorities have not, to our knowledge, punished any Serbian soldiers or officers for human rights violations. See WATCH REPORT, VOL. II, *supra* note 7, at 8-9. Croatian authorities apparently have disciplined some members of their armed forces and/or paramilitary groups. See *id.* at 8.

28. See AMNESTY INTERNATIONAL, JUSTICE AND FAIRNESS IN THE WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA, Apr. 1993, Section 12 (advocating that the International Tribunal retry individuals for crimes within its jurisdiction where the person "was convicted at the national level in a trial which was unfair, or if the trial was a sham, perhaps in an attempt to avoid justice . . ."). The statute for the War Crimes Tribunal for

It is thus clear that the international community must take primary responsibility for ensuring legal accountability. Crimes against humanity, by their very nature, virtually demand punishment by the international community. As a U.S. Military Tribunal reasoned in a judgment following the trial of World War II war criminals.

Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty. It is to be observed that insofar as international jurisdiction is concerned, the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provisions. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.<sup>29</sup>

In February 1993, the U.N. Security Council acted to enforce the international community's duty to punish those responsible for grave violations of physical integrity by authorizing the creation of an international Tribunal (Tribunal). Pursuant to a request by the Security Council, on May 3, 1993, the Secretary-General presented the Council with a report setting forth specific proposals regarding the establishment of the Tribunal. On May 25, 1993, the Security Council established the Tribunal and adopted the statute proposed by the Secretary-General.<sup>30</sup> As set forth in the statute, the Tribunal has jurisdiction over "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"<sup>31</sup> — that is, since the onset of the armed conflict.

Whether this undertaking proves effective will depend, above all, on the political will of the international community, particularly the permanent

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the former Yugoslavia prepared by the U.N. Secretary-General similarly recognizes the inherent danger in national prosecutions. Article 10.2. of the statute provides: "A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if . . . (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted." *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., at 40, U.N. Doc. S/25704(1993), adopted by the Security Council on May 25, 1993. See S. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

29. *United States v. Ohlendorf* (Case No. 9), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 498 (1950).

30. S. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

31. S. Res. 808, U.N. SCOR, 3175th mtg., at 2, U.N. Doc. S/RES/808 (1993); U.N. Doc. S/RES/808 (1993); *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, 48th Sess., at 36, U.N. Doc. S/25704 (1993).

member states of the U.N. Security Council. Although some key Western states have expressed strong support for prosecutions, the effective operation of the Tribunal will require a substantial commitment of will and resources, and temptations to downgrade the effort may be substantial. In particular, the U.N. and key member states may be tempted to exchange at least partial impunity for an agreement by Serb forces to end hostilities should there come a time when such an agreement seems possible.

### C. DEFINING THE PEACE

There are compelling reasons to oppose any political settlement that would include wholesale amnesty for violators of human rights and humanitarian law. Survivors of the ongoing conflict explain the importance of efforts to bring to justice those who are responsible for the mass rapes and other atrocities committed during the conflicts in Bosnia and Croatia by emphasizing its distinct importance over and against the self-evident importance and urgency of bringing an end to the war itself. While imploring the international community to bring effective pressure to bear to end the conflict, survivors of the war's atrocities also insist that their future will not be secure unless there is a "just peace" — one built on the foundation of the rule of law.

One need only recall the recent history of the former Yugoslavia to grasp their point. The enduring legacy of atrocities committed by Yugoslavia's national groups against each other during World War II has played some part in the current explosion of nationalist violence. Today, national groups, incited by virulent propaganda, are settling past accounts by violently settling scores.<sup>32</sup> One Serb described events in the twin Serb and Muslim villages of Siziće and Devetaci, the area in which his grandparents lived in Bosnia: during World War II, Muslim residents of Devetaci crossed the river over to the Serb village of Siziće and burned down twenty-nine homes. This past year, Serb residents of Siziće crossed the same river and burned down precisely twenty-nine Muslim homes in Devetaci.

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32. While the memory of World War II atrocities has contributed to the current explosion of nationalist violence, the Law Group does not believe that the current conflict was an inevitable expression of "ancient tribal hatreds," as it has at times been portrayed in the press and by Western political leaders. See, e.g., Craig R. Whitney, *Meddling in the Balkans: A Peril of the Ages*, N.Y. TIMES, Apr. 11, 1993, § 1, at 4. Instead, the violence was deliberately and systematically incited by nationalist leaders, notably Serbia's president, Slobodan Milošević. Propaganda, including television broadcasts showing footage of World War II atrocities against Serbs, has played a critical role in fueling the current conflict in Bosnia. See Charles Lane & Theodore Stanger, *The Ghosts of Serbia*, NEWSWEEK, Apr. 19, 1993, at 30-31.

The *New York Times* describes the phenomenon this way:

[N]ationalism gained explosive force because the trauma of the brutal civil war fought in Yugoslavia during and after World War II was never resolved in the peaceful postwar decades of Titoism, the nonaligned brand of Communism led by Marshal Tito that sought to forge a homogeneous Yugoslavia out of the diverse ethnicity of the Balkans . . . .

All that was repressed has now emerged. To the Serbs, thousands of whom were killed in Croatia and Bosnia during World War II by the puppet Croatian fascist regime, the threats posed by Yugoslavia's breakup apparently raised specters real enough to rally support for renewed nationalist fervor.<sup>33</sup>

Without establishing legal accountability for the brutality that has engulfed the former Yugoslavia in the past two years, there is every reason to fear that the cycle of retaliation will continue to spin out of control. For many citizens of the former Yugoslavia, the point is less subtle: in a period where national forces have committed brutal violations on a staggering scale, there can be no confidence in post-war respect for human rights unless those who are responsible are brought under the rule of law.

The effectiveness of international prosecutions of war criminals from the former Yugoslavia will turn, of course, on the Tribunal's scrupulous compliance with international standards of fair process. In addition to generally-applicable principles of due process, the fairness of international prosecutions requires that relevant law be enforced against violators regardless of their political affiliation.<sup>34</sup> Distinctions among potential defendants must of course be made in light of differences in their respective levels of responsibility for violations. But international criminal law should be enforced against those who committed violations regardless of their affiliation.

Fairness and effectiveness also require that international prosecutions, which presumably will have a finite reach, focus in particular on those who are most responsible for the atrocities that have been committed on a massive scale during the conflict in the former Yugoslavia. While lower-level soldiers who carry out rape and other atrocities are criminally accountable for their actions, they should not alone bear the burden of

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33. Roger Cohen, *Serbian Sanctions Backfire Into Support for War*, N.Y. TIMES, March 27, 1993, § 1, at 4.

34. The Law Group rejects any suggestion that *only* rapes of Muslim and Croat women should be condemned on the grounds that only Serb forces are using rape as a tool of "ethnic cleansing." Rape, by any side to an armed conflict and whether or not carried out as part of a campaign of "ethnic cleansing," is forbidden by international humanitarian law.

criminal responsibility while superiors who designed and implemented the campaign of persecution escape punishment.<sup>35</sup>

#### D. LAYING THE FOUNDATION

The success of any international prosecutions also will rest upon the factual foundation that supports such prosecutions. In this regard, the evidentiary challenges may be formidable. As is typical in cases when massive abuses are committed, those who are responsible for the violations maintain control of much critical evidence, such as information pertaining to the responsibility of high-level officials. Further, many survivors and witnesses of recent atrocities have been or soon will become widely dispersed. As elaborated in Chapter III, more than two million individuals have been displaced since the conflict began in 1991, and refugees continue to flow out of Bosnia, often moving on to third countries.

Moreover, both the stigma and trauma commonly associated with rape will further complicate efforts to establish evidence of this particular war crime before an international tribunal. Rape survivors are overwhelmingly reluctant to talk about their experiences (despite the deluge of publicity attending the rapes in Bosnia, the direct sources of rape accounts are a relatively small number of survivors), in large part because of the stigma associated with rape in Bosnian Muslim, Croat, and Serb communities — a stigma common to other countries as well.<sup>36</sup> The trauma associated with the rape, as well as the surrounding circumstances, is an even more important factor behind some rape survivors' reticence to speak of their ordeal, and this may have profound implications for documentation efforts.

For many persons suffering from recent trauma, the first stage of their emotional recovery may be termed "survival mode." In the view of a U.N. psychiatric social worker based in Croatia (now home to some seven hundred thousand refugees from Bosnia), during this initial phase, silence may be an integral part of some rape survivors' ability to cope or function. She believes that the Muslim refugee community in Croatia — particularly the women in that community — have sought to avoid retraumatizing rape survivors or exacerbating their trauma in part through a collective conspiracy of silence. Even when rape survivors seem willing to speak to

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35. Consistent with legal principles established at Nuremberg and subsequently reaffirmed by the international community, Article 7 of the statute for the Tribunal provides: "The fact that any [serious violation of international law] . . . was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., at 15 ¶ 59, U.N. Doc. S/25704 (1993).

36. Although most of the publicity surrounding rapes committed during the conflict in the former Yugoslavia has focused on those carried out in Bosnia, rapes were also committed on a substantial basis during the earlier conflict in Croatia.

foreign investigators, they may experience trauma after doing so. One Bosnian woman who recently recounted her experience of rape reportedly tried to commit suicide shortly thereafter.

Many rape survivors are reluctant to speak of their ordeal because they fear retaliation either from their families or from their perpetrators. Some husbands reportedly have assaulted their wives after learning they had been raped, and Serb rapists have threatened to retaliate against the relatives of rape survivors if the women recount their ordeals.

This does not mean, of course, that the international community should cease efforts to record and respond to war-related rapes in the former Yugoslavia. Many survivors themselves seem to strongly support international efforts to prosecute the perpetrators; this requires intensive efforts to document the rapes and other atrocities.<sup>37</sup> Indeed, many survivors are already playing a central part in that effort.

The seeming paradox is readily explained: for many rape survivors, accountability is the first step toward restoring the moral and political order of their society. Participating directly in that process can help restore survivors' sense of control over their own destinies, while lifting their sense of shame and powerlessness. Thus, while silence — and even denial — may be necessary during the initial period of some survivors' trauma recovery, participation in rebuilding the moral foundation of their societies by establishing accountability for war-related atrocities may be critical to their, and to their country's, longer-term recovery.

The challenge, then, for the international community is to work responsibly to establish accountability for war crimes and other violations of international criminal law committed during the conflict in the former Yugoslavia, while respecting the short-term needs of individuals recovering from recent trauma. This report examines various dimensions of that challenge, and makes specific recommendations for measures that reconcile the demands of justice with the immediate needs of women survivors of rape and other atrocities.

## II. CONCLUSIONS AND RECOMMENDATIONS

### A. DOCUMENTATION

Efforts to establish reliable documentation of violations of human rights and humanitarian law must be undertaken in a manner that is consistent with the psychological needs of survivors of rape and other gender-based violence. To this end, the Law Group recommends the following measures:

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37. This is particularly true in light of the historical dearth of international attention to violations of women's human rights, and the relative paucity of efforts to document gender-specific violations of human rights.



1. Those involved in documentation efforts — human rights professionals, health care professionals, public authorities, and the press — must take care to interview only those women who clearly *want* to speak of their ordeal.

2. Interviews must be undertaken in a manner that is responsive to the particular emotional needs of rape survivors. Interviewers should make clear that a rape survivor need not speak of her ordeal at all, and can end the interview at any time she chooses. Further, rape survivors should be given — and be assured of — complete control over the future use of their testimonies, including the terms of confidentiality.

3. Efforts to document rape should generally place that violation in the broader context of the survivors' experience, which may include other attacks against their physical and mental integrity, the loss of family members, and the destruction of their communities. Women should not be treated or made to feel as "Women Who Have Been Raped." Thus, in general, rape is best documented as part of a broader effort to document war crimes, in the course of which accounts of rape may emerge.

4. The interviewer's gender is critical when one of the subjects of inquiry is rape or gender-based violence. Women survivors of human rights abuses should be interviewed by women, and the latter should be trained in working with survivors of gender-based violence, regardless of whether it is known in advance that the survivor was subjected to such violations.

5. Interviews of rape survivors should be undertaken only in a context where there exists a system that ensures appropriate follow-up, as necessary, with the witness by, for example, a health care professional or through a support network. Such follow-up is, of course, more readily arranged by indigenous human rights organizations than by international groups, but the latter can and should work in conjunction with local health-care or human rights professionals, or more informal support networks, to ensure such follow-up.

6. The medical community in the former Yugoslavia should develop, with the support of the international medical community, a protocol for physicians to ensure that the confidentiality of survivors of rape and gender-based violence is respected in the documentation process. The international medical community should also endeavor to respond to requests from health care providers in the former Yugoslavia for further training in the treatment of individuals suffering from severe trauma.

#### B. COORDINATION AMONG DOCUMENTERS

There is a pressing need for improved coordination among individuals, non-governmental organizations, and government agents documenting human rights abuses. Such coordination is essential to minimize the harmful psychological effects on survivors of repeatedly recounting their

ordeal, and also to ensure as complete, uniform, and credible a body of evidence of war crimes as is possible. Therefore the Law Group recommends the following measures:

1. NGOs currently engaged in significant documentation efforts should take steps to better coordinate their efforts with the work of the U.N. Commission of Experts and with each other.

2. International human rights NGOs, agents and agencies of international organizations (such as the U.N. Commission of Experts), the U.N. Centre for Human Rights, Special Rapporteur Mazowiecki and his staff, and indigenous organizations conducting documentation should develop a common, standardized fact-finding methodology to be employed in the documentation process, including a standardized documentation form indicating information that should be obtained from survivors of and witnesses to war crimes.

3. International NGOs should improve their coordination with indigenous human rights and women's organizations working with survivors. Indigenous human rights and women's organizations should be integrated into international documentation efforts. Further training in fact-finding methodology should be provided to such organizations, with a special emphasis on techniques to be employed with survivors suffering from trauma.

4. Overseas funders of local organizations engaged in documentation efforts should attempt to ensure that their funding allocations help facilitate coordination among groups.

## C. ACCOUNTABILITY

### 1. *International Tribunal*

Procedures used by the recently authorized International Tribunal should ensure the participation of rape survivors by providing effective guarantees of privacy and confidentiality. The Law Group recommends the following measures to address these concerns:

- a. Rape survivors who would be traumatized or imperiled by testifying in open court should be allowed to provide testimony *in camera* or by closed circuit television, as appropriate, with their confidentiality preserved.

- b. The Tribunal should adopt procedures to ensure adequate protection against retribution to witnesses and survivors who provide testimony.

- c. Judges appointed to the Tribunal should be educated to recognize the range of effects that severe trauma may have on a person's memory. Such specialized training will help ensure proper evaluation of testimony by survivors of atrocities including rape by, for example, alerting judges to the fact that gaps in the memory of a rape survivor, far from discrediting her account, may signal the likelihood of trauma. To this end, the Tribunal

should allow expert witness testimony about the effects of trauma on the testimony of a person who has suffered atrocities.

d. It is also important that the provisions of the Tribunal's statute establishing subject matter jurisdiction be interpreted in a manner that assures appropriate enforcement of legal prohibitions against rape and other gender-specific violations. It should, for example, be made clear that "grave breaches" of the Geneva Conventions of 1949 include rape and other sexual assault. Such clarification is necessary since the statute explicitly mentions rape only as a constituent crime against humanity. In view of the profound psychological as well as physical consequences associated with forced pregnancies produced by rape, the statute should also be interpreted to include rape, forcible impregnation, and involuntary maternity as "grave breaches" of the Geneva Conventions to the extent that they entail "torture or inhuman treatment" or "willfully causing great suffering or serious injury to body or health" of women who are "protected persons" under those conventions.

## 2. *Truth Commission*

The Law Group recommends that the U.N. appoint a "Truth Commission," analogous to that which was established in El Salvador, to develop a comprehensive and authoritative accounting of gross violations committed during the conflict in the territory of the former Yugoslavia. While such a Truth Commission could help develop an evidentiary foundation for eventual trials by the Tribunal, it would not serve as a substitute for criminal prosecutions. Instead, its function would be to establish a comprehensive and authoritative accounting of gross violations of human rights committed during the conflict. In performing this function, a Truth Commission could play a critical role in promoting national reconciliation in the territory of the former Yugoslavia and in preventing a recurrence of violence.

## 3. *Support for Domestic NGOs*

The Law Group urges the international community to support local NGOs and individuals who are working to document the human rights abuses committed in the former Yugoslavia, and to promote international human rights and respect for the rule of law. These groups should be incorporated into international documentation efforts, since local organizations are better situated than international NGOs to identify and respond to the concerns of survivors associated with providing evidence. Because these groups can develop an ongoing relationship of trust with survivors, they are better able to ensure that the testimony they provide is voluntary. Moreover, such groups are situated to offer long-term emotional and material assistance to survivors, which may prove necessary in the aftermath of documenting traumatizing abuses, including rape, to which survivors have been subjected.

#### D. HUMANITARIAN ASSISTANCE TO SURVIVORS OF RAPE OR GENDER-BASED VIOLENCE

International efforts to provide humanitarian assistance to survivors of rape or gender-based violence should be undertaken with sensitivity to many survivors' desire not to be treated as "Women Who Have Been Raped." Provision of humanitarian assistance (including monetary and material assistance) should not require self-identification as a rape survivor for qualification, but should be made more generally available to women survivors of the conflict. Other programs that deserve international support include anonymous "hot lines" that provide counselling to rape survivors, and informal support groups for women survivors of the conflict and of other gender-based violence (such as domestic violence). Such programs provide a safe environment in which women can talk about their experiences when they are ready to do so.

#### E. U.S. RESPONSE TO THE REFUGEE CRISIS

The Law Group recommends that the following measures be undertaken by the U.S. government to respond to the severe refugee crisis facing the countries of the former Yugoslavia:

1. Immediately increase the delivery of humanitarian assistance to refugee populations in Croatia, Bosnia, and Serbia/Montenegro, and urge other countries to do the same.

2. Immediately increase allocations for social services (such as medical treatment and psychological counselling) to refugees, and urge other countries to do the same.

3. Increase the U.S. allocation for refugees from the former Yugoslavia to twenty-five thousand, and urge other countries similarly to increase their allocations.

4. Increase attention to issues of family reunification, and call upon the international community to increase efforts to assist in the reunification of refugees and their families.

5. Monitor the refugee policies of the governments of Croatia and Serbia/Montenegro, and actively encourage continued support for and assistance to refugees in those countries.

6. Encourage and assist agencies and organizations in the U.S. engaged in refugee resettlement to develop networks to provide necessary medical treatment and psychological counselling, as well as relevant legal representation, to refugees from the former Yugoslavia.

### III. DOCUMENTING GENDER-SPECIFIC HUMAN RIGHTS VIOLATIONS

#### A. DOCUMENTATION CONCERNS

##### 1. *Stigmatization of Rape*

Rape is one of the most under-reported crimes universally. This is true in peacetime, when there is a higher likelihood of prosecution, and is the case even in countries that have made significant advances in addressing legal barriers to effective prosecution of rape. Survivors of sexual assault typically experience an overwhelming sense of shame and self-blame. This is no less true for survivors of rape in the former Yugoslavia, where various cultures attach a particular stigma to rape.<sup>38</sup>

Rape and other gender-based violence in the former Yugoslavia have engendered multiple levels of shame. The survivors themselves typically experience profound shame, humiliation, a sense of defilement, and guilt. The husbands of women raped during the conflict report that they experience a powerful sense of shame by virtue of their failure to protect their wives from harm. The mass rapes committed to further "ethnic cleansing" — often committed in public settings — also bring shame upon the survivors' families and community, and indeed appear calculated to have precisely that effect.<sup>39</sup>

The profound sense of shame attached to rape goes a long way toward explaining why comparatively few rape survivors have been willing to provide accounts of their ordeal. The Law Group delegation learned of women who had come forward and testified publicly about having been raped, and who subsequently were ostracized in the refugee camp in which they had been living. Other residents reportedly did not want their refugee camp to be perceived as a camp of "rape victims." Many survivors also fear that they would be similarly ostracized by members of their communities in Bosnia if their rape became known, in part because their rape might give rise to a general assumption that other women in the community had also been raped.

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38. As noted earlier, most of the documented cases of rape committed during the conflict in Bosnia have been committed against Muslim women. While it has often been noted that their culture stigmatizes rape, this is also true of Croat and Serb communities. Health care professionals in Croatia (where many women were raped during that country's recent conflict between Croatian and Serb forces) and Serbia told the Law Group delegation that Croatian and Serb rape survivors, like Muslim survivors from Bosnia, have been reluctant to report the crime.

39. See Chapter I, *supra*.

## 2. *The Psychological Health of Rape Survivors*

The engulfing sense of shame experienced by survivors of rape is enough to prevent most of them from coming forward to provide accounts of their ordeal. Their reticence is compounded by the effects of a phenomenon that appears to be pervasive among the survivors of rape and other atrocities committed during the conflict in Bosnia: Post-Traumatic Stress Disorder (PTSD).

PTSD is a psychological disorder resulting from extreme situations of stress. It has been diagnosed in concentration camp survivors, Vietnam veterans, rape survivors, and refugees from war. Its symptoms are varied, but can include: nervousness verging on paranoia; sleep disorders; memory impairment or trouble concentrating; numbing of responsiveness to the external world; intensification of symptoms by exposure to events that revive the traumatic event; and avoidance of activities that arouse recollection of the traumatic event.

Health professionals whom the delegation interviewed stated that PTSD was pervasive among the women refugees and displaced persons they had treated, a pattern that is fully consistent with the nature of their recent experiences. Many women have endured multiple rapes. The Law Group learned, for example, of one nineteen-year-old woman who said she had been raped five or six times daily during her four-and-one-half month internment in a Serb-run detention facility in Bosnia — some seven hundred fifty times altogether. Often, too, rapes are committed in front of relatives, including fathers and children, compounding the dehumanizing nature of the rapes. These violations typically take place against a wider backdrop of degradation and terror: while the fate of abducted husbands remains uncertain, in the presence of daughters who are also being raped.

It is thus little wonder that many survivors of recent rapes are in extremely fragile psychological states. Their emotional recovery is further impaired by the circumstances of their daily lives. Many have been uprooted from their homes and are separated from relatives who may still be in grave danger. Without news of loved ones and in many instances grieving over known losses, uprooted from established communities and support networks, living in impermanent conditions with an uncertain future, and lacking the means to support themselves and their dependents, many survivors of rape live in conditions that are virtually sure to delay and impair their emotional recovery.

Particularly during the period immediately following rape and other atrocities, many survivors function in “survival mode,” with defense and other coping mechanisms — including denial — serving as a necessary means of day-to-day functioning. In this setting, efforts to document war crimes suffered and/or witnessed by these women may have significant counter-therapeutic consequences.

The retelling of abuses — whether done in great detail or vague description — may cause a survivor essentially to relive the traumatic episode. Moreover, when a survivor provides information about severe and humiliating abuses inflicted upon her, her family, and/or her community, the revelation can make her feel extremely vulnerable, especially if she cannot discuss the abuses with others whom she trusts. It is therefore essential that the survivor have a support network to which she can turn after telling her story, to minimize the risk of psychological harm in the wake of revealing humiliating abuse to a stranger.

The Law Group delegation received credible accounts from psychiatrists and others regarding such risks. Two involved women survivors of rape who had been stably functioning before being interviewed (one by a journalist and one by a foreign fact-finding delegation), and who suffered what were described as “psychotic episodes” after being interviewed. One woman experienced a severe clinical depression and had to be hospitalized; the other reportedly attempted suicide.

### 3. *Contextualizing Rape*

As noted above, rape is often only one of many abuses to which women have been subjected and have witnessed. For example, many survivors of sexual assault also have been forcibly displaced from their homes; have seen their homes burned and destroyed; have witnessed spouses, children, other family members, friends, and/or neighbors tortured and often killed; and have themselves been subjected to other forms of serious abuse. In this context, many health care professionals believe that the psychological risks associated with documentation efforts could be compounded if the documenter focuses only upon the issue of rape, ignoring other sources of the rape survivor's trauma. Further, to the extent that human rights investigators focus solely upon rape, they risk objectifying the rape survivors as “Rape Victims.” In doing so, interviewers may inadvertently reinforce the survivor's own sense of shame and humiliation.

### 4. *Physical Risks of Exposure*

Women raped during the conflict in the former Yugoslavia may face significant physical risks by virtue of providing information about their experience. The Law Group is aware of several reports of women being violently abused by their spouses after revealing that they had been raped.

Many survivors also fear retaliation by the perpetrators if they reveal that they were raped. Some perpetrators reportedly have threatened to kill the husbands of rape survivors who remain in detention centers administered by the perpetrators' forces if the women report their rape.

Some journalists reportedly have compounded these problems by failing to honor promises to protect the identity of women who recounted their rape experience. Such disclosures may expose the survivors to serious physical risks, while intensifying their sense of shame.

## B. PRINCIPLES FOR DOCUMENTING VIOLATIONS OF WOMEN'S RIGHTS

The distinctive needs of individuals who have endured sexual assault and other war-related atrocities call for specialized approaches to documentation. Documentation must be undertaken in a manner that is sensitive to, and places paramount importance on, the needs of the survivors themselves. As elaborated below, such an approach entails:

- \* ensuring that any testimony given is genuinely and fully voluntary;
- \* ensuring that there is follow-up by an appropriate support system for those who do provide information about their experience of sexual assault and other violations;
- \* conducting the interview in a manner that is sensitive to the survivor's emotional needs;
- \* fully respecting the desires for privacy and confidentiality of those who do provide testimony; and
- \* minimizing the potentially harmful consequences of the documentation process by maximizing coordination among those who undertake to document rape and other war crimes.

### 1. *Ensuring Voluntariness of Testimony*

As noted above, the very process of eliciting information about rape and other war crimes may pose significant psychological risks to those providing testimony, particularly if the survivor is induced to recount her experience when she is not psychologically prepared or truly willing to do so. These risks are compounded if the survivor, following an interview, does not have adequate access to mental health care or informal support networks to help her confront the emotional consequences of providing testimony. Those who undertake documentation efforts thus bear a large responsibility to ensure that they do not exacerbate the psychological trauma experienced by survivors of rape and other gender-based violence.

In light of these concerns, the Law Group believes that international efforts to document rape and other sexual assault are ideally undertaken in coordination with local support networks and/or health care providers, or others in a position to provide emotional and other care to survivors on an ongoing basis. Involvement of such individuals can be critical in ensuring that testimony is voluntary, and in attending to the emotional needs of survivors in the wake of recounting their experience. Many survivors are more likely to recount their experiences to someone with whom they have already developed an ongoing relationship based upon trust than to a complete stranger. Such individuals are, moreover, particularly well placed to ensure that a survivor's decision to speak about her experience of rape is voluntary.

One model for effective coordination is for human rights investigators to identify sources of testimony through health care and other social service providers who have developed an ongoing relationship with potential



witnesses. An example of this is the approach taken by one local human rights investigator whom the Law Group delegation interviewed in the former Yugoslavia. A physician who has provided medical care to rape survivors from Bosnia alerts this investigator when a new patient enters the hospital for a conflict-related rape. The investigator asks the doctor to inquire whether the patient would like to provide information about her experience to a human rights investigator. Only if the patient wishes to do so does the physician then facilitate direct contact between the patient and the human rights investigator.

This approach is a sound model provided the health care provider does not in any way breach his or her professional responsibilities, and can be adapted as appropriate. For example, human rights investigators may make initial contact with potential witnesses through social workers or humanitarian care providers assisting rape survivors, as well as through health care professionals.

The documenter's responsibility to ensure that testimony is given without reservation does not end here, and indeed continues throughout the period of her contact with a rape survivor. Thus, even if a rape survivor authorizes or invites a human rights investigator to establish contact with her, the investigator should take care to ensure that testimony remains truly voluntary throughout the interview process. Rape survivors and others who have experienced trauma may discover after they begin to provide testimony that they are not able to continue without imperiling their psychological health, and investigators must take pains to ensure that they do not, however subtly, press survivors to continue testifying once such reservations surface. Interviewers should make clear that a rape survivor need not speak of her ordeal at all, and can end the interview at any time she chooses.

## *2. Interviewing Rape Survivors*

In several other respects, the need for special sensitivity to the emotional needs of rape survivors has significant implications for the manner in which documentation interviews are conducted.

First, the gender of the interviewer is critically important when sexual abuse is one of the subjects of inquiry. While rape survivors are sometimes willing to recount their ordeal to persons of the opposite gender, many are more reluctant to share details of their ordeal — or even to acknowledge that they were raped — with someone of the opposite gender. Even when women rape survivors are willing to speak of their ordeal with men, the interview may unnecessarily compound the witness's discomfort.

Second, interviewers should be trained to work with rape survivors; being the same gender as the witness is necessary, but not sufficient.

Third, for reasons previously indicated, the psychological needs of women rape survivors are often best served by placing rape and other

gender-based human rights violations in the context of the other abuses which they have endured or witnessed. In general, documentation of rape should be undertaken in a manner that enables the survivor to feel that her entire story is relevant and important.

Contextualization does not, however, mean that efforts to document rape or other gender-based violence should subsume those violations in the broader experience of survivors. Just as it can be traumatizing to focus only on rape, it can also be damaging to downplay, gloss over, or ignore a woman's account of rape.

Finally, as in any human rights investigation, the interviewer should, at the outset of an interview, inform the witness of the purpose and possible consequences of the interview, including the potential uses of the information which the witness provides. The interviewer should assure the witness that the latter will have complete control over the use of her testimony, and that the interviewer will fully respect the witness's wishes in this regard. These assurances are necessary both to ease the survivor's interview-related anxieties and to ensure that she receives the protection from physical harm that continued privacy may be necessary to secure.

### 3. *Ensuring Confidentiality and Control*

In this regard, the practices of some institutions and individuals merit special concern. In Belgrade, the delegation discovered an alarming government practice in documenting the rapes of Serb women. Serbian officials, apparently determined to counter publicity of rapes perpetrated by Serb forces, are vigorously seeking to document rapes of Serb women by Muslims and Croats without regard to the potential harm to survivors. Serbian hospitals give to the government agency responsible for investigating human rights abuses, the Committee on War Crimes, the medical records of women who have, in the course of receiving medical treatment, revealed that they were raped. Serbian authorities then send stenographers to take the testimony of rape survivors while they are still hospitalized, and women are pressured to allow their accounts to be publicized.<sup>40</sup>

### 4. *Follow-Up*

If the documenter cannot herself maintain ongoing contact with a survivor who elects to provide testimony, she should conduct documentation in a context that assures that the survivor will have appropriate

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40. The delegation was also concerned by the efforts of a domestic NGO documenting abuses of Serbs. The group describes itself as independent although it is funded by the government and is located in the basement of a government building. The organization distributes videotapes of Serb rape survivors. The Law Group is concerned whether the testimony of the women is truly voluntary and whether the women were informed in advance that the tape would be widely distributed. We are concerned, in any event, that this practice is harmful to the women's recovery.

support, as necessary, following the taking of testimony. This element may be critical for the psychological well-being of the survivor in the aftermath of recounting her trauma, and also for ensuring completeness of the documentation. In many instances, the full story of abuse will not emerge in a single interview.

Documentation might, for example, be undertaken in circumstances that involve ongoing care by a mental health professional or ongoing contact with an informal support network. If the survivor is not at the time of documentation receiving care from a health care professional or participating in a formal or informal support group, the documenter should provide the survivor with information about services available to the survivor if she desires it. The documenter should offer to help the survivor make contact with such an organization if she wishes to do so.

### *5. Coordination*

There is an urgent need for greater coordination among the various organizations documenting rape and other human rights violations in the former Yugoslavia. As U.N.-sponsored efforts to establish evidence for international prosecutions get underway, the need for such coordination will become even more urgent.

To date, documentation efforts have been undertaken by a broad range of investigators including: delegations from various intergovernmental agencies and governments not party to the conflict; international human rights organizations; local medical professionals, women's groups, and other domestic non-governmental organizations; journalists; and Croatian, Bosnian, and Serbian governmental organizations. With a proliferation of investigations undertaken in the region, some rape survivors have already been interviewed by numerous individuals and organizations. Since only a fraction of rape survivors are willing to testify, those who are prepared to do so face numerous requests for testimony from investigators, both foreign and local.

The deluge of interest in their plight can compound the psychological risks associated with speaking about a recent trauma-inducing event and, ironically, may undermine the utility of the testimony obtained. The ability to secure the most credible and useful body of evidence for future prosecutions may be compromised when survivors are interviewed on multiple occasions by different individuals and translators. Some survivors, influenced by the apparent interest of interviewers in certain aspects of their account, may be subtly induced to emphasize unduly those aspects of their account in subsequent interviews. In addition, some survivors may be retraumatized with successive retellings of their ordeal to multiple interviewers.

Further, to the extent that various investigators utilize different evidence-gathering techniques, it becomes correspondingly more difficult to

rely upon the information reported by these investigators. Testimonies gathered by NGOs and others in anticipation of eventual prosecutions may fail to satisfy the evidentiary standards employed by the Tribunal. Further, international prosecutors may simply be unable to assess the quality of evidence prepared by various fact-finders, rendering their information unusable for the very purpose that inspired their documentation efforts. There is thus a significant need for coordination among the various organizations documenting war crimes and violations of human rights law in the former Yugoslavia and, in particular, for development of standardized fact-finding methodology among those engaged in the documentation process.

Since U.N.-sponsored efforts to develop evidence for potential trials will intensify in the near future, these issues demand urgent attention. In particular, it is now critically important that NGOs engaged in significant documentation efforts take steps to ensure coordination of their efforts with the work of the U.N.-appointed Commission of Experts and the prosecutor of the Tribunal.

Of special concern in this regard is the role of indigenous human rights organizations and individuals documenting war crimes in the territory of the former Yugoslavia. Their integration into the process of establishing accountability should be a high priority of international efforts, for several reasons.

Local groups are particularly well-placed to document rape and other gender-based violations of human rights in a manner that is responsive to the needs of the survivors and most likely to yield reliable information. As noted earlier, survivors of rape and other trauma-inducing violations may be willing to recount their experience only after establishing an ongoing relationship with someone. Even then, details may be forthcoming over a protracted period of contact with the investigator. As noted earlier, the availability of the investigator for follow-up with a witness may have significant implications for the witness's emotional needs.

In larger perspective, the central involvement of domestic human rights monitors in the documentation effort is critical to the long-term rehabilitation of the societies devastated by the brutal conflict. Like individuals who have endured torture, nations that have endured wholesale violations of human rights must also recover from their collective trauma.<sup>41</sup> Establishing accountability for those violations — and participating in the process of establishing such accountability — is a critically important stage in the long-term recovery of nations scourged by massive atrocities.

Some of the documentation efforts underway in the territory of the former Yugoslavia have been undertaken by individuals who themselves

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41. See Lawrence Weschler, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* (1991).

recently survived rape and other war crimes. The involvement of such individuals in efforts to establish accountability may play an important role in their own recovery, allowing them to reclaim a measure of control over their lives and to play a constructive part in confronting their personal and national trauma. With these objectives in mind, international efforts to establish accountability for abuses committed during the conflict should engage the central involvement of domestic human rights monitors in the former Yugoslavia, and should promote the use of standardized documentation methodology as well as general coordination among the various groups engaged in fact-finding.

International organizations that are likely to play a leading role in documenting abuses should, in coordination with each other, develop a standardized documentation form indicating information that human rights investigators should obtain during interviews with victims of or witnesses to crimes. Such organizations include: international human rights NGOs, such as the Law Group, Amnesty International, Human Rights Watch, Physicians for Human Rights, and the Center for Reproductive Law and Policy; the U.N. Commission of Experts charged with investigating violations of humanitarian law committed during the conflict in the former Yugoslavia; the U.N. Centre for Human Rights, particularly Special Rapporteur Mazowiecki and his staff; and local organizations and individuals involved in documenting war crimes in the former Yugoslavia.

Further, international organizations should ensure that their own activities in the former Yugoslavia foster coordination among local NGOs engaged in documentation efforts. In particular, overseas funding for local organizations engaged in monitoring human rights should be allocated in a manner that promotes coordination among groups documenting human rights violations, in order to avoid duplication and to ensure consistency, accuracy, and completeness.

Finally, international human rights advocates should provide further training in fact-finding methodology to local groups documenting abuses, with special emphasis on techniques appropriate for interviews with survivors who might be suffering from recent trauma. While a number of the women's organizations and human rights NGOs in the territory of the former Yugoslavia currently documenting gender-based violence and other human rights violations are in an excellent position to develop documentation, their ability to do so varies enormously, depending especially on the resources available to them, their expertise in human rights work, and their independence. Support for domestic groups should be directed to promote local expertise in fact-finding and encourage coordination of their work with rape survivors and health care professionals.

#### IV. THE ROLE OF HEALTH CARE PROVIDERS

Physicians and other health care providers play a critical role in addressing the consequences of grave violations of human rights, including rape, committed in the territory of the former Yugoslavia. Their role in treating persons who have endured rape and other violations has placed them on the front line of efforts to document the atrocities, as well as to address the immediate physical and psychological needs of the survivors. While well-intentioned and potentially valuable, physicians' efforts to document atrocities committed against their patients also risk abusing the physician-patient relationship of trust and dependence, and point to the need to clarify the responsibilities of health care providers operating in the extraordinary circumstances of the ongoing Balkan conflict.

##### A. DOCUMENTATION BY HEALTH CARE PROVIDERS

Many women who have been raped by military or paramilitary forces have overcome their general reluctance to describe their ordeal when necessary to obtain an abortion or other medical care for conditions stemming from the rape, and some local doctors who treat these women have undertaken to document the rapes.

Several aspects of the legal regime governing the availability of abortion operate as an incentive for at least some women who have been impregnated as a result of rape to describe the circumstances of their impregnation to a physician. Women can obtain abortions as a matter of right within the first ten weeks of pregnancy, but must obtain a certificate from a medical commission to obtain a legal abortion in the period between the tenth week and sixth month of pregnancy. The prolonged detention of some rape survivors by their perpetrators has prevented them from being able to obtain an abortion during the first ten weeks of pregnancy, thus foreclosing the option of "abortion-without-explanation."

Legally, the certificate required for an abortion after the tenth week of pregnancy can be obtained only after agreement by an ethics committee, though in practice this requirement is not always strictly enforced in light of the circumstances prevailing in the former Yugoslavia. The necessary certificate is to be issued only in particular circumstances, including where the pregnancy is the result of rape.

After the sixth month of pregnancy, abortion is not legally available. Thus, women who, by virtue of prolonged detention or other reasons, are unable to seek medical care during the first six months of pregnancy are legally obliged to carry the fetus to term. Predictably, such pregnancies have caused further trauma for women who have subsequently given birth to children conceived in rape.

As has been widely reported, many women impregnated as a result of rape experience feelings of disgust and revulsion toward their pregnancy

and the children they bear. Medical professionals interviewed by the Law Group who treat women forced to deliver children resulting from rape report that such women frequently reject the children after giving birth. In these circumstances, medical professionals providing obstetric care to pregnant woman often become aware that the woman was raped, even though the women were not required to disclose this information.

In these situations and in rape cases not involving pregnancy, medical professionals sometimes obtain information about sexual assault when the survivors seek, or are referred for, psychiatric treatment or counseling for psychological disorders stemming in part from the assault. These disorders commonly include and range from anxiety, depression, phobias, irritability, suicide ideation, attempted suicide, severe clinical depression, and/or severe psychoses.

Deeply concerned by the pattern of atrocities that have emerged from information obtained while treating rape survivors, a number of doctors, including psychiatrists, have undertaken to document these abuses. Their unique access to rape survivors and their professional training enable physicians to play a potentially valuable role in efforts to document rape and other abuses. At the same time, however, such efforts pose substantial risks.

However conscientiously a doctor seeks to ascertain a patient's desire to provide testimony about her experience of rape, the physician-patient relationship may implicitly carry an element of coercion. This is most obviously present in situations where a physician asks a patient if she would be willing to provide testimony about her rape at a time when the patient is dependent on the doctor to provide care, such as an abortion available only upon a discretionary decision of the physician. Many women receiving such care do not have family members to whom they can turn for support, and in this context the patient may have a diminished ability freely to determine whether to speak about her experience at the request of her treating physician.

Another important concern relates to breaches of physicians' duty to preserve confidentiality in their relationship with a patient. The Law Group delegation was surprised and concerned by the ease with which many physicians volunteered information about patients who had been raped, including their identities. Some physicians reportedly have been paid by journalists for information about patients who have been raped. Such behavior is a gross breach of professional responsibility.

In light of these general concerns, the Law Group is deeply concerned about a draft law before the Serbian parliament that would require persons with evidence or information about human rights abuses, including medical professionals, as well as human rights monitors, survivors, eyewitnesses, and rape survivors themselves, to provide such evidence or information to the Serbian Committee for War Crimes. This Committee was established

to investigate human rights abuses of Serbians in the territory of the former Yugoslavia and currently solicits evidence of alleged violations, including rape.

In sum, while medical professionals play a potentially valuable role in efforts to document rape and other human rights violations,<sup>42</sup> that role is fraught with difficulty. In particular, to the extent that physicians themselves attempt to document human rights violations, they risk abusing a relationship based upon trust and assurances of confidentiality.

These concerns merit special attention in the context of broader efforts to establish coordination among the various organizations and entities engaged in documenting war crimes,<sup>43</sup> and to develop uniform documentation standards. In this context, the Law Group recommends that the medical community in the former Yugoslavia develop and promote a protocol for physicians to ensure that the confidentiality of survivors of rape and gender-based violence is respected in the documentation process. The international medical community can play a constructive part, in consultation with health care providers in the former Yugoslavia, in developing such a protocol.

#### B. HEALTH CARE

The most important role of health care providers with respect to human rights violations is, of course, attending to the physical and psychological needs of those who have suffered trauma as a result of those abuses. In this, health care providers in the former Yugoslavia are in urgent need of support from the international community.

In areas such as Zagreb, which have become centers for refugees from Bosnia as well as for persons displaced by the conflict in Croatia, the resulting demand for medical services has overwhelmed available health resources.<sup>44</sup> Medical professionals uniformly cite the urgent need of medical communities in Croatia and Serbia (as well as Bosnia) for basic medical supplies.

The health crisis produced by the conflict has also created overwhelming demands for psychiatric services. Here, however, the principal need appears to be for specialized training of potentially available — but currently unutilized — personnel.

Qualified and trained medical professionals, including psychiatrists, psychologists, and social workers, do not appear to be in short supply in the areas visited by the Law Group. In fact, there reportedly are some sixty to seventy unemployed, or underemployed psychiatrists and psycholo-

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42. See discussion in Chapter III(B)(1), *supra*.

43. See Chapter III(B)(5), *supra*.

44. For example, after the hospital at Pacrac, Croatia was attacked by Serbian forces, the patients housed in the psychiatric ward were relocated to Vrapce, a psychiatric hospital in Zagreb.



gists in Zagreb alone who could be put to work providing therapy, counseling, and care to survivors of rape and gender-based violence, as well as other human rights abuses. Medical professionals with whom the delegation met indicated that, because of the suddenness, severity, and duration of the conflict, the medical profession was not adequately prepared to treat the number of patients who have suffered severe trauma as a result of the war and related atrocities. Indeed, at the outset of armed conflict in the former Yugoslavia, PTSD was not widely recognized by local health care providers, who generally have not had substantial experience in treating patients suffering from this syndrome. Medical professionals expressed particular interest in receiving training in treating persons suffering from severe trauma.

There are currently two bills pending in Congress that would support the work of local health care providers. The bills authorize funds to provide "medical, psychological, and psychiatric care and crisis counseling" for victims of war crimes in the former Yugoslavia.<sup>45</sup> The bills would also fund training of local health care providers in these areas as well as the purchase of much needed medical supplies. For reasons elaborated above, the Law Group supports these initiatives and hopes that the Legislation is enacted and implemented without further delay.

The international publicity about mass rapes has generated substantial interest on the part of potential foreign donors in projects that would address the emotional, as well as the physical, needs of rape survivors. Proposals emanating from abroad include the establishment of special counseling centers targeting rape survivors, modeled on "rape crisis centers" established in the U.S. and elsewhere.

The Law Group believes that this model is inappropriate to the needs of the majority of rape survivors in the former Yugoslavia. As previously noted, most women who have been raped are extremely reluctant to speak about their experiences and do not want publicly to be perceived as "Women Who Have Been Raped." This attitude likely would prevent many rape survivors from seeking help at any center identified exclusively as a site for treatment of rape survivors.

A more appropriate model would be the establishment of centers for women survivors of the conflict generally. Such centers could provide comprehensive support for women survivors' needs in a non-threatening environment. This approach not only would avoid reinforcing rape survivors' sense of shame and stigmatization, but would also be more clinically appropriate. As previously noted, most rape survivors link the trauma associated with their rape with their broad experience of traumatic episodes.

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45. S. 416, 103d Cong., 1st Sess. § 2(b)(1) (1993); H.R. 1377, 103d Cong., 1st Sess. § 2(b)(1) (1993).

Another approach that merits support is the establishment or maintenance of anonymous telephone "hotlines" for women survivors who wish to speak about their experiences without having to reveal their identities before they are ready to do so. Such hotlines exist in at least Zagreb and Belgrade, and should be made available in other areas with significant concentrations of refugees and displaced persons. Hotlines and similar programs should be supported and encouraged, as they enable women to obtain assistance in an anonymous fashion. This is particularly important to address the short-term needs of survivors, when they may be more reluctant and fearful to come forward publicly.

## V. INTERNATIONAL PROSECUTIONS

For reasons elaborated in Chapter I, the Law Group strongly supports international efforts to bring to justice those who are responsible for war crimes and criminal violations of international human rights law committed during the conflict in the former Yugoslavia. While prosecution of any of these crimes will have to overcome substantial hurdles, special challenges arise with respect to prosecution of rape.

### A. INTERNATIONAL TRIBUNAL

Historically, efforts to enforce international human rights law have underemphasized, if not ignored, gender-specific violations. It is thus important that prosecutions before the Tribunal created to try violations committed during the war in the former Yugoslavia ensure enforcement of legal prohibitions against rape and other gender-specific violations.

For example, to the extent that the jurisdiction of the Tribunal encompasses "grave breaches" of the Geneva Conventions,<sup>46</sup> the prosecution should interpret this basis of jurisdiction to include rape and other sexual assault. In similar fashion, in view of the profound psychological as well as physical consequences associated with forced pregnancies produced by rape,<sup>47</sup> forcible impregnation, and involuntary maternity should also be treated as grave breaches of the Geneva Conventions to the extent that they entail "torture or inhuman treatment" or "wilfully causing great suffering or serious injury to body or health" of women who are "protected persons" under those conventions.<sup>48</sup>

Procedures for receiving evidence should also be designed to encourage presentation of evidence by rape survivors. At a minimum, rape survivors should be allowed to provide live testimony at trial *in camera*, with their identities kept confidential. The need to ensure privacy of witnesses is particularly great when relatives are still at risk of retaliation by forces

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46. See Chapter I, *supra*.

47. See Chapter III(A), *supra*.

48. See Chapter I, *supra*.

affiliated with the alleged perpetrators. If appropriate, survivors should also be given the alternative of testifying by closed circuit television, so that they need not endure the trauma of seeing their alleged rapist in Court.<sup>49</sup>

Further, measures to provide protection of witnesses, including assurances of relocation, are critical. The risks associated with efforts to establish accountability for international crimes are considerable. In March 1993, a human rights investigator was severely beaten outside his residence in Belgrade by two unidentified men. The investigator was returning from interviews with refugees who had suffered abuses by Serbian forces, and the assailants stole the documentation the investigator had just gathered. Such attacks are likely to intensify as international efforts to prosecute war criminals get underway, and the international community thus will bear substantial responsibility to ensure protection of those who participate in this historic undertaking.

The Statute for the International Tribunal recognizes the need to protect victims and other witnesses, but leaves development of appropriate procedures to the Tribunal itself. Article 15 of the statute provides:

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 22 of the statute similarly recognizes the need for such protections for victims, stating that:

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.<sup>50</sup>

While the statute's recognition of the need for protection of witnesses and victims is welcome, the Law Group believes that adequate and detailed assurances of protection should be developed as soon as possible.<sup>51</sup> Many

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49. In U.S. courts, this type of procedure has at times been used with children who testify about alleged abuse in prosecutions of their alleged assailants. For example, the State of New York allows such testimony in situations where a child might suffer emotional harm or face physical retribution if he or she testified in open court. See N.Y. Crim. Proc. Law 65.20 (West 1993). The Supreme Court has held that the constitutionality of such closed-circuit testimony must be determined on a case-by-case basis. *Maryland v. Craig*, 497 U.S. 836 (1990).

50. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., at 22 ¶ 84, U.N. Doc. S/25704 (1993) and U.N. SCOR, 48th Sess., at 28 ¶ 109, U.N. Doc. S/25704 (1993).

51. Such protections and assurances should address such concerns as (a) whether confidentiality can be guaranteed, at least during the initial investigation stage; (b) whether the survivor or witness will be able to exercise control at a later date over the determination

— perhaps most — victims and potential witnesses will be reluctant to cooperate with U.N. investigators in the early stages of evidence collection without such assurances.<sup>52</sup> Article 22 of the statute raises an additional issue by explicitly permitting victims — but not eyewitnesses — to testify *in camera* before the Tribunal. Witnesses as well as survivors should be permitted to provide *in camera* testimony, since the former too are at risk of being subjected to severe emotional distress and physical danger should they provide evidence in open court.

#### B. TRUTH COMMISSION

In addition to criminal prosecutions, the U.N. should consider appointing a “Truth Commission,” analogous to the commission that it appointed to establish an official accounting of human rights violations committed during El Salvador’s civil war, to develop a comprehensive and authoritative accounting of gross violations committed during the conflict in the former Yugoslavia. While such a commission could provide an important complement to the work of the International Tribunal, it should in no way operate as a substitute for criminal prosecutions.

As in El Salvador, and other countries that have recently emerged from protracted periods of grotesque violence, such a commission could play a crucial role in promoting national reconciliation and preventing a future recurrence of violence. Indeed, the need for a credible “truth-telling” is particularly acute in the former Yugoslavia. The use of vitriolic propaganda has played a central role in fueling national conflict in the former Yugoslavia; propaganda has typically demonized certain national groups and presented interpretations of history that would seem to justify violence on the part of the target audience. For example, Serbian propaganda has demonized Bosnian Muslims as a fundamentalist threat, while highlighting atrocities committed against Serbs during World War II by Muslims. In this setting, it is critically important to prevent governments from recreating the history of their own culpability for offenses against ethnic groups.

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to use information that she provides as a basis of an indictment (which presumably will mean that her identity may become known to the suspect); and (c) if the information she provides is to be so used, whether she will have any control over the determination of whether her identity will be made public.

52. States will have the opportunity to address the need for such protections. The Security Council resolution establishing the International Tribunal invites states to submit to the Tribunal’s judges recommendations for the rules of procedure and evidence called for under Article 15 of the statute. See S. Res. 827, U.N. SCOR, 48th Sess., ¶ 3, U.N. Doc. S/RES/827 (1993).

## VI. REFUGEES AND DISPLACED PERSONS

According to a January 1993 report of the UNHCR, the conflict in the former Yugoslavia has already produced more than two million<sup>53</sup> refugees and displaced persons.<sup>54</sup> Of these, approximately one million five hundred thousand are from Bosnia, and the remaining one-half million are from Croatia. Some have fled to other states that were republics of the former Yugoslavia, while others have fled from their homes and temporarily resettled in other regions of their own state. Croatia and Serbia/Montenegro each now host approximately six hundred thousand refugees and displaced persons. This influx has placed enormous strains on the infrastructure of the host cities, which were already overburdened by more local effects of war-related devastation.

### A. REFUGEES AND DISPLACED PERSONS IN CROATIA

Croatia officially closed its borders to new refugees in July 1992, but this has not stopped the entry of individuals fleeing the conflict. With many adult men either involved in fighting or in detention camps, the majority of refugees in Croatia are women and children. The refugees are from Bosnia, while a number of internally displaced persons have fled conflicted areas of Croatia.

Refugees are required to register with the UNHCR and the Croatian authorities. Registration makes them eligible for housing and other assistance, limited as it is. The government has provided housing primarily in refugee camps, although the government has placed some individuals in hotels. Registered refugees are technically entitled to material assistance, including medical care, and school for their children, but the very real limit on resources in Croatia has curtailed the delivery of such services. Some of the refugees in Croatia have chosen not to register; these individuals are in an even more precarious situation as they are not eligible for even the limited assistance that is available. These individuals sometimes live in what are referred to as "illegal" camps, i.e. camps existing without the

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53. INFORMATION NOTES, U.N. HIGH COMMISSIONER FOR REFUGEES, OFFICE OF THE SPECIAL ENVOY FOR FORMER YUGOSLAVIA (Jan. 18, 1993)[hereinafter INFORMATION NOTES]. The report puts the figure of refugees and displaced persons at 2,069,000.

54. In international usage, a "refugee" is a person who is outside his or her country of nationality and who cannot or will not return to that country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. While individuals who are internally displaced may have fled their homes for similar reasons, they are not considered refugees because they remain within the borders of their country of origin.

authorization of the government. One such camp, located at Resnik, was forcibly vacated by governmental authorities on February 16, 1993.<sup>55</sup>

The UNHCR has one resettlement office in Croatia, located at Karlovac, a short distance outside of Zagreb. Karlovac is the site of a refugee transit camp for former male detainees. Pursuant to an agreement negotiated by the International Committee of the Red Cross with the respective parties to the conflict, all detainees were to be released. This agreement provided that upon release, the male detainees were to leave the former Yugoslavia for resettlement within a two week period. This has created tremendous difficulties because many of these ex-detainees do not want to leave the country while the whereabouts of their families are unknown, and because offers of resettlement from third countries have been slow in coming and inadequate to meet the need.

#### B. REFUGEES IN SERBIA/MONTENEGRO

The refugees in Serbia/Montenegro include Serbs who fled Croatia and Bosnia. Included in this latter group are draft-age men who do not want to serve with the Bosnian Serb armed forces. Refugees in Serbia/Montenegro are also required to register; approximately five hundred thousand of the estimated six hundred thousand have done so.<sup>56</sup>

The majority of the refugees in Serbia are not housed in camps, but are placed with host families.<sup>57</sup> When the refugees were initially placed in homes, the hosts were told by the government that the placements were of a temporary nature. But the conflict has continued for months without resolution, and the resources of the individual host families have been stretched thin. This has been exacerbated by the worsening economic situation. The UNHCR office in Belgrade works to resettle refugees, but the opportunities for resettlement of Serbs are limited since very few countries will accept them.

In addition to the Serbian refugees, there have been groups of Muslim ex-detainees within Serbia/Montenegro — principally within Montenegro. Although generally Muslims seek refuge in Croatia, these individuals came from an area close to Montenegro and were permitted by the government

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55. As noted earlier, the Law Group delegation attempted to visit the camp at Resnik on the day of the evacuation. Although the evacuation had already occurred, the delegation discovered several refugees who inadvertently had been left behind. These refugees informed the delegation that, without any notice to the refugees, armed Croatian officials had come into the camp the day before with guard dogs, separated the men from the women and children, loaded most of the refugees onto separate busses, and transported them to various other locations. One teenaged refugee interviewed by the Law Group was visibly distraught because she did not know where her mother had been sent.

56. Interview with representative of UNHCR, Belgrade Office, February 19, 1993.

57. Once source told the Law Group delegation that ninety-seven percent of the refugees in Serbia were placed with host families.

to go there. They are housed in hotels and assisted by the Montenegro Red Cross. The UNHCR has assisted in the resettlement of this group.

### C. DISPLACED PERSONS IN BOSNIA

The UNHCR's January 1993 report indicates that there are an estimated eight hundred ten thousand displaced persons in Bosnia-Herzegovina. As recent news reports have demonstrated, these individuals are in an extremely insecure position because the areas where they have sought refuge have often been drawn into the brutal conflict.

### D. PROPOSED RESPONSE

#### 1. *Refugees Remaining Within the Former Yugoslavia*

Many of the refugees and internally displaced persons within the former Yugoslavia are not interested in resettlement to third countries at this time because they have not given up the hope of being able to return to their homes. Still others are understandably unwilling to leave without family members from whom they are separated. Daily circumstances for these individuals are extremely difficult. In most cases, they have lost everything they owned. They are separated from their families, and suffer the trauma of the violence they experienced and witnessed all around them. The resources of the host countries (Croatia and Serbia/Montenegro) are too limited to provide more than a bare subsistence.

The immediate delivery of humanitarian assistance to this population of refugees is imperative. Assistance with housing, food, clothing, and education is necessary to help these individuals survive and begin to normalize their lives. Equally necessary are social services aimed at addressing the trauma of the violence and dislocation they have suffered. A high priority within the provision of social services is medical treatment and psychological counselling.

#### 2. *Refugee Resettlement: Proposed United States Action*

The resettlement options presented by the international community, including the U.S., have been woefully inadequate in comparison to the need. The U.S. should substantially increase its commitment to the resettlement of refugees fleeing the former Yugoslavia, and should encourage other nations to follow its lead. At present Germany has made the largest commitment to accept refugees, setting a total quota of seven thousand. Spain has agreed to accept one thousand, while the majority of other European countries has set quotas below one thousand.<sup>58</sup>

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58. INFORMATION NOTES, *supra* note 53.

a. Increase Refugee Allocation

The 1980 Refugee Act established procedures for the admission of refugees from abroad. Pursuant to 8 U.S.C. §1157(a) of the Refugee Act, the President, in consultation with Congress, determines the number of refugees to be admitted from outside the U.S. before the beginning of each fiscal year. Under 8 U.S.C. §1157(b), the allocation can be increased after it is set, if there is "an unforeseen emergency refugee situation" and the admission is justified by "grave humanitarian concerns."

The current allocation for refugees from the former Yugoslavia is one thousand, and this number is designated exclusively for former civilian detainees and their families. Given the gravity of the conflict in the former Yugoslavia, and the staggering numbers of refugees produced by the conflict, a substantial increase from the one thousand allocation is certainly in order, and could be done pursuant to 8 U.S.C. §1157(b). The Law Group therefore recommends an allocation of twenty five thousand refugee slots; such an increase would provide the U.S. with the credibility to approach other nations and encourage burden-sharing in the form of a comparable increase in their refugee numbers.

Although former detainees are unquestionably deserving of international protection in the form of refugee status, the exclusive designation in their favor should be broadened. Preference could be given to all individuals who have suffered or have a reasonable fear of suffering violations of fundamental human rights, including, but not limited to: former detainees, individuals fleeing contested areas, survivors of rape or other gender-based violence, potential witnesses to the proposed War Crimes Tribunal, and members of mixed marriages. The implementation of this refugee resettlement plan should take into consideration the nature of extended families and should facilitate family reunification to the fullest extent possible. Given the general consensus that the war is being carried out in a way which violates the rules of war, draft resisters should also be protected. This would be consistent with the UNHCR *Handbook*, which recommends refugee status to draft resisters when the type of military action at issue "is condemned by the international community as contrary to basic rules of human conduct."<sup>59</sup>

Given the extent of the trauma suffered by refugees of the conflict, agencies engaged in refugee resettlement should be encouraged and assisted in the development of networks to provide necessary medical treatment and psychological counselling.

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59. HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, ¶ 171 (1979).



b. Amend Temporary Protected Status Designation

The Immigration Act of 1990 allowed the Attorney General to provide Temporary Protected Status (TPS) to nationals of countries where "there is an ongoing armed conflict within the state" that would "pose a serious threat to [the] personal safety" of nationals.<sup>60</sup> It provides protections to individuals already within the U.S., who would otherwise face deportation. The designation of TPS defers any deportation action and provides the individual with authorization to work.

On August 10, 1992, the Attorney General designated nationals of Bosnia for temporary protected status, with such status to last until August 10, 1993. In order to be eligible, presence in the U.S. on the date of designation (i.e., August 10, 1992) is required. It is recommended that the Attorney General extend the designation for Bosnia, and modify it so that presence in the U.S. on the date of the re-designation establishes eligibility. Thus those refugees who have entered the U.S. since August 10, 1992 would be protected. The Law Group also recommends that the Attorney General designate nationals of Croatia and Serbia as eligible for TPS to reflect the reality of the conflict in the general region.

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60. 8 U.S.C. § 1254a(b)(1)(A).