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HUMAN RIGHTS VIOLATIONS AGAINST WOMEN*

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I. RAPE AS A WAR CRIME

Ms. FLETCHER: I will be discussing rape as a war crime and other related issues.

The rape of civilian women in the course of the conflict in the former Yugoslavia, is not a recent problem. Rape has been with us since history began. What is new and remarkable in this context is the fact that the issue is receiving international attention. It is a tribute to the political power women have acquired that we have been able to place the issue of accountability for rape and gender-based violence on the international agenda.

Mass rape of women in conflicts has occurred on several occasions in the last fifty years: thousands of women were raped in Bangladesh; Korean "comfort girls" served as sex slaves to Japanese soldiers during the second world war; and in the seventies and eighties rape was a common tool to target women for oppression in Central America. Currently both parties to the conflict occurring in Kashmir are using rape as a weapon for political gains although, according to a

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It is important to recognize that women are commonly raped in situations of conflict. There likely is not a single armed conflict in which women have not been targeted for rape and other forms of sexual violence. Women are targeted because their social status makes them vulnerable. Rape of women is used to humiliate the woman as well as to send a message to her community that the community is unable to defend its women. The fact that universally women are used as messengers is due to the fact that women do not enjoy equal social status; women are considered secondary and subservient to men. Men have the primary responsibility of defending the community. As a result, an injury to a woman is not only an individual harm but a reflection on the community.

What makes the situation in the former Yugoslavia unique is not the higher number of reported rape survivors, but the publicity and compelling evidence which reveals the systematic and widespread nature of the practice there.

Next, let's turn to the evidence in an effort not to abstract the sexual violence in the former Yugoslavia. Rapes of Bosnian Muslim women by Serb forces follow a typical pattern. First, a village is taken over by Serb armed forces. Once the town is secured, women and men are separated. Women and children are taken to a detention facility and it is in these facilities that rapes begin. The rapes are often committed in public in front of as many as two hundred witnesses, including children. Women are raped repeatedly during the time that they are held. Accounts indicate that women are not only raped, but raped with the intent to forcibly impregnate them. Serb captors have told the women they raped that “you will now bear a Serb baby.” Some women are purposely detained beyond the point in time in which they may obtain a legal abortion to force them to bear the child of rape.

We must recognize that these abuses constitute multiple harms. There are distinct injuries that result from rape, forcible impregnation and forced maternity. These violations should not be collapsed into one recognized injury.

It is important to recognize that, in these instances, rape is a tool of war and not a sexual act. It is not a private act of an errant soldier seeking sexual gratification. These rapes are designed to humiliate

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their targets and targeted communities. There are reports of rape by rifles, knives, other implements and weapons. These rapes have nothing to do with sex and everything to do with gender. They are performed in order to degrade, humiliate and mutilate Muslim women. The female body is being used to send a message to the woman and her community that she and it are conquered. It is the apparent policy of mass and systematic rapes of women that highlights the political nature of these crimes. These violations cannot be excused as a historically accepted part of war. This evidence forces the international community to act to prevent the situation from continuing.

How we respond must be informed by the needs of the survivors and the nature of the harm. Bosnian Muslim women are suffering numerous injuries, both physical and mental, as a result of being raped. When a Bosnian Muslim woman is raped—like Western women—she suffers a high level of shame and degradation. She feels as though somehow she must have done something wrong to deserve this and internalizes, to an unfortunate degree, a sense of guilt and shame.

In addition, because of the social structure particular to that culture, women bring shame on their family if they speak publicly about their rape. Because they have been defiled, their family has been defiled, and by extension their community has been defiled. A woman is bearing different levels of shame which have distinct repercussions. A woman who speaks out about her rape may be subjected to reprisals from her family. There have been reports of husbands who have beaten or abandoned their wives after their wives have revealed that they were raped.

Also, in refugee communities in Croatia, there have been reports that rape survivors who have spoken about being raped were asked to leave the community because the community did not want to be known as being a community of "raped women." These women, who have no means of support, are left in precarious circumstances. It is very difficult at this point for Bosnian Muslim refugees to find adequate housing, medical care, or protection. To the extent that shelter is provided, it is being offered in cramped refugee camps. If a woman is expelled, she faces an uncertain likelihood of finding new, adequate shelter.

Further, there are reports of Serb soldiers who have raped Bosnians coming into Croatia with forged documents. A woman reported that the soldier who raped her came up to her at a refugee camp and...
threatened harm to her family in Bosnia if she reported the incident. So, clearly women face real dangers when coming forward.

I have spoken at length about Serbian rapes of Bosnian Muslim women. Credible reports indicate that mass and systematic rape has been practiced only by Serbian forces, but there are also Serbian women who have been raped by Bosnian Muslim forces and Croatian women who have been raped during the conflict. We must hold all parties responsible for the rapes they have committed and avoid any tendency to back away from prosecution because all sides to the conflict are responsible for gender-based violence.

Now, I will turn to the difficulties we will face in holding parties responsible for rapes accountable for their crimes. There are going to be difficulties documenting rape, because of the real physical dangers that women face if they speak about their ordeals. This must be taken into account when evidence of rapes is gathered. When potential witnesses or women who want to speak about their experiences are located it is essential to provide them with adequate protection. This must include assurances of personal safety as well as emotional and psychological support. In the past, women who have been functioning stably before speaking about their rapes later attempted suicide or suffered nervous breakdowns. The documentation process must take into account the extremely fragile emotional state of the survivors.

Our report\(^2\) recommends that, to the extent possible, women should interview women. The interviews need to be conducted in a manner in which the woman survivor is assured that she has ongoing support; that is a responsibility of the documenter in this context. This is a little bit different from the traditional documentation that most human rights organizations engage in. Here, the person being interviewed must be assured that she will not be subject to reprisals because of telling her story. This will have implications for any eventual prosecutions.

The first question we must confront when discussing war crime prosecutions is what is the legal status of rape under international law. Rape is presently being treated as a war crime under the statute for the tribunal.\(^3\) But, there is a schism between the lived experience of rape

\(^{2}\) International Human Rights Law Group, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia* (June 1993). The report is reprinted with permission in its entirety at the conclusion of this panel discussion.

survivors in the former Yugoslavia and the way it appears that the international community is prepared to recognize those harms.

The statute for the war crimes tribunal explicitly recognizes rape only as a constituent Crime Against Humanity. However, the statute confers jurisdiction over those guilty of war crimes and it is clear by interpretation that rape constitutes a grave breach of the Geneva Convention. Legally, there should not be a problem of prosecution. Our concern is that there is no explicit acknowledgement in the statute that rape, forced impregnation and forced maternity constitute distinct war crimes and should be separately charged. When a woman is forced to carry a fetus conceived as a result of a rape and go through labor and give birth to that child, that is also a distinct crime. Enforcement of women’s rights and recognition of the nature of gender-based violence cannot be left to argument and interpretation. When a woman is raped, that is one injury. When, as a result of that rape, she has to seek an abortion, that is another kind of injury. It appears that this distinction can be recognized. There are additional rules that the Security Council, if not the judges themselves, can and should adopt that will clarify this. We certainly advocate that position.

The women’s caucus of non-governmental organizations ("NGOs"), in preparation for the World Conference on Human Rights, has adopted a very strong statement in regard to women's rights as being human rights. A few of their recommendations have particular bearing on war crimes and rape as a war crime in the former Yugoslavia.

One of the delays in recognizing rape in the former Yugoslavia was due to the late reporting from official levels. There were news reports of rapes, but the details were not included in the United Nations documentation until fairly late in the game. The U.N. Special Rapporteur on the Situation of Human Rights in the Territory of the Former Yugoslavia did not talk about rape specifically until his third

4. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993), supra note 3, art. 5.
5. The Geneva Convention designates certain treatment as a "grave breach" of the treaty including "torture or inhuman treatment ... willfully causing great suffering or serious injury to body or health ..." when committed against "protected persons." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
6. International Human Rights Law Group, No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia (June 1993) at 20, 44.
report filed in November of last year.\(^8\) Although there had been credible accounts of rape three months prior, there was only a brief mention of the strategic use of rape in the third report. One of the caucus's recommendations is to call for a Special Rapporteur on Violence Against Women to report to the Human Rights Commission on the condition of women's human rights. This would help ensure that abuses against women would be brought to the attention of the international community in a more timely manner.

Also, there is a need to develop and address the vulnerabilities of women in areas of conflict. We have seen the problems in the former Yugoslavia. The women's caucus is advocating the creation of a permanent tribunal that would have jurisdiction not only over perpetrators of grave breaches of the Geneva Convention, but over United Nations personnel as well. There have been reports from the former Yugoslavia of United Nations personnel perpetrating rape on civilian women.\(^9\) The United Nations must look to its own house at the same time it attempts to clean up those of others.

Finally, the caucus advocates that gender and fear of persecution based on gender become a basis for refugee status and political asylum, which it currently is not. This would protect women who have been raped and abused by their domestic partners. This is traditionally seen as a private act, but when the state has failed to prosecute abusers, such conduct would be considered state action sufficient to provide a basis for refugee status. This would help protect women who report domestic abuse to their government but who can get no redress in their own courts. These women would be able to flee to a country of safe haven.

The advocacy efforts on behalf of women's human rights are heartening. Women and human rights advocates are sending a message that women's rights are human rights and need to be taken into account as such. Special measures need to be taken in order to do that. The larger question is whether anyone is listening. In the end, it is a question of political will to take adequate measures needed to address the violations that women in the former Yugoslavia continue to endure.

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II. WOMEN'S HEALTH RIGHTS IN HIV

Ms. Taylor: I will speak a few minutes this morning about the implications of the HIV pandemic on women's international health issues and the role which international law and institutions can have in future efforts to control the spread of the disease. In particular, I will discuss two issues. First, HIV/AIDS has unveiled the lack of attention accorded to the full range of women's health concerns and made evident the importance of refocusing and reallocating scientific and medical resources directly to women's health needs. In the second part of my presentation I will show that efforts to combat the spread of HIV/AIDS in women must go beyond rectifying the technical and medical neglect of specific women's health issues and must identify and address the underlying and entrenched social and cultural contexts which render women especially vulnerable to the virus. The question which remains is what impact international law and international organizations can have on the cultural conditions which nurture the pandemic.

The incidence of HIV infection in women is increasing at an alarming rate. In 1990, the reported proportion of female HIV positive adults was 25%, but by the end of 1992 that figure had climbed to at least 40%. The World Health Organization ("WHO") estimates that at least five million women world-wide are now infected with HIV, but this number is expected to soar rapidly in the next few years. By the year 2000, WHO predicts that at least half of the world's estimated forty million HIV positive adults will be women. In the United States, women make up the fastest growing population of HIV infected persons. AIDS has become the leading cause of death of women between the ages of twenty and forty in major United States cities. Actual figures of HIV infection among women may be much higher due to inaccurate reporting of HIV in general and to under-diagnosis of HIV in women in particular.

The dramatic rise in seroprevalence rates among women has strikingly revealed that the full range of women's health issues, and, concomitantly, women's rights to health has not been a priority area for attention or investment by national or international organizations. The core international legal basis of concern for the right to health is found in Article 12 of the International Covenant on Economic, Social, and Cultural Rights. The Covenant provides that each

nation must undertake to take steps with a view to achieving the highest attainable standard of physical and mental health of each individual, without discrimination.\textsuperscript{11} In practice, however, discrimination is apparent in the way that women's health problems have been defined and the services that have been developed for women. International efforts, in particular, have traditionally equated or defined women's health as maternal health. Numerous international conventions and declarations have identified motherhood as being entitled to special protection,\textsuperscript{12} and maternal health has been the almost exclusive focus of international women's health initiatives of WHO.\textsuperscript{13}

The crucial defect of this special concern for maternal health has been the failure of national and international organizations to limit its application and give sufficient attention to women's health issues beyond maternal health.

The HIV/AIDS crisis has underscored this low priority given to the full range of women's health issues. Indeed, despite the enormous impact of HIV on women, the international community did not begin to address the significance of the pandemic on women until 1989.\textsuperscript{14} HIV has publicly highlighted the inequitable approach to disease and illness in women. For instance, as has traditionally been the case for conduct of clinical studies, women have largely been excluded from the multi-billion dollar research agenda on HIV. Conventional approaches to biomedical research for diseases which affect both men and women have used men as models for the prototypical study population, with subsequent results applied to women as though such diseases or conditions would have the same natural history or response.

Even now, comparatively little is known about the impact of disease on women, whether it is marked by the same progression as men and to what extent it is characterized by the same opportunistic infections. Worldwide, HIV is consistently under-diagnosed in women. Global research efforts have largely bypassed research and development of prevention methods that could be used by women themselves.

\textsuperscript{11} Id. arts. 2.1, 2.2, 12.1.


\textsuperscript{13} In 1985, for example, WHO stated that "women's special health needs are primarily related to their reproductive role." WORLD HEALTH ORGANIZATION, WOMEN, HEALTH AND DEVELOPMENT: A REPORT BY THE DIRECTOR-GENERAL 5 (1985).

\textsuperscript{14} Resolution A/C.2/44/L.34.
A vaginal virucide, for example, which could be utilized by women to prevent transmission of HIV, is still not generally available.\footnote{15}

Measures to control the opportunistic infections and diseases associated with HIV/AIDS which particularly affect women and can be treated successfully to prolong their lives require investigation. In fact, the association of HIV and sexually transmitted diseases further reveals the traditionally low priority of women's health issues. Sexually transmitted diseases ("STDS") are a co-factor in the transmission of HIV which greatly increase women's vulnerability to the disease. Persons with sexually transmitted diseases are at five to ten times greater risk of transmission. STDS, however, represent a long-standing issue in women's health care which has been accorded inadequate research dollars or scientific attention. Although reliable data for the worldwide incidence of STDS is not available, WHO estimates that the minimal yearly incidence of the four major bacterial STDS: gonorrhea, genital chlamydia infections, infectious syphilis, and chancreoid, exceeds eighty million.\footnote{16} These diseases disproportionately effect women, are much more difficult to detect in women, and have more grave medical consequences for women. Still, little research has been focused on STDS and facilities for treatment and detection of these diseases in women, fifty percent of whom are asymptomatic, are lacking.

The nexus between HIV/AIDS and cervical cancer, a disease closely associated with STDS, provides yet another example of the low standing of women's health issues other than maternal health. Cervical cancer is a major disease associated with HIV/AIDS which can likely be prevented or controlled to prolong the lives of infected women. Yet the Center for Disease Control's widely used definition of AIDS did not include the major opportunistic infections and disease known to affect women, including cervical cancer, until the end of 1992.\footnote{17} In addition, in most nations, facilities for treatment and detection of cervical cancer in women are lacking. Despite the fact that it is relatively easily curable and preventable, cervical cancer is the leading

\footnote{15. A female condom was launched in Europe in 1992. See Implementation of the Global Strategy for the Prevention and Control of AIDS: Report by the Director-General, World Health Assembly, 45th Sess., Provisional Agenda Item 33, at 5, WHO Doc. A45/30 (Feb. 28, 1992). More recently, the "Reality" female condom was approved for use by the FDA. Firm Gets OK for Female Condom, SACRAMENTO BEE, May 11, 1993, at A8. For a general discussion about the "Reality" Condom, see AIDS IN THE WORLD 700-07 (Jonathan Mann et al. eds., 1992).}


\footnote{17. James W. Buehler et al., The Surveillance Definition of AIDS in the United States, 7 AIDS 585 (1993).}
cause of cancer incidence of women in Africa, and the second leading in Asia. Among developing countries, cervical cancer accounts for fifty-one percent of all female cancer incidence.\textsuperscript{18}

The attention focused on maternal health to the virtual exclusion of the full scope of women's health needs by national and international organizations is a salient concern in the advancement of women's human rights generally. Indeed, among the most difficult problems in the development of women's human rights is the concentration on any area which is perceived to be related in some way to the women's reproductive role.

AIDS has publicly revealed this lack of attention to women's health issues and encouraged national and international organizations to pay more serious regard to the full range of women's health concerns beyond maternal health. It is no coincidence that in 1990 the National Institute of Health established the first Office of Research on Women's Health to address the inequities in research of women's health concerns and to ensure that women are included in clinical trials.\textsuperscript{19} WHO did not hold its first consultation on the impact of HIV on women until 1990. In 1992, however, the World Health Assembly, the policy-making organ of WHO, stressed the importance of new interventions for women's health, including STDS, and directed WHO to establish the first Global Commission on Women's Health before the end of the year.\textsuperscript{20} The Global Commission on Women's Health has been instructed to put forth a charter on women's health rights at the United Nations Human Rights Conference in Vienna next month. Hence, the political and scientific communities appear to be responding to mandates for change.

Although such new interventions to protect women's health are important, in the context of HIV, policy-makers must take more seriously the relationships that these new medical interventions for women are likely to have with the underlying social and economic conditions that nurture the disease. International efforts to combat the spread of HIV must look beyond the medical and scientific basis for the disease and identify and address the social contexts which

\begin{itemize}
\item \textsuperscript{18} WORLD HEALTH ORGANIZATION, WOMEN'S HEALTH: ACROSS AGE AND FRONTIER 87 (1992).
\item \textsuperscript{19} Carolyn M. Clancy & Charlea T. Massion, American Women's Health Care: A Patchwork Quilt with Gaps, 268 JAMA 1918 (1992).
\end{itemize}
render women especially vulnerable to the disease. The question which remains is what impact international law and institutions can have on the social mechanisms which fuel the disease.

It is increasingly accepted that the root causes of the relative increase of the incidence of the disease in women go beyond the virus itself and are the outcome of pervasive social and economic discrimination against women worldwide. Economic inequalities and traditional attitudes and values limit the ability of women to adopt protective behavior. Efforts to combat the pandemic must, therefore, go beyond the technical health aspects of HIV and address the underlying and deep-rooted social and cultural contexts that dramatically restrict women's choices.

Although the lower status of women within family and society varies from culture to culture, rough generalizations can be made. Worldwide, the consequences of women's inferior social status are similar, resulting in a special vulnerability to HIV infection. Globally, cultural norms reflect and contribute to the biases in prevailing practices regarding the extent, type and quality of education, feeding, and health care available to women as well as the inferior social and legal rights which they are accorded. This lack of equal access to education and health care restricts women's access to knowledge about HIV and the means to prevent infection. Gender inequality in sexual relations and in economic status also increases the risk of infection of women.

Women's economic dependency on men restricts the ability of women and girls in all societies to refuse unprotected sex. The economic inequality of women is a global phenomenon; worldwide, women constitute a majority of the poor. Although education is a pivotal factor for empowering women and limiting the spread of the pandemic, in many societies even women who are informed about ways to control HIV infection are powerless to control their sexual vulnerability to HIV within or outside the context of marriage.

Cultural values and patterns regarding appropriate male and female behavior tend to lock women into dependence, exacerbating their danger of exposure to HIV as well as perpetuating the spread of the pandemic. Studies from regions of high heterosexual transmission of HIV, for example, indicate that the major risk factor for married

women is the premarital and extramarital activities of their husbands. Worldwide, women have little power to influence their partner's sexual life, and have difficulty demanding that their partners use condoms and discussing sexual behavior. Traditional practices, such as the early marriage of girls, means that women are also becoming infected at a significantly younger age than men—five to ten years earlier than men on average, often in their early childbearing years. The majority of women become infected in their teens and early twenties. Cases of HIV infection in fifteen and sixteen year old girls have been documented, which means that they have become infected a few years earlier.

Traditional beliefs about marriage, spirituality, sexuality, reproduction and disease causation which are prevalent in many societies provide a fertile breeding ground for the virus by encouraging "unsafe" behavior. Cultural conventions in many societies entitle a man to his wife's sexual services. Because of this tradition, the wife is at risk because she may not refuse her husband's request for sexual relations even after he has been diagnosed with HIV. In addition, although women who test positive for HIV are encouraged to avoid childbearing, that choice may be unavailable or unrealistic in certain cultural contexts. In some African societies, for instance, the status of a woman is critically linked to her ability to have children and her reproductive role is regarded as the possession of her husband's family. Research has found that a positive HIV test result may, at times, accelerate a woman's plans to conceive.

Stereotypes in many societies place the blame on women for the spread of the disease. HIV/AIDS is, therefore, experienced differently by men and women and has vastly different social and economic consequences. Infected men expect and receive care; infected women are frequently stigmatized, rejected and expelled by their communities and families. In some African cultures, HIV/AIDS has been associated with women who are menstruating, have had an abortion or who are widowed. In some nations, many men refer to AIDS as a women's disease—something that you get from the "dangerous" part of women.

24. _Id._ at 17.
Although AIDS-related stigmatization is not unique to women, men's property and other rights may be protected by the law, while women's lack of legal status in many nations may leave them homeless and destitute after abandonment by their families.

National laws indeed often confirm or compound the violation of women's human rights and contribute to the further spread of the pandemic. Worldwide, legislative discrimination is evident in the context of marriage, social security benefits, retirement rights, inheritance laws, property ownership, and employment. Such laws increase women's vulnerability to HIV by narrowing their economic and social capacity to avoid situations which put them at risk. Although all developed countries and about half of the developing nations have established laws proclaiming women's equality, discrimination persists in practice. In most nations there is an urgent need to revise the legal basis for discrimination against all women and guarantee the enforcement of existing laws which safeguard women's equality.

The outcome of these pervasive conditions of gender discrimination is reflected in the health status of women, not only in relation to HIV, but also in the high levels of female morbidity and mortality due to other causes world-wide. Inequitable nutritional practices and lack of basic education puts girls at greater risk of malnutrition and disease. Custom forces them into the reproductive cycle before they are physically mature, setting the stage for repeated pregnancies, unsafe abortions, sexual violence and sexually transmitted diseases, including HIV. The traditional practice of female genital mutilation further increases the risk of HIV as well as a host of other dangerous and often fatal complications. WHO estimates that eighty million women in Africa as well as millions more in the middle east are victims of genital mutilation.

Clearly, the cultural data evidences that to respond effectively to the spread of HIV, national and international programs must explore and address the interrelationship between HIV and women's status. Equal weight must be given to the social and the scientific aspects of the epidemic.

International AIDS interventions have continued, however, to focus primarily on purely the health aspects of the disease without addressing the underlying social contexts which foster both unsafe behavior and restrict the ability of women to protect themselves against the disease. Prevention strategies have focused on the reduction of the number of sexual partners, fidelity within relationships, safer sexual practices (particularly the use of the condom), and most
recently the treatment of STDS. These measures, grounded in the male physique and experience have, as my previous remarks suggest, little relevance to the realities of most women's lives where they cannot control the personal and social circumstances which put them at risk. Indeed, international strategies, which build on and reinforce the stereotypical role of women as care-givers compound the impact of HIV on women by increasing their responsibility as primary caretakers for those who are ill and thereby further restricting their choices.

After a conspicuously slow start, the international community has begun to at least identify the complex social and cultural links between women's personal vulnerability to infection and their social status. The 1992 World Health Assembly, for example, stressed the importance of new organizational interventions for women's health to reduce women's vulnerability to HIV by focusing on the improvement of women's health, education, legal status and economic prospects.25

The advancement of women's human rights is central to controlling the spread of HIV. Historically, however, international health law has been primarily functionalist in nature, restricted to activities on which there was international consensus. To effectively address the impact of the pandemic on women, international health law must now take into account the complexity of the social and cultural conditions that fuel the diseases, including strategies for empowerment of women, including programs to change male attitudes and improve women's social and legal rights. Thus international health law is led into the political realm, where international consensus does not exist.

It is important not to overestimate the impact that international law can have on the underlying and entrenched social conditions that impact the exposure of women to HIV. The final decision on the incorporation of the rules of international law into domestic law and, perhaps, behavior depends upon the priorities of nations. Experience indicates, however, that states are likely to resist international efforts directed towards changing the position of women. International efforts aimed at transforming the status of women, including most notably the obligations of the Convention on Elimination of All Forms of Discrimination Against Women (“CEDAW”) have encountered tremendous national resistance. Efforts to advance the status of women in the context of HIV are, therefore, likely to be countered by allegations of cultural insensitivity and interference with the domestic affairs of states.

25. See Technical Discussion, supra note 20.
Such claims, of course, reflect some of the fundamental tensions in international law: tensions between the notion of the centrality of the state and universal human rights as well as tensions dividing the interests of communal groups and the rights of people within those communities, including women. The rapid spread of HIV/AIDS demands, however, the expansion of the proper domain of international health law. HIV/AIDS has vividly demonstrated that health and social status are not purely a matter of domestic concern, that the conditions of health of one nation can not be isolated conceptually or practically from another. Improving women's health and social status is an international health concern which necessitates collaborative multilateral action.

It is doubtful, nevertheless, whether the numerous declarations and resolutions adopted by the United Nations and its specialized agencies can have any significant impact at the family and the community level in the absence of a national commitment to improve the status of women. The discourse of rights at the international level has little meaning in the day-to-day realities of women's lives. International legislation is unlikely to alter the underlying social structures which define women’s roles and limits their choices. Existing stereotypes about the role of women in society are a bastion of tradition and a source of powerful customs that are difficult to legislate against at the national, let alone the international level.

Efforts to alter the pervasive structural, social and cultural contexts which make women particularly vulnerable to HIV must begin at the family, community and the national level. This is not to say, of course, that there is no role for international law and organizations; the international human rights machinery can contribute to efforts to control the spread of the pandemic by examining and exposing national laws and policies which directly or indirectly affect HIV prevention and control on the basis of gender. Supervision and publication of national compliance with international human rights obligations related to women in the context of HIV may also contribute to the transformation of contemporary notions about states’ responsibilities to guarantee women’s fundamental human rights. Women continue to be disadvantaged by the legal and social policies of many states which fuel social and cultural discrimination against women. Indeed, in the two decades since the codification of CEDAW, statistics indicate that women’s health and educational status has declined globally. National legislative action is, of course, a crucial
step in the process of cultural transformation, providing a legitimate basis for action and serving as a catalyst for change.

Secondly, international efforts are urgently needed to encourage states to develop binding and specific commitments to increase national health care financing and distribute existing resources in an equitable manner. The medical aspects of AIDS have been particularly difficult to confront in most developing nations because of the preexisting weaknesses of national health systems. Prevention and control of HIV is critically linked to the existence of adequate primary health care services, including basic health care education.

In addition, as suggested above, the development of international legislation addressing the allocation of existing health care services to women is also an area of critical concern. Existing health services need to be analyzed to assess their quality and accessibility to women. In its resolution calling for the new Global Commission on Women's Health, the World Health Assembly instructed the Commission to address this issue of health resource allocation. Among other tasks, the Commission is charged to set standards and criteria necessary for regular monitoring of women's health status and countries' progress in implementing past Assembly resolutions bearing on women's health. While these activities do not have the obligatory character of international law, they still constitute an important first step which may persuade some states to reconsider and revise national policies on women's health.

III. United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women

A. Introduction

President Carter signed the Convention on the Elimination of All Forms of Discrimination Against Women (Convention) in November 1980 and transmitted it to the Senate for advice and consent to ratification. Attached to the President's letter of transmittal was a letter from Secretary of State Muskie briefly describing the treaty but declining at that time to propose any reservations, declarations or understandings ("RDUs"). The State Department did prepare a


27. Muskie's letter of October 23, 1980, stated in part:
Specific language for implementing legislation or reservations is not being recommended at this time. When the Senate Committee on Foreign Relations wishes to take
memorandum of law identifying aspects of the treaty that, in its view, presented difficulties for U.S. ratification. Neither the Reagan nor the Bush Administrations ever supported ratification of the treaty, and neither made detailed suggestions for RDUs. Thus, the background to this treaty differs from that presented in 1992 when the Senate ratified the International Covenant on Civil and Political Rights (“ICCPR”) with substantial RDUs, some similar to those proposed by the Carter Administration.

As of January 1993, there were 120 states parties to the Convention. This large number of ratifications and accessions should operate as a positive factor in support of U.S. ratification. However, a

action regarding the Convention, interested agencies will meet upon request with the Committee and its staff to discuss the necessary language. If this approach is followed there will be no constitutional or other legal obstacles to ratification of the Convention by the United States. The Departments of Justice, Health and Human Services, Education, and Labor, the Equal Employment Opportunity Commission and the United States Commission on Civil Rights concur in this assessment and are enthusiastic in their support of the Convention. The Convention on the Elimination of All Forms of Discrimination against Women is a significant accomplishment of the United Nations system and an important advance in the development of the international law of human rights. United States adherence to this Convention is in the national interest and in the interest of the world community. It is our hope that the United States, after full consideration by the Senate, will become a party to the Convention.


29. Alan Kreczko, Deputy Legal Adviser of the State Department in the Bush Administration, testified to the Senate Foreign Relations Committee that Articles 10 and 16 (education and family laws) raised federalism concerns; Articles 5 and 7 required regulation of private conduct that is beyond governmental power in the United States; Article 2 might forbid discrimination against women in the armed services; and Article 11 might require a comparable worth approach to pay discrimination. These concerns were presented in a sketchy, hypothetical fashion, and Kreczko did not propose any specific RDUs. The position of the Bush Administration was that it was still studying the Convention and did not have a formal position on whether it should be ratified, with or without RDUs. See, Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the Senate Foreign Relations Committee, 101st Cong., 2nd Sess. 51 (1991) (statement of Alan Kreczko, Deputy Legal Advisor of the State Department in the Bush Administration).


disturbingly large number of these states parties have entered reserva-
tions to various provisions of the treaty, some of which may be so
extensive as to defeat its object and purpose.\textsuperscript{32}

The following will briefly analyze the key provisions of the Con-
vention, the interpretations the Committee on the Elimination of Dis-
crimination Against Women ("CEDAW") has given to those
provisions, the reservations entered by some other states, and possible
suggestions that might be made by some treaty opponents and even
proponents for RDUs.

United States ratification of the Convention can and should be
made without reservations, declarations or understandings. At most,
the Convention should be subject to whatever limitations may be
legally necessary in order to avoid having the United States assume
treaty obligations it may not constitutionally discharge. It is generally
undesirable for states to ratify human rights treaties with such exten-
sive RDUs as to neutralize the impact of those treaties and render
them meaningless to the intended beneficiaries of the treaty's protec-
tions. Moreover, extensive RDUs may render void a purported ratifi-
cation by defeating the treaty's object and purpose.\textsuperscript{33} This paper will
identify provisions in the treaty that might be construed to create con-

cflicts with the Constitution, and will discuss options for eliminating
such conflicts.

\section*{B. \textit{Summary and Analysis of Treaty Provisions}}

\textit{Article 1}

The definition of discrimination in Article 1 includes distinctions
with either the purpose or effect of impairing women's enjoyment of
human rights and fundamental freedoms in political, economic, social,
cultural, civil "or any other" fields. This definition helps to establish
the scope of the subsequent specific treaty provisions. The Convention
is technically not about gender discrimination in general, because men
are not intended beneficiaries. In this sense, the Convention differs
from the nondiscrimination provisions of such treaties as the ICCPR.

While a broad "purpose or effect" definition of discrimination is
not mandated by the Constitution, whose equal protection clause is

\begin{footnotesize}
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\item \textsuperscript{32} See, Belinda Clark, \textit{The Vienna Convention Reservations Regime and the Convention on
Discrimination Against Women}, 85 \textit{Am. J. Int'l L.} 281 (1991); Rebecca J. Cook, \textit{Reservations to
\item \textsuperscript{33} Advisory Opinion, Reservations to the Convention on Genocide, 1951 I.C.J. 15.
\end{itemize}
\end{footnotesize}
read to require proof of discriminatory intent, this definition is consistent with U.S. statutory law under provisions such as Title VII of the Civil Rights Act of 1964.

Discrimination against women on the basis of marital status is also encompassed by Article 1. This means that married persons (male and female) must be treated alike; not that no distinctions can be drawn between married and unmarried individuals.

**Article 2**

Article 2 sets forth a variety of steps states parties must take in order to insure compliance with the treaty's substantive protections. These include: (a) guarantees of the equality of men and women in the constitution or legislation; (b) adoption of anti-discrimination legislation; (c) provision of remedies before national tribunals and other public institutions; (d) insuring that public institutions refrain from discrimination against women; (e) "appropriate measures" to eliminate discrimination against women by "any person, organization or enterprise;" (f) "appropriate measures" to modify laws, regulations, customs or practices that discriminate against women; and (g) repeal of penal laws discriminating against women.

In several of its general comments explicating the treaty, CEDAW has relied in part on Article 2. In these comments, Article 2 is discussed in conjunction with more specific substantive articles of the treaty. In General Comment No. 19 on violence against women, CEDAW emphasized the reach of Article 2(e) and (f), noting that states have responsibility under international law for failure to act with due diligence to prevent violations of rights, to investigate and punish acts of violence and to provide compensation. In General Comment No. 14 on genital mutilation, CEDAW urged states parties to take "appropriate action" to combat the practice, including encouragement of political, religious and community leaders and the media to co-operate to influence attitudes toward eradication of genital mutilation.

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34. In the context of gender discrimination, the classic case imposing an intent requirement is Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979).
36. These include General comments Nos. 12 and 19 on violence against women and General comment No. 16 on unpaid women workers in rural and urban family enterprises.
Article 2(e) and (f) represent attempts at recognizing that abuse of women is often defined as occurring in the realm of the "private." Such perceptions have caused the international human rights community, until recently, to fail to come to grips adequately with important issues of state responsibility as they relate to abuse of women and thus to neglect practices that have the most pervasive and profound impact on women's ability to enjoy lives of minimal safety and dignity.

A number of Islamic states entered reservations to Article 2 preserving their freedom to continue to enforce Shari'a law that discriminates against women, including penal laws.\(^ {39} \)

While the United States has no explicit constitutional provision guaranteeing equal rights for women, the Fourteenth Amendment has been interpreted to require the showing of an important governmental purpose substantially served by any law or state action that discriminates against women. Sixteen state constitutions contain equal rights provisions,\(^ {40} \) and statutory law at the federal, state and local levels protects women against discrimination in many areas.

Some groups have suggested that an understanding be attached to Article 2 (and to other articles) to the effect that the United States is a federal state, and that it will implement the treaty at the federal level and take appropriate measures to insure compliance at the state and local level.\(^ {41} \) Such an understanding was attached to ratification of the ICCPR.\(^ {42} \) However, Article 2(d) simply provides that the state party must "ensure" that public authorities conform to the treaty, without specifying that federal states must accomplish this by direct national legislation. An understanding indicating that the United States would

\(^ {39} \) These states include Bangladesh, Egypt, Iran, and Libya. The United Kingdom reserved the right to continue to apply its laws on prostitution and sexual offenses.

\(^ {40} \) These states are Alaska, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming.

\(^ {41} \) Australia attached the following statement to its ratification of the Convention: Australia has a Federal Constitutional System in which Legislative, Executive and Judicial Powers are shared or distributed between the Commonwealth and the Constituent States. The implementation of the Treaty throughout Australia will be effected by the Commonwealth State and Territory Authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

\(^ {42} \) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

in some areas take indirect rather than direct action to insure compliance by state and local authorities is not necessary. A federal/state understanding might create the false impression that state and local governments are not bound or that U.S. ratification was intended to be an empty or hypocritical gesture.

Certainly, there is nothing in the Tenth Amendment that prohibits the United States from committing itself to insure that state and local authorities do not discriminate against women. *Missouri v. Holland* suggests that the Tenth Amendment does not bar treaty-making even with respect to subjects beyond the normal law-making power of Congress. Exercise of the treaty power often overrides longstanding and significant state interests, with respect to subjects such as debts and confiscation, property claims more generally, jurisdiction, or, as in *Missouri v. Holland*, the protection of migratory birds that the states had traditionally regarded as their exclusive property.

The reach of Article 2 to discrimination by persons, organizations and enterprises and its obligation to modify customs and practices may prompt suggestions for RDUs, by persons perceiving a potential conflict with free speech or associational rights. Similar concerns may be raised with respect to Article 5 (social customs and family education), Article 7 (political and public life), Article 8 (representation in international organizations) and Article 13 (economic and social benefits and access to cultural activities).

Suggestions for phraseology to prevent conflict between the Constitution and interpretations of the Convention's terms might include variations on the following: "Nothing in this [treaty] requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The drawback to this proposal is that it might falsely imply that the Tenth Amendment operates as a limit on U.S. obligation under the Convention. Any understanding should not extend beyond clarifying that the Convention does not require the United States to assume obligations that would violate the First Amendment to the Constitution.

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43. 252 U.S. 416 (1920).

44. This language, proposed by Senator Jesse Helms, became a "proviso" that was not included in the actual instrument of ratification of the ICCPR. 138 Cong. Rec. S4781, S4784 (daily ed. April 2, 1992).

45. Thus, an early suggestion by one human rights group for an understanding that "The United States understands that its obligations under Articles 1, 2, 5, 7 and 13 with regard to private activities do not require or authorize legislation or other action that would restrict the rights to freedom of speech or association protected by the Constitution and laws of the United.
The Restatement (Third) of the Foreign Relations Law of the United States, sections 111(2), 115(3), 311(3), notes that an unconstitutional treaty provision will not be given effect in U.S. law, but that the unconstitutionality of the provision will not relieve the United States of its international obligations under the treaty unless the unconstitutionality was "manifest and concerned a rule of fundamental importance." Article 2 and the other mentioned articles are not manifestly unconstitutional.

Governmental authorities in the United States have a wide scope of action to promote the equality of men and women in the areas encompassed by the Convention, including employment, health, family life, and education. State and local laws prohibiting discrimination against women by "private" clubs have been upheld against challenges based on freedom of association of club members.46

Moreover, the Supreme Court has held that it is a legitimate governmental purpose to have a policy of subsidizing childbirth while denying public funding for abortion, even though such a policy impinges upon constitutionally protected private decisions by indigent women.47 Nothing in the First Amendment prohibits the United States from committing itself to promote the norm of nondiscrimination by all levels of government, and by other entities and individuals, through education, encouragement and subsidization.

Article 2 has not been interpreted to require censorship of misogynistic views. CEDAW did read Article 2 as requiring states parties to take effective action to protect women against gender-based violence by individuals.48 But nothing in the Constitution prevents the United States from requiring state and local authorities to provide female victims of violence with the equal protection of the criminal laws. Indeed, such a right to equal protection is arguably commanded by the Fourteenth Amendment itself.49

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Article 3

Article 3 obligates states parties to take action in political, social, economic and cultural fields to promote the advancement and full development of women on a basis of equality with men. There is no plausible need for any RDUs to this article.\(^{50}\)

Article 4

Article 4(1) permits states to take "special temporary measures" to promote \textit{de facto} equality between men and women, without violating the treaty's norm of non-discrimination. Article 4(2) provides that measures for the protection of maternity do not violate the treaty. France and the United Kingdom attached declarations providing that they did not regard the Convention as preventing them from implementing measures that treated women more favorably than men.

No RDUs are necessary to this article. States parties are not \textit{obligated} to adopt either affirmative action or fetal protection measures. Voluntary affirmative action plans for the benefit of women by government actors are consistent with the Constitution if they meet the intermediate scrutiny test under the Fourteenth Amendment, since discrimination against men does not trigger strict scrutiny. Voluntary affirmative action plans by private employers may also be consistent with Title VII.\(^{51}\) Fetal protection policies may violate the Pregnancy Discrimination Act of 1978 under some circumstances, but Article 4 does not require the United States to adopt or promote such policies.\(^{52}\) The United States does have food and health programs that specifically benefit pregnant women.

Article 5

Article 5(a) requires the states parties to take "appropriate" measures to modify social and cultural patterns to eliminate prejudice, male supremacy and stereotyped gender roles. Article 5(b) requires states parties to take "appropriate" measures to include in family education a proper understanding of maternity and the parental obligations of both men and women and the best interests of the child.

General comment No. 3 of CEDAW interprets Article 5 to urge states parties to adopt education and public information programs that

\(^{50}\) See discussion of Article 2 \textit{supra.}
will eliminate prejudice against women. Nothing in the Constitution prevents the United States from complying with this obligation.\textsuperscript{53} Article 5 has not been interpreted by CEDAW to authorize or require the kind of censorship that would violate the First Amendment. Measures that would violate the Constitution would arguably not be "appropriate" within the terms of Article 5.

\textit{Article 6}

Article 6 requires the states parties to take all appropriate measures to suppress traffic in women and exploitation of prostitution of women. This article is modelled upon the "abolitionist" approach of the 1949 Convention for the Suppression of Traffic in Persons and Exploitation of the Prostitution of Others,\textsuperscript{54} which targets those who profit from the prostitution of others, even with the consent of the prostitute, but does not require states to penalize or to regulate the prostitute's own activities. The United States is generally a "prohibitionist" country which directly criminalizes the conduct of the prostitute, sometimes without criminalizing the conduct of the patrons. Other countries, and small areas of the U.S., are "regulationist" in permitting prostitution only within state-regulated brothels.

Except to the extent that brothel-keepers in Nevada are seen as exploiters of prostitution, U.S. law is fully in conformity with Article 6 in penalizing pimps and other traffickers and exploiters of prostitutes.\textsuperscript{55} Thus, there is no need for any RDUs to this article.

\textit{Article 7}

Article 7 requires states parties to take appropriate measures to eliminate discrimination against women in public life, including the right to vote, to participate in the formulation of public policy, to hold public office, and to participate in nongovernmental organizations concerned with public and political life.\textsuperscript{56} Several nations have entered reservations providing that this article does not require that women be drafted into the military or fight in combat.\textsuperscript{57} The phrase "concerned

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\item \textsuperscript{53} \textit{See} 20 U.S.C. § 2362(a)(3) which provides that federally funded consumer and homemaking education programs should "encourage the elimination of sex bias and sex stereotyping."
\item \textsuperscript{54} 960 U.N.T.S. 271.
\item \textsuperscript{55} \textit{See}, e.g., Mann Act, 18 U.S.C. §§ 2421-2424 (1988).
\item \textsuperscript{56} Many of these same protections are included in a treaty to which the United States is already a party. \textit{See} Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909.
\item \textsuperscript{57} These states include Australia, Austria, Germany, New Zealand, and Thailand. Other states preserved male-only lines of royalty (e.g., Belgium).
\end{itemize}
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with the public and political life of the country" was added to meet concerns by drafters that the previous version of the article would encompass private social clubs.58

CEDAW has not interpreted Article 7 to prohibit all discrimination against women in the military. A reservation by the United States to preserve the exclusion of women from certain aspects of combat, even were it desirable as a matter of policy, is thus not legally necessary.

The cases concerning state and local laws prohibiting exclusion of women from associations and clubs provide support for an argument that U.S. adherence to Article 7 would not present a constitutional problem, since the Supreme Court found that the public policy of promoting non-discrimination outweighed any associational rights of the formerly all-male members in those cases. However, the Supreme Court also emphasized that the Jaycees, Rotarians, and members of New York business clubs were not engaged in any type of political speech that would be diluted or altered by the admission of female members. The fact that Article 7 is limited to organizations engaged in public and political life could present problems in the context of misogynist political organizations whose exclusion of women was part of a political message and thus entitled to First Amendment protection.60 State courts have upheld regulations of political parties intended to promote gender equality, but Article 7 might be construed to require (not simply permit) governmental intrusion for the very purpose of altering the political message of groups engaged in public and political life. However, this concern appears to be largely hypothetical, since it is highly unlikely that any public or political group would argue that it is attempting to convey a distinctly misogynist message that would be diluted by female membership.

Article 8

Article 8 concerns equal access to opportunity to represent governments in international organizations and to participate in the work

60. An analogous example might be Jews or African-Americans seeking admission to the Ku Klux Klan.
of international organizations. No state has entered a reservation, declaration or understanding to this article, and there is no need for the United States to do so.

**Article 9**

Article 9 guarantees equality in the right to nationality, including the right to confer nationality to one's children. U.S. law no longer disfavors women or their children in the acquisition of U.S. nationality. Indeed, the only remaining gender-based distinctions in U.S. law conferring nationality to children burden fathers of non-marital children, rather than mothers. Thus, no RDUs are justified with respect to Article 9. This is a subject of exclusive federal competence.

**Article 10**

Article 10 guarantees equal opportunity in education, broadly defined to include pre-school, general, technical, professional, and adult education, access to scholarships and sports, information on family planning, and career and vocational guidance. Coeducation is to be encouraged but is not strictly mandated.

The objectives of Article 10 are met by federal statutes such as Title IX of the Education Amendments of 1972, and interpretations of the Fourth Amendment. There is thus no need for any RDUs to Article 10.

**Article 11**

Article 11 concerns equal opportunity in employment. Though the provisions of this article were substantially diluted to meet objections raised by the United States during the drafting, further objections to ratification might be raised because U.S. law still does not fully protect the job security of women taking maternity leave. However, even with respect to this weakest area for U.S. compliance with Article 11, there is no inherent incompatibility between the treaty and

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65. For example, the United States objected to a provision that states parties undertake measures to introduce paid leave for pregnancy or maternity with the costs borne by social security systems or other public funds, on the specious ground that private insurance presently covered these costs. U.N. Doc. A/32/218 para. 97 and Annex IV at 6. Article 11(2)(b) was amended to require states parties only to "introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."
existing U.S. law, since Article 11(2)(b) only requires states parties to take appropriate measures to "introduce maternity leave with pay or with comparable social benefits." 66

Some may object to Article 11(1)(d), since federal law does not strictly mandate a comparable worth approach to equal pay. But "appropriate measures to eliminate discrimination" does not suggest that an immediate comparable worth norm is mandated by the Convention.

Fetal protection policies are permitted in U.S. law only to the extent they can be justified on the basis of proven female-specific risks. 67 This is not inconsistent with Article 11(2)(d) which does not mandate exclusion of women from jobs on grounds of fertility. Moreover, Article 11(3) requires periodic review of the necessity of protective (fertile woman-excluding) legislation. U.S. law requiring actual proof of the necessity of gender-specific regulations of the workplace thus conforms to Article 11.

Article 12

Article 12 requires elimination of discrimination against women in health care and obligates states parties to provide access to pregnancy- and maternity-related health care. Article 12(1) prohibits discrimination against women in access to family planning services. The travaux préparatoires do not indicate that this phrase was intended to include legal abortion, and CEDAW has not so construed it. 68

U.S. law appears to be in conformity with Article 12. While problems such as exclusion of women subjects from federally-sponsored medical research have been identified, steps are being taken to address these problems. There are a number of programs designed specifically to insure access to obstetrical care and assist maternal nutrition, though delivery of such services is still inadequate. Abortion is not outlawed in the United States, and so even the most extreme reading of Article 12 would not create a conflict with U.S. law.


68. The same may be said concerning references to family planning in Articles 10, 14, and 16. In General recommendation No. 19, CEDAW disapproved of practices of forced sterilization or abortion as forms of violence against women. CEDAW also urged states to insure that women are not forced to seek unsafe unlawful abortions because of a lack of access to family planning services.
Article 13

Article 13 insures enjoyment on a basis of non-discrimination of rights to family benefits, loans and other financial benefits, and participation in recreation, sports and cultural life. Several states have taken reservations either to preserve Shari'a law or discriminatory tax laws.

While the United States does not provide the kind of family benefits that many other industrialized nations do, its welfare and tax laws are non-discriminatory on the basis of gender, in terms if not entirely in effect. Intentional discrimination against women in social welfare and tax laws would be subjected to intermediate scrutiny, and such provisions have been invalidated by courts. Federal statutes prohibit discrimination against women by financial institutions, and recipients of federal financial assistance and state actors are prohibited from discriminating against women in athletic, recreational and cultural activities. Many “private” social clubs may also be subjected to non-discrimination rules without violating the First Amendment. Thus, there is no need for RDUs to Article 13.

Article 14

Article 14 concerns rural women, guaranteeing them equal treatment with rural men, and repeating many of the other substantive provisions of the Convention in order to stress that it is intended to benefit rural women as well as urban women. There is no need for any RDUs to Article 14.

Article 15

Article 15 guarantees equality before the law, the right to contract and administer property, and equality in freedom of movement and choice of residence. Several nations have entered reservations to preserve discriminatory property, contract and residence laws.

Since coverture laws have been repealed, and U.S. law is now in conformity with Article 15, there is no need for RDUs to this provision.

Article 16

Article 16 concerns non-discrimination with respect to marriage, divorce, and child custody, and prohibits child marriage. A number of

states have entered reservations to this article in order to preserve discriminatory practices.

While family law is largely prescribed by the states, state rules in this area are governed by the Fourteenth Amendment. State laws concerning marriage, divorce and child custody have been evolving rapidly in the direction of formal legal equality between men and women. Any remaining anomalies are probably invalid under the Fourteenth Amendment. Thus, there is no basis for any RDUs to Article 16 nor any objection that the subject matter of the article cannot be touched by federal (including treaty) law.

*Articles 17-30*

These provisions concerning implementation of the Convention do not pose any obstacle to U.S. ratification. CEDAW possesses the authority to review periodic state reports and to issue general comments on the meaning of the treaty. This is the most minimal form of human rights treaty implementation.

**C. SELF-EXECUTION**

The Convention contains provisions that could be regarded as self-executing (e.g., equality of rights to acquire nationality in Article 9). It also includes articles that anticipate further legislative action (e.g., the embodiment of equality principles in the national constitution or legislation under Article 2(a)), that under traditional approaches might be regarded as non-self-executing.

There is no need for a declaration of non-self-execution, such as that attached to the ICCPR. The attachment of such a declaration, without simultaneously presenting Congress with fully adequate implementing legislation, signals an intent not to comply with the treaty's obligations. If the legislature is unwilling to provide meaningful enforcement mechanisms for the treaty's provisions, the judiciary should be permitted to play its traditional role in providing relief to individuals who are the intended beneficiaries of the treaty's self-executing provisions.

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71. "[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 CONG. REC. S4781, S4783 (daily ed. April 2, 1992).
D. CONCLUSION

Ratification of the Convention by the United States is long overdue. No barriers of constitutional dimension stand in the way of ratification. Ratification without reservations, understandings or declarations is preferable. At most, the Senate could consider attaching an understanding clarifying that the Convention should not be construed to require the United States to take action in violation of the First Amendment to the Constitution.
IV. No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*

A. 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,72 sought to enhance the thoroughness of local documentation 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, 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

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72. 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." U.N. Doc. S/RES/780 (1992), para. 2.
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 in Croatia, and Belgrade, Serbia. 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, governmental documentation centers, and others documenting rape and gender-based violence. The delegation also met with Biljana Plasvic, 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

73. The delegation visited a refugee transit camp at Karlovac, approximately 40 minutes outside of Zagreb, administered by United Nations High Commissioner of 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 had, however, 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.

74. 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).
contribution 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 Keker, 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 this report by Kenneth Anderson, Director, Arms Project of Human Rights Watch, 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

B. 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 20,000 civilians killed to 137,000 killed or missing; 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 grave violations of human rights and humanitarian law have been committed by all sides to the conflict.

Serbian 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 Serbian control over geographic areas by using violence and

76. 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 200,000 Bosnian civilians killed).
intimidation to remove non-Serb residents. 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 Croatian forces in Bosnia also have summarily executed both civilians and hors de combat, and have subjected detainees to severe mistreatment. Muslim and Croatian military, paramilitary and police forces, as well as civilians, have also looted and destroyed villages, including cultural monuments. While most of these abuses have been directed against Serbian victims, fierce fighting has periodically erupted between Croatian 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." 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.

1. 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. While all sides in the Bosnian conflict have committed rapes, Serbian forces appear to have used rape on the largest scale, principally against Muslim women. Available evidence suggests that rape has been used to humiliate women as direct targets, and to humiliate their communities, thereby

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77. 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.


80. 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.

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

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 . . . .

Reports indicate that some rape survivors 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."*

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.85 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.


84. See, e.g., id., para. 41.

Although most reported rapes have been attributed to Serb forces, rapes have been committed on a significant scale by Muslim and Croatian forces against Serbian women. The Law Group is also aware of reports alleging acts of sexual violence, such as crude circumcisions, committed by Bosnian Muslims against Serbian men.

2. 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. 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..." when committed against 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 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 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." 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).

86. See Laber, supra note 82, at 4; see also WATCH REPORT VOL. II, at 21.
88. 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).
“protected persons”; significantly, the Security Council has repeatedly referred to these provisions as applicable to the situation in Bosnia.\footnote{90} 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.”\footnote{92}

Rapes 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 United Nations, requires punishment of those who are responsible for the crimes.\footnote{93}

To the extent that rapes have been committed as part of a campaign “to destroy, in whole or in part,” a national, religious or ethnic 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.\footnote{94} Under this body of

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\footnote{90. For definition of “protected persons,” see note 88, supra.}
\footnote{91. See note 89, supra.}
\footnote{92. 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.}
\footnote{93. 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, 2587-88 (1991).}
\footnote{94. 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 issued a provisional ruling 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 . . . . 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).}
law, individuals who are responsible for acts of genocide must be punished, and any court that has jurisdiction over the perpetrators can try them for genocide.95

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,96 a court in Sarajevo recently convicted two Serbian soldiers who had confessed to committing several rapes and murders of Bosnian Muslims, and sentenced the two to death.97 Such trials likely will be rare, however,98 and in any event would take place under conditions in which the independence of the trial court may be in doubt.99


97. 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.

98. Serb 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.

99. 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
It is thus clear that the international community must take primary responsibility for assuring 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 trial of World War II war criminals, the *Einsatzgruppen Case*, 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.\(^\text{100}\)

In February 1993, the United Nations 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 a War Crimes Tribunal. Pursuant to a request to by the Security Council, on May 3, 1993, the Secretary-General presented the Council with a report setting forth specific proposals regarding the operation of the Tribunal. On May 25, 1993, the Security Council established a tribunal and adopted the statute proposed by the Secretary-General.\(^\text{101}\) As set forth in the statute, the Tribunal will have jurisdiction over "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"\(^\text{102}\) — that is, since the onset of the armed conflict.

Whether this undertaking comes to fruition will depend, above all, on the political will of the international community, particularly

\(^{100}\) United States v. Ohlendorf (Case No. 9), IV *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 498 (1950).

\(^{101}\) *U.N. Doc. S/RES/827 (1993).*

the permanent member states of the U.N. Security Council. Although key Western states have expressed strong support for such prosecutions, the actual creation of a War Crimes Tribunal will require a substantial commitment of will and resources, and temptations to abandon the effort may be substantial. In particular, the United Nations and key member states may be tempted to exchange impunity for an agreement by Serb forces to end hostilities should there come a time when such an agreement seems possible.

3. Defining the Peace

There are compelling reasons to oppose any political settlement that would include 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. One Serb described events in the twin Serb and Muslim villages of Sizije 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 Sizije and burned down 29 homes. This past year, Serb residents of Sizije crossed the same river and burned down precisely 29 Muslim homes in Devetaci.

103. 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, at 4, § 1. Instead, the violence was deliberately and systematically incited by nationalist leaders, notably including Serbia's president, Slobodan Milosevic. 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.¹⁰⁴ 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 all violators regardless of their political affiliation.¹⁰⁵ While distinctions among potential defendants must be made in light of relevant differences in their actual responsibility for violations, international criminal law must be enforced without regard to which side of the conflict a potential defendant supported. Thus, while any prosecutions will likely focus in particular on Serb-perpetrated atrocities, there must also be accountability for grave violations committed by Muslim and Croatian forces.

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.


¹⁰⁵. The Law Group rejects any suggestion that *only* rapes of Muslim and Croatian women should be condemned on the grounds that only Serb forces are using rape as a tool of “ethnic cleansing.” Rape, by any side and whether or not carried out as part of a campaign of “ethnic cleansing,” is condemnable as an international crime.
While lower-level soldiers who carry out rape and other atrocities are criminally accountable for their actions, they alone should not bear the burden of criminal responsibility while superiors who designed and implemented the campaign of persecution escape punishment.\footnote{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." \textit{Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)}, Annex, art. 7.3., U.N. Doc. S/25704 (1993).}

4. 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 experience (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, Croatian, and Serbian communities — a stigma common to western and other countries as well.\footnote{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.} 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 700,000 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 foreign investigators, they may suffer an emotional breakdown after so doing. 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. The survivors themselves generally seem, as best as can be gauged, strongly to support international efforts to prosecute the perpetrators, and this will require intensive efforts to document the rapes and other atrocities. Indeed, many survivors are already playing a central part in that effort.

The seeming paradox is readily explained: accountability is the first step toward restoring the moral and political order of the survivors' society. Participating directly in that process helps 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 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

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108. 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 or gender-based violations of human rights.
measures that reconcile the demands of justice with the immediate needs of women survivors of rape and other atrocities.

C. CONCLUSIONS AND RECOMMENDATIONS

1. 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:

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 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, 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 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 assures appropriate follow-up 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 sup-
port networks, to assure 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 Yugo-
slavia for further training in the treatment of individuals suffering
from severe trauma.

2. Coordination Among Documenters

There is a pressing need for improved coordination among indi-
viduals, non-governmental organizations and government agents doc-
umenting 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, and 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 orga-
nizations, with a special emphasis on techniques to be employed with
survivors suffering from trauma.

4. Overseas funders of local organizations engaged in document-
tation efforts should attempt to assure that their funding allocations
help facilitate coordination among groups.
3. Accountability

a. War Crimes Tribunal

Procedures used by the recently authorized International War Crimes Tribunal should assure 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. To the extent that is consistent with the due process rights of the defendants, survivors of sexual assault, including rape, should be allowed to submit sworn affidavits in evidence.

b. The Tribunal should allow testimony by "expert witnesses"—specifically, persons who have personally documented rapes perpetrated during the conflict in the former Yugoslavia—based on their documentation so that individual victims may be collectively represented by those in whom they have already placed their trust. Such witnesses would be particularly appropriate in cases establishing commanders' responsibility based upon a demonstration that individuals under their control carried out a pattern of rape.

c. The Tribunal should adopt procedures to assure adequate protection against retribution to witnesses and survivors who provide testimony.

d. Judges appointed to the War Crimes 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 assure 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.

It is also important that rules interpreting the statute of 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. To this end, to the extent that the jurisdiction of the Tribunal encompasses "grave breaches" of the Geneva Conventions of 1949, rules interpreting the statute explicitly should state that such breaches include rape and other sexual assault. Such clarification is necessary since the statute recognizes 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, rules interpreting the statute should also explicitly recognize that rape, forcible impregnation, and involuntary maternity constitute “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.

b. Truth Commission

The Law Group recommends that the United Nations 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 Commission could help develop an evidentiary foundation for eventual trials by an international War Crimes 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 preventing a recurrence of violence.

c. 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 assure 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 traumas, including, rape, to which survivors have been subjected.
4. *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 as they are ready to do so.

5. *U.S. Response to the Refugee Crisis*

The Law Group recommends that the following measures be undertaken by the United States 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 and psychological treatment and counselling) to refugees, and urge other countries to do the same.

3. Increase the U.S. allocation for refugees from the former Yugoslavia to 25,000, 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 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 United States engaged in refugee resettlement to develop networks to provide necessary medical and psychological counselling and treatment, as well as relevant legal representation, to refugees from the former Yugoslavia.
D. DOCUMENTING GENDER-SPECIFIC HUMAN RIGHTS VIOLATIONS

1. Documentation Concerns

a. 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, whose various cultures attach a particular stigma to rape.\(^\text{109}\)

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.\(^\text{110}\)

The profound sense of shame attaching to rape goes a long way toward explaining why 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.

109. 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 Croatian and Serbian communities. Health care professionals in Croatia (where many women were raped during that country's recent conflict between Croatian and Serbian forces) and in Serbia told the Law Group delegation that Croatian and Serbian rape survivors, like Muslim survivors from Bosnia, have been reluctant to report the crime.

110. See supra part IV.B.1.
b. 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").

Post-Traumatic Stress Disorder 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 have 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 19-year-old woman who 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 750 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 the 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 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, both of whom had been stably functioning before being interviewed (one by a journalist and one by a foreign fact-finding delegation), and both of whom suffered what were described as psychotic episodes thereafter. One woman experienced a severe clinical depression and had to be hospitalized; the other reportedly attempted suicide.

c. 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.
d. 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.

2. 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;
* assuring 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.

a. Assuring 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 does not have adequate access following an interview 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 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 assuring 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 assure 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 reasons relating 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, 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
b. 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, most are far more reluctant to share details of their ordeal — or even 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 myriad 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' 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.

c. Assuring 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 Serbian women. Serb 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. Serb 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 had been raped. Serb 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.¹¹¹

d. Follow-Up

If the documenter cannot herself maintain ongoing contact with a survivor who elects to provide testimony, she should conduct documentation in collaboration with someone with whom the survivor has already established an on-going relationship of trust and support.¹ This element is 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

¹¹¹. The delegation was also concerned by the efforts of a domestic NGO documenting abuses of Serbians. 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 Serbian 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.
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 would like.

e. 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 United Nations-sponsored efforts to establish evidence for war crimes 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 war crimes 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 war crimes 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 assure 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 for war crimes 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' 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. 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 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 develop evidence for use in cases brought before the War Crimes Tribunal 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.

Those organizations that are likely to play a leading role in developing evidence for the War Crimes Tribunal 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 war 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, and 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 assure 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 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 to 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 enor-
mously, 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.

E. 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 viola-
tions has placed them on the front line of efforts to document the
atrocities, as well as to address the immediate physical and psychologi-
ical needs of the survivors. While well-intentioned and potentially val-
uable, 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 responsibili-
ties of health care providers operating in the extraordinary circum-
stances of the ongoing Balkan conflict.

1. 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 condi-
tions 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 abor-
tion in the period between the tenth week and six 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 — perhaps most — 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 are 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 con-
cerned 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. The 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, 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, and to develop uni-
form documentation standards. In this context, the Law Group rec-
ommends that the medical community in the former Yugoslavia
develop and promote a protocol for physicians to ensure that the confi-
dentiality 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.

113. See discussion supra part IV.D.2.a.
114. See supra part IV.D.2.e.
2. Health Care

The most important role of health care providers in respect of 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. 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 60-70 unemployed psychiatrists and psychologists 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, post-traumatic stress disorder (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

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115. For example, after the hospital at Pacrac, Croatia was attacked by Serb forces, the patients housed in the psychiatric ward were relocated to Vrapce, a psychiatric hospital in Zagreb.
counseling" for victims of war crimes in the former Yugoslavia.116 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 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 United States 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, 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.

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.

F. INTERNATIONAL WAR CRIMES 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.

1. War Crimes Tribunal

Historically, efforts to enforce international human rights law have underemphasized, if not ignored, gender-specific violations. It is thus important that rules interpreting the statute of the tribunal created to try violations committed during the war in the former Yugoslavia be drafted to 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, rules interpreting the statute explicitly should state that such breaches 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, the Tribunal's rules explicitly should recognize that rape, forcible impregnation, and involuntary maternity constitute 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.

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 assure privacy of witnesses is particularly great when relatives are still at risk of retaliation by forces 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.

117. See supra part IV.B.
118. See supra part IV.D.1.
119. See supra part IV.B.
120. 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
Further, measures to provide protection of witnesses, including assurances of relocation, are critical. The risks associated with efforts to establish accountability for war 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 assure protection of those who participate in this historic undertaking.

The Law Group also recommends that the War Crimes Tribunal adopt procedures that would enable survivors of rape and other atrocities to make evidence available without having to provide live testimony, in a manner that is consistent with defendants' due process rights. Such mechanisms might include allowing survivors to submit affidavits that would be kept under seal, and allowing individuals who have participated in systematic documentation of rape to testify as "expert witnesses" about the cases and patterns that they verified. Such expert testimony would be particularly appropriate in cases against commanders, where it is important to establish that individuals acting under the defendants' command engaged in a pattern of sexual assault.

The statute for the War Crimes 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

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).
to, the conduct of in camera proceedings and the protection of
the victim's identity.121

While the statute's recognition of the need for protection of wit-
nesses and victims is welcome, the Law Group believes that adequate
and detailed assurances of protection should be developed as soon as
possible.122 Many — 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.123 Article 22 of
the statute raises an additional issue by explicitly permitting victims —
but not eyewitnesses — to testify in camera before the Tribunal. Wit-
tesses 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.

2. Truth Commission

In addition to war crimes prosecutions, the United Nations
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 viola-
tions committed during the conflict in the former Yugoslavia. Such a
commission could operate more expeditiously than a war crimes tri-
unal, and its fact-finding would help develop an evidentiary foundation
for the Tribunal. While such a commission could provide an impor-
tant complement to the work of the War Crimes 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

121. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution

122. Such protections and assurances should address such concerns as (a) whether confiden-
tiality 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 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.

123. States will have the opportunity to address the need for such protections. The Security
Counsel resolution establishing the War Crime Tribunal invites states to submit to the Tribunal's
judges recommendations for the rules of procedure and evidence called for under Article 15 of
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; that 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.

G. 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\textsuperscript{124} refugees and displaced persons.\textsuperscript{125} Of these, approximately 1.5 million 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 600,000 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.

1. 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.

\textsuperscript{124} \textbf{INFORMATION NOTES, U.N. HIGH COMMISSIONER FOR REFUGEES, OFFICE OF THE SPECIAL ENVOY FOR FORMER YUGOSLAVIA} (Jan. 18, 1993). The report puts the figure of refugees and displaced persons at 2,069,000.

\textsuperscript{125} 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.
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 limits 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 authorization of the government. One such camp, located at Resnik, was forcibly vacated by governmental authorities on February 16, 1993.126

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.

2. 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 500,000 of the estimated 600,000 have done so.127

126. 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.

The majority of the refugees in Serbia are not housed in camps, but are placed with host families.\textsuperscript{128} 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 Serb 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 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.

3. \textit{Displaced Persons in Bosnia}

The UNHCR’s January 1993 report indicates that there are an estimated 810,000 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.

4. \textit{Proposed Response}

a. 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 members of their family, 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.

\textsuperscript{128} One source told the Law Group delegation that 97\% of the refugees in Serbia were placed with host families.
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 for medical and psychological treatment and counselling.

b. Refugee Resettlement: Proposed United States Action

The resettlement options presented by the international community, including the United States, have been woefully inadequate in comparison to the need. The United States 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 7,000. Spain has agreed to accept 1,000, while the majority of other European countries has set quotas below 1,000.

i. 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 United States 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 1,000, 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 1,000 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 25,000 refugee slots; such an increase would provide the United States 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." 129

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 and psychological counselling and treatment.

ii. 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. 130 It provides protections to individuals already within the United States, 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 United States 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 United States on the date of the re-designation establishes eligibility. Thus those refugees who have entered the United States 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.
H. Appendix

The Delegation met with and provided training in fact-finding methodology for rape to the following women's groups and human rights organizations involved in addressing the issue of rape and gender-based violence. A brief description of the activities of each organization is contained below.

1. Zagreb
   a. Center for Women Victims of War

   The Center for Women Victims of War (the "Center") has been recently established by merging several smaller women's organizations including Autonomous Women's House, Croatian Women's Documentation Center and Zagreb Women's Lobby. Currently the organization has approximately a dozen members. Despite their new relationship, it appears that the constituent groups will continue to operate independently in some respects.

   The Center assists women refugees regardless of nationality, and is developing a program to assist women refugees by organizing support groups in refugee camps. The groups plan to focus on addressing the immediate material, and emotional needs of women refugees, including those relating to food, shelter, and education for dependent children. The groups are intended to provide a forum for women to discuss any particular trauma or experience when they are willing. Women who desire individual counselling can be identified and appropriate care provided.

   b. Kareta

   Kareta, which has three members, was founded after Croatian independence in 1991 to address the concerns of gender-based violence against Croatian and Muslim women. The group has retained the services of a United States law professor, Catherine MacKinnon, and is developing an international strategy to address the concerns of Bosnian Muslim women who have been raped by Serbian forces. One component of this includes litigation in the United States courts. Professor MacKinnon has filed an action in Federal District Court in New York against the civilian leader of the Bosnian Serbs, Radovan Karadzic.
The Organization of Women of Bosnia-Herzegovina

The Organization of Women of Bosnia-Herzegovina ("Women of BiH") is among the most recently founded women's groups. The Delegation met with approximately ten members of the group, all of whom were Bosnian refugees, professional women who fled Sarajevo.

Women of BiH was organized to aid Bosnian women refugees and attempts to respond to requests for material, legal, and psychological help. The group also has retained the services of Professor MacKinnon.

d. Tresnjevka

Tresnjevka is a three-member women's group that has documented rape since mid-1992. The group has published testimonials of survivors of rape and other human rights abuses and has provided information regarding Croatian and Bosnian Muslim women who have been raped to international bodies concerned with human rights violations in the former Yugoslavia. Tresnjevka plans to operate a rape crisis center for women who have been raped in the course of the conflict.

2. Belgrade

a. SOS-Belgrade

SOS-Belgrade ("SOS") is a volunteer organization with approximately thirty members, established three or four years ago, to provide telephone counselling services to women survivors of rape and domestic violence. It provides services without regard to nationality or religious affiliation.

The hotline is staffed during the evening hours by volunteers trained in rape counselling. At the present time, there is no facility for women to provide in-person counselling services, and most contact is by telephone.

The organization is trying to provide outreach services for rape survivors in hospitals. SOS counsellors are visiting women survivors who request a rape counselor. The counsellors provide psychological counselling and attempt to identify and address the material needs of rape survivors.

b. Center for Anti-War Action

The Center for Anti-War Action mobilizes opposition to the war. The activities of the organization include designing a program to assist
young men who do not want to serve in the military for reasons of conscience.

c. Humanitarian Law Fund

The Humanitarian Law Fund ("HLF"), founded in November of 1992 and currently with a staff of four, is documenting human rights and humanitarian law violations committed primarily by Serbian forces. HLF also attempts to document incidents of rape and gender-based violence against Serbian, Muslim, and Croatian women.