

## The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia\*

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### THE COMMISSION'S ESTABLISHMENT

On October 6, 1992, the Security Council adopted Resolution 780, establishing a Commission of Experts to investigate and collect evidence on "grave breaches of the Geneva Conventions and other violations of international humanitarian law" in the conflict in the

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\* *Editor's note:* research for this article was updated through February 14, 1995.

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The views expressed herein are those of the author and do not represent the views of the Commission of Experts or the United Nations. The assistance of Carolyn Durnik, Assistant Project Director of the IHRLI Database Project, and David Gualtieri, IHRLI Staff Attorney, is gratefully acknowledged.

former Yugoslavia.<sup>1</sup> Not since the International Military Tribunal at Nuremberg (1945)<sup>2</sup> had the world community taken collective action to provide for an international body to investigate violations of international humanitarian law with a view to prosecuting its perpetrators before an ad hoc international tribunal.<sup>3</sup>

On February 22, 1993, following the submission of the Commission's *First Interim Report*, which stated that the establishment of an ad hoc international criminal tribunal would be "consistent with the direction of its work,"<sup>4</sup> the Security Council provided for such a

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<sup>1</sup> S.C. Res. 780, U.N. SCOR, 47th Year, 1992 S.C. Res. & Dec. at 36, ¶ 2, U.N. Doc. S/INF/48 (1992), reprinted in appendix A of this issue of *Criminal Law Forum*. See generally M. Cherif Bassiouni, Current Developments, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 Am. J. Int'l L. 784 (1994).

<sup>2</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 (London Agreement). The Charter of the International Military Tribunal at Nuremberg is set out in *id.* at 284.

<sup>3</sup> On the basis of the precedent of the former Yugoslavia, the Security Council established a similar Commission of Experts to investigate violations in the Rwandan civil war. S.C. Res. 935, U.N. SCOR, 49th Year, 3400th mtg. at 1, U.N. Doc. S/RES/935 (1994), reprinted in appendix D of this issue of *Criminal Law Forum* and available in U.N. Gopher\Documents\Security Council Resolutions. This Commission submitted a preliminary report in the early fall of 1994. Letter from the Secretary-General to the President of the Security Council, Oct. 1, 1994, U.N. Doc. S/1994/1125 (1994), transmitting *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994)*, available in U.N. Gopher\Current Information\Secretary-General's Reports. The Security Council set up a judicial mechanism about a month later, with institutional ties to the International Tribunal for the Former Yugoslavia. The relevant resolution adopts and annexes the Tribunal's Statute. S.C. Res. 955, U.N. SCOR, 49th Year, 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994), reprinted in appendix D of this issue of *Criminal Law Forum* and available in U.N. Gopher\Documents\Security Council Resolutions. The Commission subsequently submitted its final report. Letter from the Secretary-General to the President of the Security Council, Dec. 9, 1994, U.N. Doc. S/1994/1405 (1994), transmitting *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935 (1994)*, available in U.N. Gopher\Current Information\Secretary-General Reports.

<sup>4</sup> Letter from the Secretary-General to the President of the Security Council, Feb. 9, 1993, U.N. Doc. S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, ¶ 74 [hereinafter *First Interim Report*].

tribunal.<sup>5</sup> Through Resolution 808, the Security Council

*[d]ecide[d]* that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991[.]<sup>6</sup>

In its deliberations on this matter, the Security Council had considered three initial proposals for the establishment of a tribunal for the former Yugoslavia, presented by France, by Italy, and by Sweden on behalf of the Conference on Security and Cooperation in Europe (CSCE).<sup>7</sup>

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<sup>5</sup> S.C. Res. 808, U.N. SCOR, 48th Year, 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993), reprinted in appendix A of this issue of *Criminal Law Forum* and available in U.N. Gopher\Documents\Security Council Resolutions.

<sup>6</sup> *Id.* ¶ 1.

<sup>7</sup> Letter from the Permanent Representative of France to the Secretary-General, Feb. 10, 1993, U.N. Doc. S/25266 (1993), transmitting a report on the establishment of an international criminal tribunal for the former Yugoslavia prepared by a national Committee of Jurists; Letter from the Permanent Representative of Italy to the Secretary-General, Feb. 16, 1993, U.N. Doc. S/25300 (1993), transmitting a draft statute for an international criminal tribunal for the former Yugoslavia prepared by a national Commission of Jurists; Letter from the Permanent Representative of Sweden to the Secretary-General, Feb. 18, 1993, U.N. Doc. S/25307 (1993), annexing a summary of CSCE Rapporteurs (Corell-Turk-Thune), Moscow Human Dimension Mechanism to Bosnia, Herzegovina, and Croatia, *Proposal for an International War Crimes Tribunal for the Former Yugoslavia* (1993), and the text of a decision by CSCE participating states on this proposal. All three submissions were inspired by M. Cherif Bassiouni, *Draft Statute for the Establishment of an International Criminal Tribunal* (Association Internationale de Droit Pénal, Nouvelles Études Penales No. 9, 1992); see also M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (2d rev. ed. 1987). Following the French, Italian, and CSCE submissions, a number of other governments and organizations forwarded comments or proposals, including Russia, Letter from the Permanent Representative of the Russian Federation to the Secretary-General, Apr. 5, 1993, U.N. Doc. S/25537 (1993); the United States, Letter from the Permanent Representative of the United States of America to the Secretary-General, Apr. 5, 1993, U.N. Doc. S/25575 (1993); and the Organization of the Islamic Conference, Letter from the Permanent Representatives of Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey, on behalf of the Organization of the Islamic Conference, to the Secretary-General, Mar. 31, 1993, U.N. Doc. S/25512 (1993).

Pursuant to Resolution 808, the Secretary-General submitted a report to the Security Council on May 3, 1993.<sup>8</sup> The *Secretary-General's Report* includes the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.<sup>9</sup> On May 25, 1993, the Security Council unanimously approved Resolution 827, establishing an International Tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia," and it adopted the proposed statute without change.<sup>10</sup> The Security Council stated further that

pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report.<sup>11</sup>

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<sup>8</sup> *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 & Add.1 (1993), reprinted in appendix B of this issue of *Criminal Law Forum* and in 32 I.L.M. 1163 [hereinafter *Secretary-General's Report*].

<sup>9</sup> The Statute of the International Tribunal is set out as an annex to *Secretary-General's Report*, supra note 8, and is reprinted in appendix B of this issue of *Criminal Law Forum* and in 32 I.L.M. 1192 [hereinafter Statute].

<sup>10</sup> S.C. Res. 827, U.N. SCOR, 48th Year, 3217th mtg. at 1, ¶ 2, U.N. Doc. S/RES/827 (1993), reprinted in appendix A of this issue of *Criminal Law Forum* and in 32 I.L.M. 1203.

<sup>11</sup> *Id.* preambular ¶ 10. The Commission's work was ended on April 30, 1994, even though there was no prosecutor in office at that time. The Secretary-General had formally nominated me for this post in August 1993. The Security Council decided to act on the nomination by "consensus," instead of by vote, and consensus was not reached on my candidacy. See Paul Lewis, *Disputes Hamper U.N. Drive for a War Crimes Tribunal*, N.Y. Times, Sept. 9, 1993, at A10, available in LEXIS, World Library, Allnws File; Stanley Meisler, *U.N. Is Deadlocked on War-Crimes Prosecutor*, Montreal Gazette, Sept. 12, 1993, at B1, available in LEXIS, World Library, Allnws File. The Security Council later reached a consensus on Ramón Escovar-Salom, from Venezuela. S.C. Res.

The Commission of Experts was, therefore, the first stage in the establishment of the Tribunal. This article discusses the history of the Commission, the methods used to gather evidence, and the Commission's findings, which form the basis for the Tribunal's prosecutions.

### THE COMMISSION'S MANDATE AND COMPOSITION

Security Council Resolution 780 established the Commission's mandate as follows, requesting the Secretary-General

to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), 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[.]<sup>12</sup>

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877, U.N. SCOR, 48th Sess., 3296th mtg. at 1, U.N. Doc. S/RES/877 (1993), available in U.N. Gopher\Documents\Security Council Resolutions. Escobar-Salom soon resigned, without taking office, in order to assume the position of Minister of the Interior of Venezuela. *Bosnia — Venezuela: Boutros-Ghali Accepts Prosecutor's Resignation*, Inter Press Serv., Feb. 8, 1994, available in LEXIS, World Library, Allnws File; *Secretary-General Appoints Graham Blewitt as Acting Deputy Prosecutor, War Crimes Tribunal, for Humanitarian Law Violations in Former Yugoslavia*, U.N. Press Release, U.N. Doc. SG/SM/5221 (Feb. 8, 1994), available in U.N. Gopher\Current Information\Press Releases. Nearly half a year later, the Secretary-General recommended Judge Richard J. Goldstone of South Africa to fill the vacancy, the Security Council agreed, and Judge Goldstone took office on August 15, 1994. S.C. Res. 936, U.N. SCOR, 49th Year, 3401st mtg. at 1, U.N. Doc. S/RES/936 (1994), available in U.N. Gopher\Documents\Security Council Resolutions; Paul Lewis, *South African Is to Prosecute Balkan War Crimes*, N.Y. Times, July 9, 1994, at A2, available in LEXIS, World Library, Allnws File; *Yugoslav War Crimes Prosecutor Delays Mission*, Reuters, Aug. 26, 1994, available in LEXIS, World Library, Allnws File.

<sup>12</sup> S.C. Res. 780, *supra* note 1, ¶ 2.

The Commission interpreted its mandate as requiring the collection of all possibly relevant information and evidence concerning violations of international humanitarian law that it could secure given its resources and capabilities.<sup>13</sup>

Resolution 780 reiterated the Council's previous request in Resolution 771 that governments and organizations submit reports to the Security Council containing information relating to violations of international humanitarian law, including grave breaches of the Geneva Conventions of 1949.<sup>14</sup> The later resolution, however, called upon governments, UN bodies, intergovernmental organizations (IGOs), and nongovernmental organizations (NGOs) to make such information available specifically to the Commission of Experts.<sup>15</sup> Subsequently, in Resolution 787, the Security Council welcomed the establishment of the Commission and requested it "to pursue actively its investigations" of "grave breaches . . . and other violations of international humanitarian law."<sup>16</sup> Resolution 787 also reasserted the UN's condemnation of all violations of international humanitarian law, including the practice of "ethnic cleansing" and the deliberate obstruction of the delivery of food

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<sup>13</sup> There were suggestions at the first session of the Commission by then Under-Secretary-General for Legal Affairs and UN Legal Counsel Carl-August Fleischhauer that the term "evidence" was not to be construed in its technical sense as understood in criminal law. This issue was of concern to the Commission, as was the question of the resources needed to secure legally relevant and admissible evidence. Thus, the information and evidence that the Commission gathered, as well as the reports that it prepared, were not compiled with a view that they would be used exclusively by the prosecutor as evidence but also would have a more general purpose of describing the policies, patterns, and outcomes of violations.

<sup>14</sup> S.C. Res. 771, U.N. SCOR, 47th Year, 1992 S.C. Res. & Dec. at 25, ¶ 5, U.N. Doc. S/INF/48 (1992).

<sup>15</sup> S.C. Res. 780, *supra* note 1, ¶ 1. At the time, very few reports were submitted by governments. Additionally, some reports, such as those of the United States, contained mostly NGO- and media-generated information, which was in the public domain. None of the information and evidence available to governments with intelligence-gathering capabilities was submitted. See *infra* sections entitled "Critical Assessment of the Information Received" and "Reports from Governments."

<sup>16</sup> S.C. Res. 787, U.N. SCOR, 47th Year, 1992 S.C. Res. & Dec. at 29, ¶ 8, U.N. Doc. S/INF/48 (1992).

and medical supplies to the civilian population of Bosnia–Herzegovina.<sup>17</sup> It also reaffirmed that those who committed or ordered the commission of such acts would be held individually responsible.<sup>18</sup>

Although Resolution 780 did not specify the size of the Commission, Secretary-General Boutros Boutros-Ghali appointed five persons in their individual capacity on the basis of their expertise and integrity.<sup>19</sup> The Commission members did not represent their governments, ensuring the political independence and impartiality of this fact-finding body. The original five Commission members appointed by the Secretary-General included Professor Frits Kalshoven, Emeritus Professor of International Humanitarian Law at the University of Leiden (the Netherlands), as Chairman of the Commission of Experts; Commander William Fenrick, Director of Law for Operations and Training in the Department of Defence (Canada); the Hon. Keba M'Baye, former President of the Supreme Court of Senegal, former President of the Constitutional Council of Senegal, and former President of the International Court of Justice (Senegal); Professor Torkel Opsahl, Professor of Human Rights Law at Oslo University, President of the Norwegian Institute of Human Rights, and former member of the UN Committee on Human Rights and the European Commission on Human Rights (Norway); and myself, Professor of Law at DePaul University College of Law and President of DePaul University's International Human Rights Law Institute (Egypt).<sup>20</sup>

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<sup>17</sup> *Id.* ¶ 7.

*Editor's note:* While we condemn the policy and practice of "ethnic cleansing" in the strongest terms, this term is so widely understood and used by the public and the media to refer to a policy and acts of genocide that quotations marks appear redundant and are used only to introduce the term.

<sup>18</sup> *Id.*

<sup>19</sup> *Report of the Secretary-General on the Establishment of the Commission of Experts pursuant to Paragraph 2 of Security Council Resolution 780 (1992)*, U.N. Doc. S/24657 (1992). This report to the Security Council left open the possibility that the Commission might be enlarged, but this did not occur.

<sup>20</sup> Though a naturalized U.S. citizen, I was appointed on the basis of my citizenship of origin, as it had been decided not to have experts from the permanent members of the Security Council.

In August 1993, Professor Kalshoven took an indefinite medical leave and subsequently resigned his chairmanship. Professor Opsahl served as acting chairman from then until his sudden death on September 16, 1993.<sup>21</sup> As a consequence of the resignation of Kalshoven and the death of Opsahl, the Secretary-General reconstituted the Commission. On October 19, 1993, he announced my appointment as Chairman of the Commission of Experts and the appointments of Professor Christine Cleiren, Professor of Criminal Law, Erasmus University of Rotterdam (the Netherlands); and the Hon. Hanne Sophie Greve, Judge of the Court of Appeals of Bergen (Norway), to fill the vacancies on the Commission.<sup>22</sup>

### THE COMMISSION'S FINANCES

The Commission did not have an independent budget, nor did the United Nations provide resources for investigation and data collection.<sup>23</sup> The UN Office of Legal Affairs (OLA) provided limited support for the work of the Commission in the form of personnel and some of the

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<sup>21</sup> In a letter to the Security Council, the Secretary-General noted Professor Opsahl's important contribution to the work of the Commission and described his untimely death as a great loss to the Commission, the United Nations, and the international legal community. Letter from the Secretary-General to the President of the Security Council ¶ 4, Oct. 5, 1993, U.N. Doc. S/26545 (1993), transmitting *Second Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)* [hereinafter *Second Interim Report*].

<sup>22</sup> *Id.*; *Women Legal Experts Named to U.N. War Crimes Panel*, Reuters, Oct. 21, 1993, available in LEXIS, World Library, Allnws File.

<sup>23</sup> The United Nations funds its bodies through the regular budget, which is first approved by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and then by the Fifth Committee of the General Assembly. The Security Council funds peacekeeping activities through a special budget. Neither organ funded the Commission, and its ability to fulfill its mandate was seriously hampered as a result. The lesson here is that when the Security Council establishes a body like the Commission of Experts, it should probably fund it through its peacekeeping budget and set the budget of the new entity at the time it is created.



Commission members' travel and per diem expenses. In addition, the Secretary-General established a voluntary trust fund on March 26, 1993, although the Secretariat did not act on this matter until May 24, 1993, when letters were sent to UN member states inviting contributions.<sup>24</sup>

For a period of nine months (December 1, 1992–August 31, 1993), the United Nations funded the cost of travel and honoraria of the Commission members; the salary of the chairman (the only full-time Commission member); and the salary of two (later three) OLA-seconded professional staff members, two secretaries, and (later) an administrative clerk. From August 1993 to April 1994, no budget existed for the Commission, although the OLA continued to contribute the personnel mentioned above. Since no other UN resources were forthcoming, the Commission used the monies from the voluntary trust fund to cover its operating costs, as well as to fund its investigations. It is unclear why the OLA, which serviced the Commission, failed to present a budget request to the ACABQ and the General Assembly's Fifth Committee to fund the Commission, even though the budget request for January 1–July 31, 1994, had been prepared by the Commission and forwarded to the OLA in due time.<sup>25</sup>

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<sup>24</sup> Because of this delay (for which no explanation was given), funds were not available to the Commission until July–August 1993. The following countries contributed a total of \$1,320,631: Austria, \$20,000; Canada, \$237,869; Czech Republic, \$1,000; Denmark, \$15,201; Germany, \$16,000; Hungary, \$3,000; Iceland, \$500; Liechtenstein, \$3,184; Micronesia, \$300; Morocco, \$5,000; the Netherlands, \$260,152; New Zealand, \$53,492; Norway, \$49,978; Sweden, \$94,955; Switzerland, \$50,000; Turkey, \$10,000; the United States, \$500,000. Letter from the Secretary-General to the President of the Security Council, May 24, 1994, U.N. Doc. S/1994/674 (1994), transmitting *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, ¶¶ 12–17 & n.4, available in U.N. Gopher\Current Information\Secretary-General's Reports [hereinafter *Final Report*].

<sup>25</sup> Deputy UN Legal Counsel Ralph Zacklin told Iain Guest, a journalist who wrote a report for the Open Society Institute (unpublished manuscript, on file with Cherif Bassiouni) on the prosecution of war criminals, that he "forgot" to present the Commission's budget to the ACABQ in November because of other pressing business. As a result, the ACABQ did not fund the Commission's 1994 budget. The Secretary-General reportedly agreed with Mr. Fleischhauer on terminating the Commission prematurely, even though the Commission still had over \$230,000 in the voluntary trust fund on April 30, 1994. Since the Commission's monthly costs at that time were

Because of these financial constraints, the Commission turned to governments for contributed personnel and volunteers. Certain governments did indeed provide personnel to the Commission, as did Physicians for Human Rights, and an ad hoc group of legal and mental health experts volunteered their services as well.<sup>26</sup> In addition, the Commission's database project, discussed below, was funded by the DePaul University International Human Rights Law Institute (IHRLI) through private grants it obtained.<sup>27</sup>

Considering the Commission's mandate and the extent and range of the violations reported,<sup>28</sup> it is incomprehensible that no resources were

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approximately \$50,000, it could easily have continued until July 31 and completed its work.

<sup>26</sup> Personnel were made available as follows: Canada, military lawyers and investigators seconded to participate in investigations in Sarajevo, Dobrinja, Dubrovnik, Medak, and United Nations Protected Area (UNPA) Sector West, Croatia; the Netherlands, combat engineers, including radiological experts to perform mass grave and radiological investigations, and experts in finding unmarked graves — whose contribution was vital to the success of the mass graves investigation in UNPA Sector West, Croatia; Norway, military lawyers who worked on the Dubrovnik investigation. Governments also contributed personnel to the Commission's secretariat in Geneva: France, the Hon. Jean-Paul Laborde; the Netherlands, Lieutenant-Colonel Anton Kempnaars; Norway, Morten Bergsmo.

Physicians for Human Rights contributed three different teams to investigate the mass grave at Ovchara/Vukovar and to conduct the exhumations in UNPA Sector West, Croatia, totaling 24 experts whose services were funded by the United States and private sources. These teams were led by world-renowned forensic experts Dr. Clyde Snow, Dr. Robert Kirschner, and Dr. Eric Stover (Executive Director of Physicians for Human Rights).

An international team of female attorneys and mental health experts and male mental health specialists volunteered to conduct the rape and sexual assault investigation. See *infra* note 79.

On these various projects, see *infra* section entitled "The Commission's On-site Investigations."

<sup>27</sup> IHRLI received grants from the Soros Foundation, the Open Society Fund, and the John D. and Catherine T. MacArthur Foundation.

<sup>28</sup> The scale of victimization in the former Yugoslavia is staggering. The Commission reported that of a population of 6 million, 1.5-2 million are now refugees abroad after being deported or forced to flee their homes. *Final Report, supra* note 24, ¶ 310 n.87. In addition, civilian and military casualties reportedly exceeded 200,000 at

made available through the regular UN budget process for either the investigations or the operating expenses of the Commission. Even the voluntary trust fund, which had been informally requested by the Commission at its first meeting (November 1992) and formally in its *First Interim Report* (February 1993) was not communicated to member states until the end of May 1993, delaying the collection of funds. The exceptional results achieved by the Commission were due to the contribution of personnel referred to above, to monies donated to the voluntary trust fund, and to foundation and university support of the IHRLI database project. But these resources were extremely limited.

### THE COMMISSION'S WORKING METHODS

From November 1992 to April 1994, the Commission held twelve sessions, at which the members discussed a number of substantive, methodological, and organizational problems related to the Commission's mandate.<sup>29</sup> At the third session (January 25–26, 1993), the Commission

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the time the Commission's *Final Report* was published. *Id.* The high estimated number of casualties is supported by the reported discovery of 187 mass graves. *Id.* ¶¶ 254–264. In addition, over 700 prison camps were reported, where violations such as rape and torture occurred. *Id.* ¶¶ 216–231. Further study of the documents received by the Commission indicated that there were reportedly 960 places of detention. *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, Annex VIII: *Prison Camps* ¶ 9, U.N. Doc. S/1994/674/Add.2 (Vol. IV) (1994). Some 3,000 rape cases were reported. *Final Report, supra* note 24, ¶¶ 232–253. From the high number of these incident reports, the Commission surmised that earlier projections by various sources of 20,000 cases of rape were not completely unreasonable. *Id.* ¶ 310 n.87.

<sup>29</sup> Sessions were held on the following dates: first session, November 4–5, 1992; second session, December 14–16, 1992; third session, January 25–26, 1993; fourth session, March 1–3, 1993; fifth session, May 24–25, 1993; sixth session, July 13–14, 1993; seventh session, August 30–31, 1993; eighth session, October 27, 1993; ninth session, December 14–15, 1993; tenth session, January 11–12, 1994; eleventh session, February 15–16, 1994; twelfth session, April 11–15, 1994. All of the sessions, except the first, which was convened in New York, were held in Geneva. *Final Report, supra* note 24, ¶ 9 n.1.

formally adopted Rules of Procedure, which defined its working methods.<sup>30</sup> The Commission also at this time formally appointed rapporteurs for several general and specific issues. Commander William Fenrick was appointed Rapporteur for On-site Investigations and Rapporteur on Issues of Law, and I was appointed Rapporteur for the Gathering and Analysis of Facts. In November 1993, the Hon. Hanne Sophie Greve and the Hon. Keba M'Baye were appointed, respectively, Rapporteur for the Prijedor Project and Rapporteur on the Destruction of Cultural Property. Professor Christine Cleiren was asked to prepare a report on the legal aspects of rape and sexual assault.

The Commission relied on three methods in its work: (1) collection and analysis of data sent to, or requested by, the Commission; (2) on-site investigative missions in the former Yugoslavia or in other countries to interview witnesses, collect additional information, and verify facts; and (3) collection of information by governments on the Commission's behalf.<sup>31</sup> The materials available to the Commission included reports from governments, UN bodies, NGOs, and IGOs; victim and witness statements; and reports by the media and other public sources. This information was forwarded to IHRLI for entry into the database and for analysis, as discussed below.

#### DATA GATHERING BY THE COMMISSION SECRETARIAT AND THE RAPPORTEUR FOR THE GATHERING AND ANALYSIS OF FACTS

Both the Commission Secretariat and I in my role as Rapporteur for the Gathering and Analysis of Facts actively pursued many avenues of information gathering and developed links with a variety of sources, including the state War Crimes Commissions of Bosnia-Herzegovina,

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<sup>30</sup> Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Rules of Procedure [hereinafter Comm'n Rules], in *First Interim Report*, *supra* note 4, at 21-23. These rules were informally adopted at the December 1992 meeting after having been generally agreed upon at the November 1992 meeting.

<sup>31</sup> *Final Report*, *supra* note 24, ¶ 19.

Croatia, and the Federal Republic of Yugoslavia (Yugoslavia). These bodies were given copies of the IHRLI database to help make their data input uniform. Close contacts were also developed with other national organizations, NGOs, the media, and individuals in more than forty countries.

### *Video Archive*

My staff and I gathered valuable information from print,<sup>32</sup> broadcast, and electronic media, including LEXIS/NEXIS and the Foreign Broadcast Information Service (FBIS). In addition to a survey of international print media, a video library was assembled, containing media-generated and other sources of footage depicting violations of international humanitarian law. Footage was obtained from the major U.S. and European television networks—such as ABC, NBC, CBS, and CNN in the United States; the BBC and ITN in the United Kingdom; and various French, Italian, Austrian, and German television stations. In addition, footage from within the former Yugoslavia was gathered from FRY-RTV Belgrade, Studio One Belgrade, Croatian TV in Zagreb, Bosnian TV in Sarajevo, and other local stations. Footage was also obtained from local citizens who taped both personal accounts and unfolding events with home recorders. Altogether, an archive of more than three hundred videotapes was compiled.<sup>33</sup>

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<sup>32</sup> Several organizations and individuals assisted in a volunteer capacity in the collection of print media. Chief among them were Minnesota Advocates for Human Rights and Thomas Warrick from the Washington, D.C., law firm of Pierson, Semmes & Bemis.

<sup>33</sup> Video documentation was done by Linden Productions (Los Angeles, California) on a largely volunteer basis. Linden Productions received a grant from IHRLI of \$80,000, funded by the Soros Foundation, but the bulk of this enormously costly project was funded by Linden, thanks to the generosity of its president, Pippa Scott.

Linden created a unique computerized videotape archive, classifying the tapes into such subject-matter categories as violence against persons (civilian and military); killing, torture, and mistreatment in camps; violence against women—rape; use of special paramilitary groups; forced deportation; and destruction of religious and cultural property. Each videotape was broken down, shot by shot, and every screen image was fully described in the videotape database and time-coded according to incidents, locations, dates,

A video documentarian catalogued all videotapes received by IHRLI.<sup>34</sup> The testimonies of individuals on tape concern treatment in detention centers, rape, torture, and ethnic cleansing. Many of these testimonies identify alleged perpetrators. The footage also provides graphic, visual evidence of the destruction of property, such as civilian homes, schools, hospitals, cultural landmarks, and places of worship. In addition to its intrinsic informational value, this material is very useful for the identification of persons and places by witnesses.

### *IHRLI Database*

At the Commission's first session, I proposed establishing a documentation center and database. However, the Commission had neither the space nor the resources to do so at its secretariat in Geneva. IHRLI offered its facilities and resources and pledged to obtain the additional necessary funds. At first, the suggestion met with resistance from the OLA, which insisted that the project be carried out on UN premises. I believed, however, that my mandate did not state where the work

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victims, witnesses, perpetrators, and other important characteristics that could be seen on the screen. Complete transcripts were made of all videotapes as the final step in the archiving process. The videotapes were placed in humidity and dust-free vaults, which were protected by security systems and available only to authorized personnel. The entire computerized system and the videotapes have been made available to the Tribunal's prosecutor. The system developed by Linden Productions is particularly useful as it permits computerized selection of tapes, events, places, and persons. The computer program can also be linked to the IHRLI database and to FBIS to merge all sources of information. To date, however, the prosecutor's office has not pursued the possibility of merging the databases and is instead in the process of developing a new system for organizing information, funded by the United States. See *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, ¶ 158, U.N. SCOR, 49th Year, Agenda Item 152, U.N. Doc. S/1994/1007 (1994) [hereinafter *Tribunal Annual Report*].

<sup>34</sup> The video documentarian labeled each videotape with the following information: date received, submitter, title, and sequential identification number for easy retrieval. The video documentarian screened all of the videotapes and prepared a summary for the video master index, indicating the videotape's contents, running time, source, and broadcast date, if any.

should be conducted and, indeed, most rapporteurs of UN bodies work elsewhere than at UN facilities. On this basis, I proceeded with the creation of a database in Chicago at IHRLI to organize the mass of information so as to facilitate its retrieval and analysis.<sup>35</sup> It was not until several months later that then Chairman Kalshoven acknowledged the existence of the database and requested what was already in place: security measures to protect the data and to insure confidentiality on the part of the database staff.<sup>36</sup> Eventually, the work I carried out as rapporteur met with the approval of the Commission, the Secretary-General, and the Security Council.<sup>37</sup>

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<sup>35</sup> The Commission and IHRLI agreed that data gathering, establishment of the database, and data analysis would be done by IHRLI under my direction as rapporteur. IHRLI agreed to provide the Commission with copies of the database software and to forward database information on a regular basis. When the Commission ended its work in April 1994, IHRLI forwarded a complete set of documents and a copy of the database to the office of the prosecutor. See *Tribunal Annual Report*, *supra* note 33, ¶ 157. IHRLI has continued to assist the prosecutor's staff in connection with the technical aspects of the database and the transfer of documents.

<sup>36</sup> Several security measures were implemented to prevent leaks of information or tampering with the documents. First, the space provided by DePaul University for the database project was protected by an electronic security system. University Security, which is linked to the Chicago Police Department, monitored the security system. Second, each person working on the project at IHRLI signed a confidentiality agreement. Lastly, original and photocopied documents were stored in locked file cabinets in the offices protected by the electronic security system. In addition, copies of all documents were stored in a secure off-site facility.

<sup>37</sup> The Commission endorsed the efforts of the Rapporteur in its *First Interim Report* to the Security Council, stating that it wished "to place on record its deep appreciation to the Rapporteur on the Gathering and Analysis of Facts for his invaluable contribution to this undertaking." *First Interim Report*, *supra* note 4, ¶ 25. The Secretary-General also urged the continuation of the database work in his letter transmitting this report to the Security Council. *Id.* at 2; see also *infra* text accompanying note 158. When the Security Council established the Tribunal, it also urged the continuation of the Commission's work, including its data gathering, stating that "the Commission of Experts . . . should continue on an urgent basis the collection of information . . . as proposed in its interim report." S.C. Res. 827, *supra* note 10, preambular ¶ 10. By letter dated May 27, 1993, to Cherif Bassiouni, Chairman Kalshoven formally expressed his gratitude to the rapporteur and his staff for the work that had been done. The Commission stated in October 1993 that "the database has

The cost of the database operation from December 1992 through December 1994 was approximately \$1.4 million.<sup>38</sup> As noted earlier, neither the United Nations nor the Commission covered any of this sum.

As Rapporteur for the Gathering and Analysis of Facts, I had a staff, over a two-year period, of an average of forty people.<sup>39</sup> In addition, a number of attorneys in Chicago, New York, Minnesota, and Washington, D.C., contributed their services pro bono.<sup>40</sup> They were particularly skilled in the fields of criminal prosecution generally, and sexual assault specifically, multiparty litigation, and computer-assisted document management. Their efforts were especially beneficial in the development of the documentation system, the assessment of the data, the preparation of reports, and the formulation of an investigation strategy.

As of the middle of 1993, an average of 3,500 documents were being received each month; by April 30, 1994, IHRLI had over 65,000 pages of documents. The documentation system was developed with the

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already proved to be of great assistance to the Commission as a basis of support for its specific missions and investigations." *Second Interim Report, supra* note 21, ¶ 105.

<sup>38</sup> This sum took the form of contributions from DePaul University (office space) and the foundations cited *supra* note 27. I also wish to make note of the invaluable contribution of thousands of hours of volunteer work by lawyers, law students, data analysts, and others. In this regard, see *infra* notes 39-40.

<sup>39</sup> Despite some turnover, staff regularly included 20-25 salaried and volunteer attorneys, 10-15 paid and volunteer law students, 5-10 data analysts, 2 computer programmers, 1 documentarian, and 1 video documentarian. Three salaried attorneys administered the day-to-day operations, oversaw the substantive work, and analyzed the database results with the assistance of other attorneys.

<sup>40</sup> Among those providing exceptional pro bono services to IHRLI and the Commission were a number of attorneys volunteering their services through Minnesota Advocates for Human Rights; Edwin E. Brooks, Ami de Chapeaurouge, Paul A. Duffy, Helen L. Hackett, Amy A. Hijjawi, Alan E. Molotsky, Nancy K. Tordai, and Richard W. Waller from the Chicago law firm of Katten, Muchin & Zavis; Joan Marsh from the Chicago law firm of Kirkland & Ellis; Susan A. McColgan and Ann C. Taylor from the Chicago law firm of Lord, Bissell & Brook; Alexander S. Vesselinovitch from the Chicago law firm of Seyfarth, Shaw, Fairweather & Geraldson; Duane Layton from the Washington, D.C., law firm of Thompson & Mitchell; Thomas Warrick from the Washington, D.C., law firm of Pierson, Semmes & Bemis; and Penny Venetis from the New York law firm of O'Melveny & Myers.



following goals in mind: (1) preserving the integrity of the documents submitted to the Commission; (2) verifying that documents containing allegations of grave breaches were analyzed and correlated; (3) facilitating the retrieval of documents; and (4) insuring that the information retrieval method was useful to research and analysis.

The IHRLI project was organized as follows. First, the documentarian sequentially numbered all original "source documents" pertinent to the work of the Commission and then stored them according to number in a pristine master file. Once source documents were filed in the master file, they could not be removed without the permission of the documentarian. A source document might, for example, be a report from a local or an international human rights group or a government submission. A single source document might describe one incident or several incidents, and any given incident might involve multiple victims and/or multiple violations of international humanitarian law.

Next, an attorney analyzed all documents in the master file in order to determine whether they were relevant to the war crimes database. Relevant documents were photocopied for future entry into the system according to guidelines established by the legal staff.<sup>41</sup> These guidelines covered every category of information in the database and were necessary because of the wide variability in the quality and format of information coming in from a multitude of sources. A staff attorney distributed assignments for database entry and monitored the progress of documents through the data-entry phase.

Data entry was carried out by data analysts with legal and/or human rights experience. Data entry proceeded on a small, independent computer network consisting of five workstations linked by a file server. Data were simultaneously entered from each computer workstation.

Before data entry began, the data analysts reviewed the documents they had been assigned and identified information pertinent to the database. They then entered this information into the appropriate categories of the database, according to the guidelines established by the legal staff. All allegations of possible grave breaches or other violations of international humanitarian law were entered. Distinctions relating to

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<sup>41</sup> *Data Entry Procedures for the Staff of the Rapporteur on Data Gathering and Analysis* (IHRLI Internal Document, Apr. 6, 1993).

credibility, accuracy, or bias in source documents were not made until the analytical stage of this project, nor was any attempt made at this point to eliminate duplication of information.

The documentarian also entered source information about each document into a separate documentarian's database. Data analysts were able to access the documentarian's database during the entry of data into the war crimes database so that source information recorded there would be consistent and accurate. A narrative description of each incident, capturing every important item of information relating to it (names, locations, dates, alleged violations, and so forth), was also entered into the war crimes database.

The computerized database provided a comprehensive, systematic, and manageable record of alleged violations. Nearly six thousand "cases" were entered into the database. The cases often concerned multiple events that may have constituted several independent violations of international humanitarian law. In the interests of time and efficiency, it was not feasible to create a separate data file for each event or possible violation. If a source document contained roughly the same set of facts regarding location, time frame, victims, witnesses, and perpetrators, then the facts were combined into a single incident report, or "case." For example, a source document detailing the rapes of a series of women at a particular camp by the same guards over a period of several months would likely be processed as a single case.

Several quality control measures ensured the consistency and accuracy of the database. Once all information relating to a given incident had been entered into the system, the data analyst generated, printed, and edited an "incident report." The data analyst then gave the incident report and the source document to a supervising attorney for quality control analysis. The attorney either approved the incident report or returned it so that corrections could be made. If the report was approved, the source document went back to the documentarian to be filed.

Apart from storing information in an organized, retrievable fashion, the database performed the following functions that proved particularly useful to the Commission's work: (1) generating reports by information category and (2) making possible "context-sensitive" searches. The category-specific reports were either statistical (calculating the number of times a particular violation occurred) or thematic (assembling

significant amounts of information relating to a particular category). For example, a "location report" would identify for a particular location the names of perpetrators and witnesses, the dates of incidents, and the source document(s). The context-sensitive searches were similar to a LEXIS or WESTLAW search, relying on keywords. When a search term (or "query") was entered, the computer searched certain categories of every file and produced a list of all case numbers where that term appeared. Search terms could be the name of a particular perpetrator, the name of a victim, a location, and so on.

Despite certain difficulties, such as the unverified nature of much of the information, the database provides strong indication of the types and quantity of violations that an ad hoc tribunal might encounter. The "cases" reveal that massive and brutal victimization, affecting thousands of individuals, has taken place in the territory of the former Yugoslavia. The majority of alleged violations involve murder, torture, kidnapping/hostage taking, forced eviction, and imprisonment. Large numbers of rapes and sexual assaults also have been reported.<sup>42</sup> As noted earlier, although approximately six thousand cases were entered into the database, the number of alleged violations and victims runs to tens of thousands. This is attributable to several factors. First, a single incident often concerned multiple victims, though the number of victims was also often rough and possibly inflated. Second, the same incident was sometimes reported by different sources. For example, the Vukovar mass grave, discussed below, was reported by several sources, each with estimates varying from two to three hundred victims. Some of these sources reported that the victims were missing, while others concluded that they had been killed. Data analysts were instructed to enter the information exactly as it had been reported, irrespective of inconsistencies or possible inaccuracies, since these problems could more properly be addressed during the analytical stage.

While multiple reports of the same incident led to inflated figures within the database, they tended to corroborate each other and therefore have some probative value. Once the data were analyzed and

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<sup>42</sup> All parties to the conflict appear to have committed such violations of international humanitarian law. However, the database contains substantially more allegations of violations committed by Serbian and Bosnian Serb forces against Bosnian Muslim civilians than by or against any other ethnic or religious group.

case files assembled, these reports were filed together and any duplication was eliminated. Further analysis was done to clarify ambiguities and correct inaccuracies to the extent the data permitted.

### *Appraisal of Data-gathering Efforts*

The Commission and I experienced mixed results in our efforts to gather data on, and evidence of, alleged violations of international humanitarian law. Reports prepared by governments, UN bodies, IGOs, and NGOs contain numerous allegations but most of them do not provide legally relevant or admissible evidence of violations. In some cases, more detailed information could have been obtained if the Commission had had the financial means to help willing sources that could not themselves afford the costs of duplicating documents, photographs, and videotapes or recording witness testimony. For example, the Yugoslavian War Crimes Commission and the Bosnian War Crimes Commission had neither the resources nor the capability to assemble and reproduce the information in their possession.<sup>43</sup>

It was also difficult to collect official documents, conduct on-site investigations, and interview victims, witnesses, and unbiased observers while the conflict in the former Yugoslavia was ongoing. Certain UN bodies, such as the United Nations Protection Force (UNPROFOR) and the United Nations High Commissioner for Refugees (UNHCR), as well as the International Committee of the Red Cross (ICRC), construed their mandates as excluding the transmission of such information. Thus, highly knowledgeable sources having firsthand information could not share it with the Commission, except through published reports or reports available for limited circulation but not containing evidence. Furthermore, the European Community Monitoring Mission for Yugoslavia (ECMM), which was potentially a very useful source of firsthand information, stored its reports in boxes piled up in a room at UNPROFOR headquarters in Zagreb. There was thus no easy way to

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<sup>43</sup> Providing funds and other forms of support to bodies such as these could have helped to level the playing field. For example, the Croatian War Crimes Commission and some Croatian human rights organizations were comparatively well funded and equipped and thus better able to distribute their information than other such groups.

retrieve relevant information, and since the ECMM did not have a uniform system for monitors to follow, the reports varied in quality and content. Lastly, it appeared that some governments, including the United Kingdom, when chairing the ECMM, had removed some of the records.<sup>44</sup>

It should be noted as well that the Commission launched its data-gathering activities before the Tribunal was established and thus before the Tribunal's Rules of Procedure and Evidence were adopted.<sup>45</sup> Consequently, the Commission had no way of knowing what types of evidence would be considered admissible by the Tribunal,<sup>46</sup> and this further complicated its task.

### *Critical Assessment of Information Received*

The Commission's data gathering and analysis would have benefited from greater input on the part of governments, UN bodies, IGOs, and NGOs. From the time that the Commission began compiling data in November 1992 until approximately a year later, the character and quality of the information submitted by the various sources did not change substantially. The material was generally limited and incomplete, lacking documents, records of interviews, videotapes of interviews,

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<sup>44</sup> This was the case with field files for the second half of 1992, which was the worst period of ethnic cleansing in northern, central, and then eastern Bosnia-Herzegovina.

<sup>45</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev.1 (1994), reprinted in appendix C of this issue of *Criminal Law Forum* [hereinafter I.T. R. Proc. & Evid.]; see also *supra* note 13 and accompanying text.

*Editor's note:* the Rules of Procedure and Evidence were amended Oct. 4, 1994, U.N. Doc. IT/32/Rev.2 (1994), and Jan. 30, 1995, U.N. Doc. IT/32/Rev.3 (1995). This article is based on U.N. Doc. IT/Rev.1. Appendix C prints the most recent text of the rules, U.N. Doc. IT/Rev.3, indicating all deletions from, and additions to, U.N. Doc. IT/32/Rev.1, so that the reader can reconstruct the full text of this earlier document.

<sup>46</sup> See in this regard *id.* RR. 89-98 (evidence), 71 (depositions).

photos, and other supporting evidence.<sup>47</sup>

While the reports adequately established the occurrence of large-scale victimization in the former Yugoslavia, they did not, for the most part, contain evidence in the legal sense, which is necessary to bring criminal charges under international criminal law or the domestic criminal law of states in whose territory these acts were committed. Several explanations are offered: NGOs wanted to protect their sources; some IGOs, like UNHCR and ICRC, thought that they were precluded by their mandates from giving evidence or even information; UNPROFOR (until October 1993) similarly interpreted its mandate as precluding it from furnishing evidence; some governments were uncertain about the fate of the Commission, and others probably had no political interest in turning over evidence. The parties to the conflict did their best to cooperate, but their resources were limited and they lacked trained personnel. They also faced the objective difficulty of gathering evidence during a war.

Several problems were common to the reports that the Commission received. The information varied widely in terms of form and substance, complicating data entry and analysis, as discussed below. Many of the reports also failed to provide sufficient detail about the events described (such as information relating to the identity of victims, perpetrators, and witnesses). Particularly troublesome was the consistent failure to identify the military units involved in alleged incidents, to provide information about "order of battle,"<sup>48</sup> and to give details about the location of military units at a given time. Each of these related factors is critical to establishing "command responsibility." All of these details had to be discovered, whenever possible, through other sources.

Governments did not provide any intelligence information in their possession—such as satellite and aerial photographs; intercepted telephone, radio, and cable communications; and other materials that

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<sup>47</sup> There were exceptions, in particular the government of Croatia, Human Rights Watch, and, after October 1993, the governments of the United States, the United Kingdom, Sweden, and Austria, which provided detailed evidence, including witness statements. These materials proved highly valuable.

<sup>48</sup> This refers to a military organizational chart that gives details on type of units, strength, equipment, and command structure.

could have revealed the disposition and movement of troops and supplies, particularly important where national borders were crossed. Such information would help to establish the role of different governments in these multiple conflicts, the international character of the conflict, the chain of command, and the apex of command and control. It would also help to establish the role of the "warring factions" (Bosnian Serb, Bosnian Croat, and Bosnian government forces) in certain operations that were planned with a view to concealing that role, especially where serious violations of international humanitarian law were presumably contemplated. Such information leads not only to legal conclusions but also to political consequences, which may explain why it was not made available to the Commission. Furthermore, to my knowledge, such intelligence has not yet been made available to the prosecutor of the Tribunal, the Hon. Richard Goldstone.

Finally, the sources of information upon which reports were based were either not verified or not verifiable. Many reports did not disclose original sources, nor did they state whether any original evidence might be available (such as affidavits of victims, witnesses, or perpetrators; photographs; or medical reports or autopsy reports).<sup>49</sup> Without access to certain documents and sources, it was difficult to weigh the validity of allegations; assess the sufficiency and credibility of the evidence; decide whether further investigation in a given case was needed; ascertain the potential responsibility of alleged perpetrators; and determine the legal nature of a violation and the potential criminal charge.<sup>50</sup> Nevertheless, the cumulative effect of this information, much of which was corroborative, was to help establish patterns of violations from which certain policies could be identified, particularly the policy underlying the consistent failure of military and political leaders to act to prevent grave human rights violations and to punish their perpetrators.

As noted above, there were data-entry and analysis problems because sources varied significantly in terms of quality and content, in

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<sup>49</sup> Some reports may have relied on diplomatic correspondence that cannot be publicly revealed. Other reports may have been based on media sources. These reports would not be useful unless the original source could be verified.

<sup>50</sup> These difficulties are exacerbated by the fact that most evidence of violations consists of oral testimony, affidavits, and statements made by victims and witnesses.

part reflecting their different data-gathering methodologies and goals. More specifically, spellings of names and locations were inconsistent due to transliteration or translation into the reporting language. Locations were, at first, difficult to pinpoint due to a lack of specific geographical information. Reports of the same incident sometimes varied in the numbers of persons involved and in the outcome described. Property damage reports rarely indicated more than the type of property affected; the location and value of property were rarely included. Numbers of victims, properties, and other variables were often reported in numerical ranges (for instance, 100-1,000). Names of victims, perpetrators, and witnesses were often altered or omitted from the reports. Finally, important details that may have seemed irrelevant to the reporting source but that were important in the data-gathering process were left out.

In order to correct for these deficiencies and errors, IHRLI secured the services of linguists familiar with the Bosnian, Croatian, and Serbian variants of Serbo-Croatian, as well as a professional cartographer; obtained detailed maps of the region, including digitalized maps on a 1:10,000 scale; installed a computer program to make the spelling of place-names uniform; and consulted older listings of towns and counties in Bosnia-Herzegovina and Croatia since the names of many places had been changed after their occupation. IHRLI also developed a training and data manual for the staff and working maps on which the locations, for example, of prison camps and mass graves were plotted.

#### REPORTS FROM GOVERNMENTS<sup>51</sup>

Some of the government reports relied heavily on hearsay and media sources, which could not be readily verified. In other instances, government reports were quite detailed and appeared to be based on

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<sup>51</sup> The following governments submitted materials pertaining to war crimes and mass victimization: Albania, Australia, Austria, Belgium, Bosnia-Herzegovina, Burkina Faso, Canada, Colombia, Croatia, Denmark, France, Germany, Iran, Italy, Kenya, the Netherlands, Norway, Russia, Saudi Arabia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Arab Emirates, the United Kingdom, the United States, Venezuela, and Yugoslavia. In particular, Austria, Canada, France, Sweden, Switzerland, the United Kingdom, the United States, and the parties to the conflict provided valuable information of an evidentiary nature.



credible and verifiable eyewitness accounts. But, possibly for security or confidentiality reasons, the reports omitted important details relating to names of victims, perpetrators, and witnesses, as well as dates and specific locations. While these reports generally failed to state facts sufficient to make out a *prima facie* case, they clearly set out facts that, if substantiated, would constitute evidence of grave breaches and other violations of international humanitarian law.

The inadequacy of most government reports was particularly disappointing since these materials were intended to be the Commission's primary source of information.<sup>52</sup> Moreover, most governments did not turn over information already in their possession—interviews with refugees; "soft intelligence" and unclassified information; and data on order of battle, names of commanders, and troop movements. At least twenty countries outside the Balkans have large refugee populations from this region. Some of these refugees could have been interviewed and the interviews released in an edited form to ensure confidentiality or protect sensitive information. Some governments could have declassified relevant intelligence and released it to the Commission in a sanitized manner to protect original sources and methods by which such information is obtained. But this was not the case.

The governments that provided the most valuable information were Bosnia–Herzegovina, Croatia, and, as of the fall of 1993, Austria, Sweden, Switzerland, the United States, and the United Kingdom. In late 1993 and early 1994, the Federal Republic of Yugoslavia provided some valuable information but did not make sources and witnesses available. The authorities of the self-proclaimed Bosnian Serb Republic and Serb Republic of Krajina did not provide information, except for the latter's communications to Commissioner Fenrick and myself on purported mass graves in UNPA Sector West, Croatia, discussed below.

As the Commission's work progressed and gained credibility, more information and evidence was forthcoming, particularly from Yugoslavia. Indeed, had the Commission not been prematurely terminated, as discussed below, it would have obtained significantly more

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<sup>52</sup> As noted earlier, the Security Council contemplated that reports from governments would be the best source of information. S.C. Res. 771, *supra* note 14, ¶ 5; S.C. Res. 780, *supra* note 1, ¶ 1.

valuable evidence from this source. In fact, Yugoslavia submitted a report to the United Nations in May 1994,<sup>53</sup> but the Commission had by that time submitted its *Final Report*.

#### REPORTS FROM UN BODIES AND INTERGOVERNMENTAL ORGANIZATIONS

The UN bodies that provided reports to the Commission of Experts included UN Commission on Human Rights—Special Rapporteur for the Former Yugoslavia Tadeusz Mazowiecki;<sup>54</sup> UNHCR; UNPROFOR; and UN Commission on Human Rights—Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions Bacre Waly Ndiaye. The IGOs that provided reports included the ECMM and the Conference on Security and Cooperation in Europe (CSCE). These reports gave clear indications of the types of massive and systematic violations of international humanitarian law and human rights taking place in the former Yugoslavia. They also contained examples and descriptions of particular instances.

As noted above, the Commission Secretariat made efforts to obtain UNHCR reports of alleged violations but was unsuccessful due to UNHCR's interpretation of its mandate. These materials could have included field reports, notes of field interviews, or copies of refugee interviews establishing, for example, allegations of murder, rape, and torture, which were contained in UNHCR's confidential internal reports.

The Commission Secretariat also tried to obtain documentation from UNPROFOR and its Civil Police unit (CIVPOL), but most of

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<sup>53</sup> Letter from the Permanent Mission of Yugoslavia to the Secretary-General, May 6, 1994, U.N. Doc. S/1994/548 (1994), transmitting *Third Report Submitted to the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)* [hereinafter *Yugoslavian Report*]. Moreover, in March 1994, I had met in Geneva with Yugoslavia's Minister of Justice, who is also chairman of the state War Crimes Commission, and expected to receive evidence from that source and to be able to conduct interviews of rape victims in Serbia. This was prevented by the premature termination of the Commission of Experts in April 1994. See *Yugoslavia to Continue Cooperation with U.N. War Crimes Commission*, BBC Summary of World Broadcasts, Mar. 19, 1994, available in LEXIS, World Library, Allnews File. See *infra* text accompanying note 164.

<sup>54</sup> The Commission of Experts established close cooperation with the Special Rapporteur and his staffs in both Geneva and Zagreb.

these reports were classified and not available for dissemination by UNPROFOR in light of its interpretation of its mandate. CIVPOL had firsthand knowledge of many events, as well as access to information and evidence of criminality, but apparently did not collect such evidence as a matter of policy. For example, when field officers reported certain facts, they were either not recorded in detailed CIVPOL reports or the information was not given to the Commission. CIVPOL, at least until the fall of 1993, was particularly concerned about jeopardizing its relations with the warring factions, especially the Serbs since they were not only the militarily dominant party but also the most intractable. Both UNPROFOR and CIVPOL, however, cooperated fully with the Commission in many other respects, most notably in providing logistical support that proved invaluable.<sup>55</sup>

The Commission Secretariat did not receive information from ICRC, also due to apprehension over exceeding its mandate. This material concerned the dates when camps opened and closed, the numbers and ethnicity of prisoners, and the conditions of detention.

Like the government reports, the published or unclassified reports from UN bodies and IGOs lacked the specificity needed to make out criminal responsibility but were useful in identifying patterns of conduct from which policies could be deduced. Additionally, information from these sources substantiated and corroborated other information the Commission received. For example, the UNPROFOR daily shelling activity report on Sarajevo proved invaluable in preparing Annex VI to the *Final Report*, on the battle and siege of Sarajevo, although most of the information used in this annex came from media sources.

#### REPORTS FROM NGOS

The reports received from a number of NGOs, particularly those in the region of the former Yugoslavia, proved very helpful in enabling the

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<sup>55</sup> Sometime in October 1993, UNPROFOR investigated the Medak Pocket incident, which involved Croats against Serbs in Croatia, see *infra* section entitled "Investigation of the Medak Pocket," and the Stupni Do incident, which involved Croatian Defense Council forces against Muslim villagers in Bosnia-Herzegovina. The Commission was given access to these reports and they were turned over to the prosecutor of the Tribunal.

Commission to gather pertinent, substantiated data. Though NGOs are not in essence investigatory bodies, the extent of the investigations underlying these reports and the level of analysis they achieved indicated a true effort and genuine commitment by many such organizations to produce verifiable facts. The published reports of Helsinki Watch, for example, set out detailed information that came closest to the type of data the Commission required in attributing responsibility for violations of international humanitarian law. Witness interviews, in particular, were very useful not only for learning about the incidents they described but also for corroborating other events and reports.

However, as with the other reports submitted to the Commission, further data were required in order to construct effective cases against those groups or individuals responsible for alleged violations. Although many international and local NGOs were a better overall source of information, some did not provide the Commission with the supporting documentation it needed. Thus, the contributions from Helsinki Watch, which were the most useful, did not include original supporting documentation. Amnesty International, despite its initial cooperation and willingness to provide information, also failed to provide supporting documentation. Both maintained that doing so would breach express or implied promises of confidentiality or endanger informants. However, such concerns were addressed in some cases by excising names and other identifying information to protect confidentiality,<sup>56</sup> and a general practice along these lines could have been very worthwhile.

Nothing of what has just been said should be construed as criticism, because NGOs should not be regarded as a substitute for the criminal investigatory role of UN-created commissions. The service to humanity that NGOs provide is highly laudable.

#### MEDIA SOURCES

The media (print, electronic, and broadcast) proved to be an invaluable source of leads, significant facts, and corroboration. Many incident

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<sup>56</sup> This procedure was followed in many cases involving governments, NGOs, and other organizations that provided information of a confidential nature. The Commission was particularly attentive to these concerns, and its procedures, as well as IHRLI's, proved to be entirely secure.

reports contained in the IHRLI database are based on media accounts of violations. Media reports also corroborated much of the information received by the Commission from other sources. Indeed, the service to the world that the media have performed in this conflict should not go unrecorded. Journalists were the first to discover some of the prison camps and the horrid conditions under which the detainees lived. Journalists provided the world with photographic and videotaped evidence of many violations of international humanitarian law, particularly in the prison camps. It is fair to say that the media brought the conflict to the attention of the world.<sup>57</sup>

### THE COMMISSION'S ON-SITE INVESTIGATIONS

In addition to gathering information from the sources described in the preceding sections, the Commission conducted several on-site investigations, which it deemed necessary to the fulfillment of its mandate to secure evidence of violations of international humanitarian law and to verify allegations of the existence of certain patterns and policies of criminality.<sup>58</sup> Given the volume of the available information and the Commission's limited resources, such investigations could be carried out only on a selective basis. The Commission used the following objective criteria to decide which investigations to pursue: "the source of the information, the strength of the evidence, the number of victims, the identity and rank of the persons allegedly responsible, and the gravity of the alleged violations."<sup>59</sup> The Commission stated that an important factor in identifying the categories of crime in specific cases to be investigated in depth would be patterns of behavior sufficiently consistent to reveal a policy or system in such violations as genocide, ethnic

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<sup>57</sup> See, e.g., Roy Gutman, *A Witness to Genocide* (1993).

<sup>58</sup> S.C. Res. 780, *supra* note 1, ¶ 2. It must nevertheless be reiterated that the Commission's work was not viewed as part of the prosecutor's task of gathering evidence needed to prosecute under the Tribunal's rules. See *supra* notes 13, 45–46 and accompanying text.

<sup>59</sup> *First Interim Report*, *supra* note 4, ¶ 31.

cleansing, or large-scale sexual assaults.<sup>60</sup>

Notwithstanding the best intentions and the ingenuity of the commissioners, practical and financial difficulties posed a severe obstacle. Nevertheless, from July 1993 until March 1994, the Commission undertook an extraordinary thirty-four field missions and conducted several major investigations. Discussed in more detail below, the most extensive efforts included the following: (1) an attempted mass grave exhumation in Ovcara/Vukovar, United Nations Protected Area (UNPA) Sector East, Croatia; (2) a mass grave exhumation in Pakracka Poljana, UNPA Sector West, Croatia; (3) an investigation, carried out in and outside the territory of the former Yugoslavia, of rape and sexual assault; (4) a radiological investigation in UNPA Sector West, Croatia (self-proclaimed Serb Republic of Krajina); (5) an investigation of the battle of Dubrovnik, Croatia, and the resulting destruction of cultural property; (6) an investigation into the 1993 attack in the Medak Pocket, UNPA Sector South, Croatia (self-proclaimed Serb Republic of Krajina); and (7) an investigation of ethnic cleansing in Prijedor, northwestern Bosnia-Herzegovina.

#### *Mass Grave Exhumation in Ovcara/Vukovar*

The Commission received reports of a mass grave in Ovcara, an agricultural cooperative a few kilometers from the city of Vukovar, which had been the site of a three-month siege by the Yugoslav National Army (JNA), with the support of Serb paramilitary groups and local militias. The grave was alleged to contain over two hundred bodies of wounded and sick Croats who were at the Vukovar hospital in November 1991, when the JNA and Krajina Serb militias took over the city.<sup>61</sup> The Commission visited the site to ascertain the existence of the shallow mass grave. Once the mass grave was identified, the Commission asked UNPROFOR to secure the location and then proceeded to plan for the investigation. Commissioner Fenrick visited officials in Vukovar, Belgrade, Zagreb, and Knin on several occasions in an effort to obtain

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<sup>60</sup> *Id.*

<sup>61</sup> *Final Report, supra* note 24, ¶ 265.

the necessary cooperation to conduct an exhumation.<sup>62</sup> The Commission's objectives were to exhume the bodies, collect physical evidence, send the bodies to a morgue facility to conduct autopsies to establish identity and cause of death, and collect testimony.<sup>63</sup>

After considerable delay, officials of the Serb Republic of Krajina met with Commissioner Fenrick in Knin on September 5, 1993, and conveyed in writing their full cooperation with the exhumation. At the same time as the Ovcara dig was being planned, the Commission secured the cooperation of the Croatian government and of the Serb Republic of Krajina to conduct an exhumation of a mass grave in Pakracka Poljana/Marina Selo, which reportedly contained the bodies of Serbs killed by Croats.<sup>64</sup> The officials of the Serb Republic of Krajina provided additional written assurances in October 1993 after another meeting with the Commission, during which the Commission agreed that medical observers from Croatia and the Serb Republic of Krajina were welcome to be present during the exhumation and the postmortem examinations.<sup>65</sup> The postmortem examinations were to be conducted outside Croatia due to the lack of facilities locally to deal with such a large number of bodies.<sup>66</sup>

Thereafter, the Commission deployed its team of sixty-five investigators, led by Commander Fenrick, the Rapporteur for On-site Investigations. The team conducted preliminary site surveys but was unable to start the exhumation because a local commander informed them that the Parliament of the Serb Republic of Krajina had decided to postpone the exhumation until the conflict was resolved.<sup>67</sup> Then, in

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<sup>62</sup> See *id.* ¶ 268.

<sup>63</sup> *Id.* ¶ 265.

<sup>64</sup> See *id.* ¶ 269.

<sup>65</sup> See *id.* ¶ 270. In connection with getting permission from the Knin authorities, see *infra* note 114.

<sup>66</sup> *Id.* ¶¶ 270, 283. Hospitals in the area could cope with 20–30 bodies at any one time. Capacity to accommodate 200 bodies is available only at the Chicago Medical Examiner's Office and the U.S. Air Force hospital and morgue in Wiesbaden, Germany.

<sup>67</sup> *Id.* ¶¶ 271–272.

November, the Krajina Serb authorities agreed again to cooperate fully.<sup>68</sup> Unfortunately, the Commission was forced to postpone the mission until the spring due to the winter weather conditions. The planned date for the exhumation was April 10, 1994, but the Commission was terminated as of the thirtieth of that month and thus the exhumation never took place.<sup>69</sup> All information regarding the mass grave was given to the office of the prosecutor of the Tribunal.<sup>70</sup> Although it is hoped that the prosecutor will conduct the exhumation, this is doubtful since Yugoslavia, the Serb Republic of Krajina, and the Bosnian Serb Republic refuse to recognize the competence of the Tribunal. Moreover, as time passes, not only does the forensic analysis become more difficult but also it becomes more difficult to obtain antemortem data, against which the postmortem evidence is compared for identification. These problems were foreseeable when the Commission was terminated prematurely.

#### *Mass Grave Exhumation in Pakracka Poljana*

The Commission confirmed the possibility of mass graves in this area during a reconnaissance mission in March 1993.<sup>71</sup> There were allegedly 1,700 bodies in what appeared to be seventeen trenches, each about ten meters long and two meters wide.<sup>72</sup> Local Serbs reported a large number of missing persons from the area. In October 1993, the Commission deployed the investigative team that had previously prepared the Ovchara site to conduct a site survey here. The seventeen trenches were dug out with a backhoe but nothing was found. The trenches were probably dug during the war for military purposes. Altogether seventy-one potential sites were excavated in the vicinity, but no mass grave was discovered.<sup>73</sup>

The Commission was concerned, however, that an undiscovered

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<sup>68</sup> *Id.* ¶ 275.

<sup>69</sup> *Id.* ¶ 276.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* ¶ 277.

<sup>72</sup> *See id.* ¶ 282.

<sup>73</sup> *Id.*



mass grave existed in the area because of the large number of alleged missing persons. A team of Dutch specialists then conducted more searches and discovered nineteen bodies, which were exhumed. The forensic team concluded that the nineteen persons, who were buried in nine separate graves located in an open field, had been executed, as evidenced by expended cartridges surrounding the area and wounds visible on some of the bodies.<sup>74</sup> Furthermore, the graves appeared to be clandestine burial sites that had not been disturbed since the interment of the bodies.<sup>75</sup>

Krajina Serb officials would not allow the bodies to be moved to Croatia for postmortem examinations, and proper facilities did not exist in Pakracka Poljana. By then, winter had arrived and fieldwork could no longer be conducted. Therefore, the team eventually placed the bodies in body bags and properly reburied them at an identified place under UNPROFOR security.<sup>76</sup> Since it was terminated early the following spring, the Commission was unable to conduct a full criminal investigation. However, as in the case of Ovchara, all information regarding the mass grave was given to the office of the prosecutor of the Tribunal with the hope that the prosecutor will complete the investigation.<sup>77</sup>

### *Rape and Sexual Assault Investigation*

The Commission conducted an unprecedented on-site investigation into rape and sexual assault in early 1994.<sup>78</sup> This investigation supplemented efforts to document the incident reports contained in the database of mass and systematic rape and other forms of sexual abuse. The cumulative nature of the information received reveals the tragic and barbarous resort to rape as an instrument of war and as part of the policy

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<sup>74</sup> *Id.* ¶ 281.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* ¶ 283.

<sup>77</sup> *Id.* ¶ 284.

<sup>78</sup> *Id.* ¶¶ 241–253.

of ethnic cleansing conducted essentially, though not exclusively, by Serbs against Bosnian Muslims and Croats. Rapes were also reported to have been committed by Croats and Bosnians against Serbs.

The investigation was unprecedented because of its scope and method. About forty people participated—including female attorneys, female mental health specialists, male mental health specialists, female interpreters, and administrative support personnel.<sup>79</sup> All of the attorneys and mental health experts volunteered their time in support of the investigation, which resulted in interviews of 223 refugees—146 from Bosnia-Herzegovina and 77 from Croatia—in seven cities.<sup>80</sup> Both

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<sup>79</sup> The investigation took place under my direction with assistance from Commissioner Cleiren and Commission staff Bruna Molina-Abrams, Deputy Secretary; Julio Bacz, Assistant Secretary; and Lieutenant-Colonel Anton Kempnaars, Military Assistant to the Chairman of the Commission of Experts.

To implement the project, Karen Kenny, Interview Coordinator, was put in charge of the field work and performed exceptionally well under difficult circumstances. She worked closely with Maja Drazenovic, Chief Interpreter; Thomas Osorio, Field Officer; and Nancy Paterson, Coordinator of the Legal Team. Elenor Richter-Lyonett and Sabrina Negotovic served briefly as NGO Coordinators. Ms. Drazenovic recruited and selected the interpreters not only for their language skills but also for their ability to empathize with the interviewees.

The attorneys who conducted the interviews were from Bangladesh, Canada, Finland, Ireland, and the United States. All were prosecutors with the exception of one criminal defense lawyer. Interviewing teams usually consisted of three women: an attorney, an interpreter, and in most cases a mental health expert.

The legal team included Lena Andersson, Susan Axelrod, Francine Borsanyi, Linda S. Crawford, Sharon Janelle Crooks, Kenna Dalrymple, Feryal Gharahi, Sara Hossain, Nancy Paterson, Tanja Petrovar, Laura D. Silver, and Merja Pentikainen. The mental health experts, who did not conduct interviews but served as facilitators and support for the process, included Dr. Abigail Benton Sivan, Dr. Stephanie Cavanaugh, Dr. Wanda Fremont, Alice Geis (R.N.), Dr. Stephanie Gregory, Dr. Daniel Hardy, and Dr. Richard Rahe. Lisa Capitanini was part of the administrative staff serving in Split to organize interviews.

I am deeply grateful to the legal and mental health experts who volunteered their time to conduct this investigation, as well as the NGOs upon which the Commission relied. All of those who participated should be commended for their dedication and concern. I also wish to express my appreciation to Professor Catharine MacKinnon of the University of Michigan Law School, who gave generously of her time and help in contacting victims and witnesses whom she represented or otherwise knew.

<sup>80</sup> *Final Report, supra* note 24, ¶¶ 241-243.

women and men were the victims of sexual assault.

This investigation relied on the support of European and local NGOs, which secured about four hundred prospective witnesses. The Commission's efforts overcame significant initial resistance based on multiple grounds: distrust of the United Nations; fear of reprisals; protection of the witnesses' confidentiality; fear of retraumatizing the victims; and fear that information might fall into the wrong hands or be used for the wrong purposes. Overcoming these objections and other obstacles, including certain bureaucratic difficulties that caused the delay and almost the cancellation of the investigation, was in itself an accomplishment. The dedication of the people who planned and carried out the investigation was exemplary and quickly became known among the refugee community. The investigation turned into a healing process for the survivors and conveyed to them and their community that the world had not abandoned them.<sup>81</sup>

This effort produced significant goodwill for the United Nations, considering that so many victims blamed the United Nations for not protecting them. Toward the end of this project, the Commission's office at UNPROFOR was receiving ten to fifteen calls a day from victims and witnesses who wanted to be interviewed. It was an extraordinary manifestation of confidence that had emerged in the refugee community. Unfortunately, as with other on-site investigations, the investigation of rape and sexual assault was cut short (March 31) because the Commission was closed down ahead of schedule. To this writer and so many others, it was a tragic loss: the investigators knew of the horrible experiences that the interviewed victims had endured and how important it was to give them the cathartic and healing opportunity to tell their stories. The victims wanted the world to know what had happened to them and the perpetrators to be prosecuted.

The Commission compared the information obtained through the interviews with the information contained in the IHRLI database, which covered over 1,600 reported rape cases and over 4,500 insufficiently documented reports. The information, analyzed as a whole, established five patterns of rape:

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<sup>81</sup> *Id.* ¶ 241 n.65.

1. Individuals or small groups often committed sexual assaults in connection with intimidation and looting of a target ethnic group before fighting began in the area. Men would break into a house, steal, beat the inhabitants, and rape the women, usually in front of family members.<sup>82</sup>

2. Individuals or small groups committed sexual assaults in connection with fighting in an area. Either women were raped in their homes or rounded up and selected from a group to be raped publicly after the town was secured.<sup>83</sup>

3. Individuals or groups sexually assaulted women in detention. Soldiers, camp guards, paramilitaries, and civilians were allowed to choose women held in detention and remove them from the camp to rape them. Afterward, the men either killed the women or returned them to the camp. Women frequently reported gang rape and beatings or torture accompanying rape.<sup>84</sup>

4. Individuals or groups committed sexual assaults as part of a policy of ethnic cleansing. Women were detained to be raped. The rapes usually occurred in front of other detainees, and victims were often beaten or tortured at the time. Women were held for the purpose of impregnation and not released until it was too late to obtain an abortion.<sup>85</sup>

5. Women were also detained in hotels or homes for the sole purpose of sexually entertaining soldiers who came off the front line.<sup>86</sup>

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<sup>82</sup> *Id.* ¶ 245.

<sup>83</sup> *Id.* ¶ 246.

<sup>84</sup> *Id.* ¶ 247.

<sup>85</sup> *Id.* ¶ 248.

<sup>86</sup> *Id.* ¶ 249.

It is important to note that men were also the victims of sexual assault, including castration and genital mutilation.<sup>87</sup> Additionally, rape and sexual assault frequently occurred with the permission of camp commanders and/or in their presence.<sup>88</sup>

The Commission also conducted interviews in Slovenia and Austria.<sup>89</sup> The Turkish government extended an invitation to interview refugees in Turkey, but this could not be done because of the Commission's premature termination. The Commission also failed to get permission from the government of the Federal Republic of Yugoslavia to interview victims and witnesses in Serbia.<sup>90</sup> Although the government promised to conduct interviews and send the information to the Commission before its termination, none was received. It is believed, however, that given more time, Yugoslavia could have provided such information.

#### *Radiological Investigation in UNPA Sector West*

The Commission received reports from the Krajina Serbs regarding the dumping by Croatia of nuclear waste in areas throughout UNPA West Sector. In response, the Commission deployed to the sector an investigative team consisting of two specialists from the Royal Netherlands Army Nuclear, Biological, and Chemical School, seconded by the government of the Netherlands, under the direction of Commissioner Fenrick.<sup>91</sup> They took extensive soil samples in multiple areas that could have been used as dump sites, but the level of radioactivity of the samples was normal.<sup>92</sup> In March and April 1994, the administration of the Serb Republic of Krajina submitted new information with respect to other possible dump sites. However, the Commission was not able to conduct

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<sup>87</sup> *Id.* ¶¶ 247, 250.

<sup>88</sup> *Id.* ¶¶ 247, 252.

<sup>89</sup> *Id.* ¶ 241 n.65.

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* ¶ 302.

<sup>92</sup> *Id.* ¶ 303.

another investigation because of its premature termination, and the information was sent to the office of the prosecutor of the Tribunal.<sup>93</sup>

### *Battle of Dubrovnik Investigation*

The Commission sent a team of military lawyers from Canada and Norway, along with a French art historian, to investigate the destruction of cultural property and attacks against civilians during the battle of Dubrovnik. The team had three objectives:

1. To determine whether and when indiscriminate attacks or deliberate attacks on civilian persons or civilian objects had occurred.
2. To quantify the loss of civilian life, injury to civilian persons, and damage to civilian property, including cultural property.
3. To attribute responsibility for apparent violations of the law of armed conflict.<sup>94</sup>

From the team's investigation, the Commission concluded that between eighty-two and eighty-eight civilians were killed during a one-year period due to the activity of the JNA.<sup>95</sup> In particular, the St. Nicholas Day bombardment of December 6, 1991, resulted in the death of thirteen civilians and the destruction of a significant amount of cultural and personal property in the town.<sup>96</sup> The Commission concluded that this was a deliberate attack on civilians and cultural property and that a prima facie case could be made against the JNA's commanding officers who were responsible for the bombardment.<sup>97</sup>

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<sup>93</sup> *Id.* ¶ 305.

<sup>94</sup> *Id.* ¶ 298.

<sup>95</sup> *Id.* ¶ 299.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* ¶¶ 300-301.

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*Investigation of Ethnic Cleansing in Prijedor*

Commissioner Greve conducted an in-depth investigation into the attack against non-Serbs and the ethnic cleansing of the county of Prijedor. She studied the situation from the time the Serbs took power on April 30, 1992, including military operations, opening of detention facilities, mass destruction of property, and forcible expulsion of persons. A comparison of 1991 census figures and the population count in June 1993 showed that 52,811 people had been killed or were missing—all non-Serbs.<sup>98</sup> From the data that Commissioner Greve collected and some four hundred interviews of witnesses to the destruction, she prepared a lengthy report describing not only the violations of international humanitarian law but also the pattern of conduct evidencing a deliberate policy that produced a significantly high level of victimization.<sup>99</sup> The Commission concluded that these practices, particularly in Prijedor, constituted crimes against humanity and possibly genocide.<sup>100</sup> This study, which was largely testimony driven, documents the policy and practice of ethnic cleansing in this region and suggests how it has been carried out elsewhere. Other reports and studies contained in the annexes to the *Final Report* reinforce these findings.

*Investigation of the Medak Pocket*

The Medak Pocket is a small territory located 150 kilometers southwest of Zagreb (partly in Croatia), in UNPA Sector South. Croatian forces attacked this cluster of rural villages in September 1993, when the area was under Serb control. After securing the area, the Croats agreed to retreat to their previous position. However, before relinquishing the territory, the Croatian forces burned or blew up all homes in the area and allegedly killed or took all livestock and looted personal property.<sup>101</sup> In addition, there was evidence that civilians had been injured or killed

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<sup>98</sup> *Id.* ¶ 153.

<sup>99</sup> *Id.* ¶¶ 151–181.

<sup>100</sup> *Id.* ¶ 182. See *infra* note 143.

<sup>101</sup> *Id.* ¶ 210.

during the attack.<sup>102</sup> The Commission chose to conduct an investigation of the incident for two reasons. First, at the time, the incident was relatively recent; therefore, witnesses were still available and other evidence was still fresh. Second, UNPROFOR forces had arrived right at the end of the destructive retreat and were able to obtain much evidence. The Commission deployed a team of investigators to interview witnesses and procure the UNPROFOR report of the incident. They concluded that while "there was no strong unambiguous pattern of criminal killing sufficient at the time to affix responsibility upon the Croat commanders for deliberate killing of civilians," there was a "clear, obvious and overwhelming pattern of wanton destruction" of property for which named senior Croatian officials could be prosecuted.<sup>103</sup>

#### INVESTIGATIONS CONDUCTED BY GOVERNMENTS ON BEHALF OF THE COMMISSION

The Commission also relied on various governments to conduct interviews of refugees and to undertake investigations. Several governments were particularly helpful in this respect. The cumulative number of such interviews exceeded one thousand. However, details of this process, including the governments that participated, cannot be disclosed for reasons of security, confidentiality, and so forth.

#### THE COMMISSION'S REPORTS

Pursuant to its Rules of Procedure,<sup>104</sup> the Commission submitted two interim reports to the Secretary-General. The reports were approved, respectively, at the Commission's third (January 25-26, 1993) and seventh (August 30-31, 1993) sessions. The Secretary-General, in turn,

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<sup>102</sup> *Id.* ¶ 212.

<sup>103</sup> *Id.* ¶¶ 212-214.

<sup>104</sup> Comm'n Rules, *supra* note 30, R. 10(2).



submitted these reports to the Security Council.<sup>105</sup> At the Commission's final and twelfth session (April 11–15, 1994), it unanimously adopted the *Final Report*, which was submitted to the Secretary-General on May 5, 1994. The Secretary-General forwarded the *Final Report* to the Security Council on May 24, 1994.<sup>106</sup> The 84-page *Final Report* refers to twelve annexes, running about 3,200 pages. Because the Commission considers the annexes to be an integral part of the report, for reasons discussed below, the Secretary-General agreed to their subsequent publication.<sup>107</sup>

### *First Interim Report*

The *First Interim Report* provides a description of the Commission's activities from November 1992 to January 1993. The report contains an introductory section describing the Commission's mandate and composition and the information submitted to the Commission by various governments and other bodies. The introduction is followed by sections describing or discussing (1) the Commission's efforts to coordinate its work with other bodies, such as the CSCE; (2) the tasks carried out by the Commission to fulfill its mandate, such as the examination, verification, and analysis of information, identification of cases warranting in-depth investigation, and consideration of issues of law; (3) alleged mass grave sites; (4) the Commission's projected plan of work; and (5) the Commission's resources and budget requirements.

In this report, the Commission disclosed its decision to establish the IHRLI database in order to keep a comprehensive record of alleged violations. The commissioners felt that in order to fulfill the Commission's mandate objectively, they had to analyze the information systematically and the database permitted them to do so.<sup>108</sup> The

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<sup>105</sup> *First Interim Report*, *supra* note 4; *Second Interim Report*, *supra* note 21.

<sup>106</sup> *Final Report*, *supra* note 24.

<sup>107</sup> The annexes were not attached to the report but are nevertheless part of it. See *generally* section *infra* entitled "Annexes to the Final Report." The annexes will be released as U.N. Doc. S/1994/674/Add.2 (vols. I–V) (1994).

<sup>108</sup> *First Interim Report*, *supra* note 4, ¶¶ 22–23.

Commission also stressed that the database could be only "as effective as the evidence received."<sup>109</sup> According to the Commission, many of the reports that it had received were not complete, lacking necessary information, such as names and locations. Additionally, reports seemed to rely on secondhand information, such as media sources. Therefore, the Commission requested that governments submit the files on which their reports had been based.<sup>110</sup> The Commission also discussed the necessity of obtaining tangible evidence, such as statements and forensic reports, on its own.<sup>111</sup>

The *First Interim Report* also contains a lengthy and important discussion of issues of law in relation to the conflict in the former Yugoslavia. The Commission determined that the character and complexity of the armed conflict in the region, considered in conjunction with agreements the parties had made, such as declaring themselves bound by the Geneva Conventions and the 1977 Protocols thereto, justified categorizing the situation as an international armed conflict subject to the international law of armed conflict and international humanitarian law.<sup>112</sup>

### *Second Interim Report*

The *Second Interim Report* covers the period February 1993–August 1993 and discusses the following: (1) implementation of the Commission's projected plan of work set forth in the *First Interim Report*; (2) future projects to be undertaken; and (3) resources and budget requirements. This report describes plans to conduct on-site investigations of mass graves and detention facilities.<sup>113</sup> Knowing that the cooperation of local authorities was necessary to this undertaking, the Commission held talks

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<sup>109</sup> *Id.* ¶ 28.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* ¶ 32.

<sup>112</sup> *See id.* ¶ 45.

<sup>113</sup> *Second Interim Report, supra* note 21, ¶¶ 76–80, 84–86.

with a series of officials.<sup>114</sup> In addition, the Commission stated its intention to use seconded personnel from various countries for the purpose of conducting these investigations.<sup>115</sup>

### *Final Report*

The *Final Report* is a comprehensive account of the Commission's work and findings, addressing (1) its mandate, structure, and methods of work; (2) applicable law; (3) general studies on the military structure of the warring factions and on ethnic cleansing; (4) substantive findings on ethnic cleansing that relate to the county of Prijedor, the battle and siege of Sarajevo, a field investigation conducted in Sarajevo, a field investigation of the Medak Pocket, detention facilities, rape and other forms of sexual assault, mass graves in general and mass grave investigations conducted in Ovcara and Pakracka Poljana, the destruction of cultural property, the battle of Dubrovnik, and the radiological investigation conducted in UNPA Sector West; and (5) conclusions and recommendations.

The *Final Report* deals with a number of questions of law that the Commission thought needed clarification. Questions of command responsibility and superior orders are well established in customary international law.<sup>116</sup> However, because of certain claims by members of the warring factions, the Commission decided to affirm the inviolability

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<sup>114</sup> *Id.* ¶ 12. During April 18–29, 1993, the Commission sent a delegation to the region of the former Yugoslavia. *Id.* ¶ 13. Chairman Kalshoven, Commissioner Fenrick, and I traveled to Zagreb and Belgrade. *Id.* ¶ 13 n.7. Then, Chairman Kalshoven went on to Ljubljana, while Commissioner Fenrick and I went to Sarajevo. *Id.* Commissioner Fenrick went to Knin May 17–19 to meet with the Prime Minister of Knin to request permission to conduct the mass grave exhumation at Ovcara. *Id.* ¶ 17.

<sup>115</sup> *Id.* ¶¶ 97–101.

<sup>116</sup> See, e.g., United States v. Yamashita (1945), in 4 UN War Crimes Comm'n, *Law Reports of Trials of War Criminals* 1 (1947), *aff'd*, 327 U.S. 1 (1946); United States v. Ohlendorf (Einsatzgruppen Case), in 4 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946–April 1949*, Case No. 9 (1949–1953); William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1 (1973); Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982).

of the international humanitarian law applicable to the conflict.<sup>117</sup> It is also important to note that the Geneva Conventions were incorporated into the Criminal Code of the former Socialist Federal Republic of Yugoslavia. Moreover, the same acts that constitute grave breaches, such as murder, rape, and wanton destruction of property, are common crimes in the criminal codes of all the new republics that have emerged in the region. Claims by some of the warring factions with respect to reprisals also made it necessary to explain the limits of this concept under international humanitarian law.<sup>118</sup> Additionally, the Commission thought that it was important to affirm that both Protocols I and II of the Geneva Conventions apply to this conflict even though neither instrument is mentioned in the Statute of the Tribunal.<sup>119</sup>

The *Final Report* also addresses the scope of crimes within the competence of the International Tribunal,<sup>120</sup> particularly under articles 4 and 5 of the Statute. Thus, the report sought to clarify certain aspects of the category of crimes against humanity, particularly with respect to the element of intent and the selection of groups as part of a policy of persecution.<sup>121</sup> In order to be convicted of crimes against humanity, one must have had the intent to engage in specific conduct against a given

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<sup>117</sup> *Final Report*, *supra* note 24, ¶¶ 41-109.

<sup>118</sup> *Id.* ¶¶ 63-66.

<sup>119</sup> *Id.* ¶ 51; Statute, *supra* note 9, art. 2 (jurisdiction over grave breaches of the Geneva Conventions of 1949); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

<sup>120</sup> *Final Report*, *supra* note 24, ¶¶ 41-109. For a discussion of rape and other sexual offenses, see C.P.M. Cleiren & M.E.M. Tijssen, *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, in this issue of *Criminal Law Forum*.

<sup>121</sup> *Final Report*, *supra* note 24, ¶¶ 83-86; Statute, *supra* note 9, art. 5. See generally M. Cherif Bassiouni, *Crimes against Humanity: The Need for a Specialized Convention*, 31 Colum. J. Transnat'l L. 457 (1994).

group. The acts must be done as part of a systematic policy of persecution against this group. The intent to persecute or the intent to develop a policy of persecution is demonstrated objectively by the conduct that took place.

With respect to the crime of genocide, the Commission took the position that the definition of this crime in the Genocide Convention of 1948 is not static.<sup>122</sup> Rather, the definition is sufficiently pliable to encompass not only the targeting of an entire group, as stated in the convention, but also the targeting of certain segments of a given group, such as the Muslim elite or Muslim women. Furthermore, a given group can be defined on the basis of its regional existence, as opposed to a broader and all-inclusive concept encompassing all the members of that group who may be in different regions or areas. For example, all Muslims in Bosnia–Herzegovina could be considered a protected group. One could also define the group as all Muslims in a given area of Bosnia–Herzegovina, such as Prijedor, if the intent of the perpetrator is the elimination of that narrower group. In the context of the conflict in the former Yugoslavia, Albanians, Croats, Gypsies, Hungarians, Muslims, Serbs, and others constitute ethnic groups and "may, at least in part, be characterized by religion, ethnicity and nationality."<sup>123</sup> That is, it may be possible to consider the inhabitants of a given area irrespective of their religion as part of the entire group, as well as an identifiable group on its own, protected in either case by the Genocide

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<sup>122</sup> *Final Report, supra* note 24, ¶ 96; Statute, *supra* note 9, art. 4; Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, art. 2, 78 U.N.T.S. 277. The Statute incorporates the convention's definition verbatim:

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

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

<sup>123</sup> *Final Report, supra* note 24, ¶ 95.

Convention as incorporated into article 4 of the Statute.<sup>124</sup> For example, all Bosnians in Sarajevo, irrespective of ethnicity or religion, could constitute a protected group.

One of the major differences between genocide and crimes against humanity is that in order to establish genocide, the prosecution must show an intent to destroy the group in whole or in part, whereas in regard to crimes against humanity there is no requirement of destruction of the group. To establish the latter type of crime, the prosecution must show only an intent to persecute through a policy of systematic conduct, which can be proven by either a pattern of behavior or individual acts.

Since the *Final Report* was much longer than the UN standard of 30 pages, a waiver was needed in order to publish it. The report was completed in a relatively short period of time during the month of April 1994. It took into account all of the data and tentative conclusions contained in the annexes, which were still being completed. In effect, the report synthesizes the roughly 3,200 pages of material set out in the annexes. Regrettably, after April, the so-called warring factions, and several governments—in particular, note the Federal Republic of Yugoslavia submission in May 1994—indicated that additional information was available. Given the number of violations that occurred prior to the preparation of the *Final Report* and annexes and given that the conflict continues, it is certain that more crimes within the jurisdiction of the Tribunal have occurred. The termination of the Commission also means that there is no investigatory body to monitor continuing violations and to persist in gathering evidence related to policies and patterns of violence, such as ethnic cleansing and systematic rape. Whatever the Commission did on these and other subjects discussed in the *Final Report* and its annexes will remain as the only historic record available to document this tragic conflict.

#### *Annexes to the Final Report*

The *Final Report* incorporates by reference twelve annexes, which include a series of subannexes that bring the total number to twenty-three.

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<sup>124</sup>

See *id.* ¶ 96.

These twenty-three discrete reports run to about 3,200 pages of detailed information and analysis. The *Final Report* of the Commission states that the annexes are an integral part of the report and must therefore be published.<sup>125</sup> According to the letter by which the Secretary-General transmitted the *Final Report* to the Security Council:

The final report includes several annexes containing reports of investigations and studies, which as a whole constitute an integral part of the report. In his letter to me of 6 May 1994, the Chairman of the Commission requested that the annexes be published, although for cost purposes and given their volume (approximately 3,000 pages) it was suggested that they be published in English only and funded from the remaining surplus in the Trust Fund of the Commission of Experts.<sup>126</sup>

Because the Commission was terminated before it could complete its program of work, the trust fund held over \$230,000 as of May 1994. The Commission allocated this entire sum to the publication of the annexes, and the Secretary-General agreed to this proposal.

After the appointment of Judge Richard Goldstone of South Africa as prosecutor,<sup>127</sup> the OLA decided that he should have a chance to review the annexes to prevent the disclosure of sensitive information. Even though the Commission's findings are independent and not subject to anyone's veto, as chairman I considered this step to be reasonable and judicious. The process, however, took some time. The United Nations received the final text of the annexes on December 22, 1994, for distribution to the Security Council and for publication.

Annexes I–I.C are relatively short administrative or descriptive accounts prepared by the Commission's secretariat<sup>128</sup> or by IHRLI staff

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<sup>125</sup> *Id.* ¶¶ 39–40.

<sup>126</sup> *Id.* at 2.

<sup>127</sup> See *supra* note 11.

<sup>128</sup> At the time, the Commission's secretariat included Vladimir Kotliar, Secretary; Bruna Molina-Abrams, Deputy Secretary; and Julio Baez, Assistant Secretary. The Commission's first Secretary was Jacqueline Dauchy.

under my supervision.<sup>129</sup> Annex I contains the Commission's Rules of Procedure, which were appended also to the *First Interim Report*.<sup>130</sup> Annex I.A includes an extensive explanation of the IHRLI database and documentation center and a description of the documents received by the Commission and catalogued by the IHRLI documentarian.<sup>131</sup> Annex I.B lists the thirty-four missions undertaken by the Commission.<sup>132</sup> Annex I.C lists and acknowledges the many organizations that assisted or supported the work of the Commission.<sup>133</sup>

Commissioner Cleiren prepared Annex II, which is an 18-page report on the criteria for applying international humanitarian law to the crime of rape and other sexual assaults.<sup>134</sup> In her analysis, she addresses sexual assaults not only on women but also on men and children.<sup>135</sup>

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<sup>129</sup> Overall responsibility for editing the annexes was given to Carolyn Durnik and Marcia McCormick. The following staff attorneys assisted in the preparation of reports: Patsy Campbell, Carolyn Durnik, Georgann Grabiec, Marcia McCormick, Suzan Ozturk, Peter Spies, and Carson Wetzel. The following staff analysts assisted in the preparation of reports: Daniel Bronson, Richard Danis, Mirande Dupuy, Sebastien Mancel, Christine Matthews, Azra Mehdi, James Rogan, Diane Silverman, John Stomper, John Tomasic, Stacey White, Monica Witczak, and Mario Zadro.

<sup>130</sup> See *supra* note 30.

<sup>131</sup> Carson Wetzel, IHRLI Staff Attorney, was the principal analyst for Annex I.A.

<sup>132</sup> The Commission's secretariat prepared Annex I.B. Some missions were for reconnaissance purposes in order to decide whether an investigation should be conducted or in order to prepare for an investigation.

<sup>133</sup> The Commission's secretariat prepared Annex I.C.

<sup>134</sup> Commissioner Cleiren was assisted in the preparation of Annex II by Melanie E.M. Tijssen, Attorney and Assistant to Professor Menno Kamminga, Professor of Public International Law, Erasmus University of Rotterdam, the Netherlands.

<sup>135</sup> Although international humanitarian law does not specifically address violent sexual crimes against men, to exclude them would amount to impermissible discrimination on the basis of sex under international law. *E.g.*, Universal Declaration of Human Rights arts. 1-2, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 3, 999 U.N.T.S. 171.

Children are specifically protected by several international conventions. *E.g.*, Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990).



Annex III describes the basic military structure of the warring factions and the structure, strategy, and tactics of the military forces engaged in the conflict.<sup>136</sup> This 37-page annex looks specifically at the Yugoslav Army and its predecessor, the JNA; the Bosnian Serb Army; the Croatian Army; the Croatian Defense Council; and the Bosnian Army. Because the various forces were organized only recently, put together for the most part from the JNA or local territorial defense forces, the annex also sets out a history of the Yugoslav military and the territorial defense forces from World War II to the present.

Annex III.A details the activities of the "special forces" and paramilitary groups that have engaged in fighting during the conflict, acting either on their own or in conjunction with the regular military forces.<sup>137</sup> The report identifies not only the paramilitary groups but also the party to the conflict for which they have been fighting.<sup>138</sup> Sources consulted in preparing this report included documents and audio- and videotapes collected by the Commission or by IHRLI, as well as media reports. All information relating to the activities of paramilitary groups was analyzed, but general references, such as "Serbian paramilitaries," were not included in the statistical data. Only reports containing specific names of paramilitary organizations or names of leaders were used to prepare the annex. Based upon the documents, information sheets were generated for each identified paramilitary group and were used to make comparisons among the groups. The information sheets included the name of the unit, ethnicity, uniform, number of troops, place of origin, area(s) of operation, political affiliation, leader(s), alleged members,

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<sup>136</sup> Annex III was prepared by me with the assistance of Richard Janney, IHRLI Staff Attorney; Peter M. Manikas, IHRLI Staff Attorney; and Edmund A. McAlister, Assistant to M. Cherif Bassiouni.

<sup>137</sup> Annex III.A was prepared under my direction. Mark W. Bennett, IHRLI Staff Attorney, was the principal legal analyst.

<sup>138</sup> Due to the uneven quality (with much of the information not verified) and the paucity of documents received by the Commission, the report should not be considered comprehensive. More groups may be discovered or their identity clarified upon further investigation. The documents received indicated 83 paramilitary groups as follows: 56 in support of Yugoslavia or the self-proclaimed Serb republics in Bosnia and Croatia; 13 in support of Croatia; and 14 in support of Bosnia-Herzegovina.

source(s) of information, and alleged activity. The annex comprises about 300 pages of material.

Annex IV pertains to the policy of ethnic cleansing.<sup>139</sup> This 90-page report contains three sections: first, a history of conflicts in the former Yugoslavia dating back to the first century A.D.; second, an analysis of the policy of ethnic cleansing; and, third, a study of the town of Zvornik, which was prepared by the Ludwig Boltzman Institute of Human Rights (Vienna, Austria). Since the ethnic rivalries in the territory of the former Yugoslavia are historically rooted, the first section describes the origins of the rivalries and the region's turbulent past in the hope of providing an understanding of the perspective of the parties involved in the current conflict. The second section examines the policy and practice of ethnic cleansing in the region, with an emphasis on the case of Serbian forces attempting to create a "Greater Serbia" by seizing territory in Bosnia-Herzegovina and Croatia.<sup>140</sup> The third section focuses on the town of Zvornik and the expulsion of almost its entire Muslim population.<sup>141</sup> The Boltzman Institute relied on information that it gathered from an evaluation of five hundred interviews of Bosnian refugees from the Zvornik area, which were conducted as part of a larger interview study involving nine hundred Bosnian refugees from the area. The institute also conducted thirty-one interviews itself, using experienced, bilingual interviewers who were specifically trained for this mission. The institute developed a complex questionnaire for the interviews. Among other things, refugees were asked to reconstruct in chronological order the events surrounding their expulsion and to identify perpetrators.

Commissioner Greve prepared Annex V, an extensive report on

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<sup>139</sup> Annex IV was prepared by me with the assistance of Peter M. Manikas and Jan Brakel, IHRLI Staff Attorneys.

<sup>140</sup> *Id.* ¶ 2 defines "ethnic cleansing" as "the rendering of an area ethnically homogenous by using force or intimidation to remove persons of a given ethnic group from the area."

<sup>141</sup> Zvornik is situated on the Drina River, which marks the border between Bosnia-Herzegovina and Yugoslavia. The town is strategically important because it links these areas by both a road bridge and a railroad bridge. The bridges are significant in terms of troop movements from Serbia to Tuzla and Sarajevo. Of course, the bridges are important to Bosnian forces for the same reason.

the genocide and ethnic cleansing that occurred in the county of Prijedor, in northwestern Bosnia–Herzegovina.<sup>142</sup> Commissioner Greve based the approximately 140-page report on more than four hundred statements given by surviving victims and witnesses. In addition, she relied on local Serbian media reports of the events and her own research. Her investigation resulted in an in-depth and comprehensive report on the purge of Muslims and Croats from the county of Prijedor and the alleged violations of international humanitarian law that they suffered. However, the report is not likely to be published at this time because of the sensitive material it contains and because of impending indictments.<sup>143</sup>

Annex VI is a lengthy chronology and analysis of the battle and siege of Sarajevo.<sup>144</sup> The 1,300-page report covers the period April 5, 1992–February 28, 1994. The analysts relied on incident reports from the IHRLI database; source documents received by the Commission, particularly daily, weekly, and monthly UNPROFOR reports recording the number of shells entering the city; and media accounts of attacks on Sarajevo. The annex contains information on daily combat and shelling

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<sup>142</sup> Because of the confidential nature of the material contained in Commissioner Greve's report, the complete annex will not be published until sometime in the future. Morten Bergsmo, whose services were contributed by Norway, assisted in the preparation of this report.

<sup>143</sup> However, the study on Prijedor and other information submitted by the Commission to the office of the prosecutor were relied upon in the application by Prosecutor Goldstone to Germany on November 8, 1994, to defer to the Tribunal in the prosecution of Dusko Tadic. For background, see Melinda Crane-Engel, *Germany vs. Genocide*, N.Y. Times, Oct. 30, 1994, § 6, at 56, available in LEXIS, World Library, Allnws File; *Yugo War Crimes Court Asks Germany to Extradite Bosnian Serb*, Agence France Presse, Nov. 8, 1994, available in LEXIS, World Library, Allnws File.

On February 13, 1995, Prosecutor Goldstone returned 21 indictments for war crimes and crimes against humanity allegedly committed in the Prijedor area. Prosecutor of the International Tribunal for the Former Yugoslavia v. Dusan Tadic and Twenty Named Co-defendants, Attachment to Tribunal Press Release, Feb. 13, 1995, U.N. Doc. CC/PIO/004-E (1995); Jon Henley, *Serb Jailers Charged with Murder, Rape, and Torture*, The Guardian (Manchester), Feb. 14, 1995, available in LEXIS, World Library, Allnws File.

<sup>144</sup> Annex VI was prepared under my direction. William B. Schiller, IHRLI Staff Attorney, was the principal legal analyst.

activity; specific targets hit; known damage to targets; sniping activity; and total casualties reported. The annex also contains an account of daily military activities and international events, such as peace negotiations, related to the battle and siege. The purpose of the chronology is to record the events and effects of the battle and siege and to evaluate patterns of violations, as well as to determine command responsibility.

Annex VI.A also concerns Sarajevo.<sup>145</sup> The Commission decided to investigate a specific incident in the siege of Sarajevo to determine the feasibility of identifying and prosecuting alleged perpetrators. The Commission sent Commander Fenrick and a team of Canadian military lawyers to conduct the investigation. They chose to investigate the mortar shelling of a soccer game in Dobrinja, a suburb of Sarajevo, which occurred on June 1, 1993.<sup>146</sup> The investigation team interviewed many Bosnian witnesses but was unable to interview Serbian witnesses. Additionally, the team reviewed an UNPROFOR analysis of the mortar craters resulting from the shells. From the information gathered, the team wrote a six-page report.

Annex VI.B is a 37-page study of the battle and siege of Sarajevo and the law of armed conflict. The study was prepared by Commander Fenrick and Major A.J. van Veen, a military lawyer from the war crimes investigation team seconded by Canada, who visited Sarajevo in mid-1993, meeting with Bosnian officials and military personnel and visiting several areas that were shelled during the siege. The objective of the study was to impute command responsibility for violations of the laws of war. For this purpose, the authors prepared an analytical survey of the battle and all violations committed.

Annex VII is a 16-page report on the Medak Pocket operation, which occurred in early September 1993.<sup>147</sup> As discussed earlier,

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<sup>145</sup> Annex VI.A was prepared by Sergeant J.L. Lamothe and Warrant Officer S. Murray-Ford, members of the Canadian war crimes investigation team, see *supra* note 26, under the direction of Commissioner Fenrick.

<sup>146</sup> The team did not choose the incident prior to arriving in Sarajevo. Criteria such as number of casualties and sources of information were used to determine which incident to investigate.

<sup>147</sup> Annex VII was prepared under the direction of Commissioner Fenrick. Major J.C. Holland, Canadian Armed Forces, was the principal legal analyst.

Croatian forces entered and attacked an area of small, rural villages known as the Medak Pocket. After agreeing to relinquish the territory, the forces allegedly destroyed and burned everything before they left. UNPROFOR troops arrived at the end of the retreat and were able to collect a significant amount of evidence. The investigation team produced the annex from several witness interviews that it conducted, as well as the UNPROFOR report.<sup>148</sup>

Annex VIII concerns prison camps and detention facilities within the territory of the former Yugoslavia.<sup>149</sup> The report spans 880 pages divided into two sections. The first section is a summary analysis that contains a discussion of methodology; the total number of detention facilities; the total number of detention facilities broken down by ethnic group in control; the total number of detention facilities by geographic region; and a discussion of patterns and commonalities identified from various reports. The second section divides the facilities by main regions (Bosnia–Herzegovina, Croatia, Yugoslavia, and Slovenia) and then by counties within those regions. Organized and analyzed by location, the documents relating to detention facilities yielded the following information: (1) the name, location, dates of operation, and physical description of the facilities; (2) the identity and ethnicity of camp commanders, guards, and anyone else involved in the operation of a given camp; (3) the ethnicity of prisoners and whether they were civilians or military personnel; (4) the transfer of prisoners from one camp to another; (5) the total reported prisoner population of a given camp; and (6) the treatment of prisoners and camp conditions, such as the availability of food, bathroom facilities, sleeping accommodations, and medical care, as well as the number of prisoners in one room.

Three annexes concern the issue of rape and sexual assault. The first, Annex IX, is an analysis based upon documents collected by the Commission and incident reports in the IHRLI database that include allegations of rape and sexual assault.<sup>150</sup> From these materials, summary

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<sup>148</sup> See *supra* note 55.

<sup>149</sup> Annex VIII was prepared under my direction. Eric S. Krauss and William B. Schiller, IHRLI Staff Attorneys, were the principal legal analysts.

<sup>150</sup> Annex IX was prepared under my direction. Marcia McCormick, IHRLI Staff Attorney, was the principal legal analyst.

sheets were created for each allegation, setting out information such as the identity of victims, witnesses, and perpetrators; the date and location of the incident; the source of the report; and the method used to record the information. The sheets also summarize the incident itself. As with Annex III.A, the summary sheets were used as an analytical tool to compare information in a standardized format. The summaries were organized geographically, divided by the setting in which the rape occurred (custodial or noncustodial), and then arranged chronologically within the categories of custodial and noncustodial setting. The analytical portion of Annex IX is divided by geographical location as well. The 123-page report identifies specific individual cases of rape, as well as patterns or policies of rape, providing a foundation in fact for the allegation that rape has been used as an instrument of war.

Annex IX.A is a 62-page report on the sexual assault investigation conducted by the Commission in March 1994.<sup>151</sup> The annex contains two parts. Part one is a report by the interview coordinator, which contains the following: (1) a discussion of the methodology used both to choose the victims and witnesses to be interviewed and to conduct the interviews; (2) comments regarding the substance of allegations; (3) recommendations for further investigation; and (4) the plan of action for the interview process. Part two is a report by the mental health team, which discusses the activities and role of these experts, as well as the psychological effects of giving testimony and the psychological and physical status of those interviewed.

Annex IX.B is an eight-page report on a pilot rape study conducted in Sarajevo.<sup>152</sup> The investigation team consisted of two Canadian military police investigators and a Canadian military lawyer. Sarajevo was the chosen site because the Bosnian War Crimes Commis-

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<sup>151</sup> Annex IX.A was prepared under my direction. Karen Kenny, Consultant to the Commission of Experts and Interview Coordinator for the investigation, was the principal legal analyst. Dr. Stephanie Cavanaugh, Consultant to the Commission, was the principal psychiatric analyst.

<sup>152</sup> Annex IX.B was prepared under the direction of Commissioner Fenrick. Lieutenant-Colonel Kim S. Carter, Canadian Armed Forces and Consultant to the Commission of Experts, was the principal legal analyst. Petty Officer J. Ross and Master Corporal T. McCombe, Canadian Armed Forces, served as the investigators.

sion and the League for the Help of Victims of Genocide are located in Sarajevo. Both organizations previously indicated that they had collected extensive information regarding rape. The objective of the study was to assess the feasibility of prosecuting alleged perpetrators and their superiors in certain cases of rape.

Three annexes were produced regarding the issue of mass graves. Annex X is a study based on 10,000 pages of documents received by the Commission and on database incident reports related to mass graves.<sup>153</sup> This 106-page report contains two sections. The first is a summary analysis of the information that discusses the methodology of the report and indicates the total number of graves, the number of graves in each geographic region, the number of graves by ethnicity of victims and perpetrators, the number of graves near detention facilities, and other information. This section also discusses patterns, trends, and commonalities identified from the various sources of information. The second section is an analysis by geographical location and describes grave sites by county, including information, when available, on the military activity in the county at the time the grave was created.

To compile and organize information for this report, IHRLI staff created a separate mass grave database within the main database. When an incident report of a mass grave was entered into the database, it was cross-checked against any information already entered to avoid duplication. Thus, if a file regarding a specific grave site already existed, any additional information was entered into the existing file; if a report concerned a new grave, a new file was opened for the site and the information was entered. The files allowed the analysts to organize a great deal of information and to corroborate accounts of mass graves.

Annex X.A is a report on the mass grave investigation conducted in Ovchara, in UNPA Sector East, Croatia.<sup>154</sup> This 14-page annex contains a report by the Canadian war crimes investigation team and a report by the forensic team. The Canadian team describes their efforts

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<sup>153</sup> Annex X was prepared under my direction. Georgann Grabiec, IHRLI Staff Attorney, was the principal legal analyst.

<sup>154</sup> Commissioner Fenrick prepared Annex X.A with the assistance of members of the Canadian war crimes investigation team, members of the Royal Netherlands Army, and Dr. Eric Stover of Physicians for Human Rights.

to obtain the necessary permission from local Serbian authorities to conduct the investigation and all events leading up to UNPROFOR's securing the area. The forensic team, Physicians for Human Rights, discusses the technical equipment and procedures that were used during the preliminary site preparation, such as electronic mapping procedures, and that were to be employed during the mass grave exhumation.

Annex X.B concerns the mass grave exhumation at Pakracka Poljana, UNPA Sector West, Croatia.<sup>155</sup> It is substantially similar to Annex X.A but lengthier and more detailed because this exhumation was completed. The 47-page report comprises two parts: an interim report and an investigation report prepared by the Canadian team; and a forensic report by Physicians for Human Rights, which describes the methods employed to exhume the bodies and catalogue physical evidence, as well as the findings on how the victims were killed.

Annex XI is a 12-page study of the destruction of cultural property prepared by Commissioner M'Baye. The study does not attempt to cite every violation of the laws of war concerning the destruction of cultural property in the region. Rather, Commissioner M'Baye focused on two incidents: the battle of Dubrovnik (October–December 1991) and the destruction of the Mostar Bridge (November 9, 1993). The analysis of the incidents and the application of the laws of war are to serve as examples for the prosecutor to follow in investigating the deliberate destruction of cultural property.

Annex XI.A is a 33-page study of the battle of Dubrovnik and the law of armed conflict.<sup>156</sup> A team of experts on the law of armed

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<sup>155</sup> Commissioner Fenrick prepared Annex X.B with the assistance of Major J.C. Holland and Major P. Olson, of the Canadian war crimes investigation team, members of the Royal Netherlands Army, and Dr. Eric Stover of Physicians for Human Rights.

<sup>156</sup> In 1979, UNESCO placed Dubrovnik on the World Heritage List. In 1991, the JNA attacked the town and caused extensive damage to historical, cultural, and religious property. The damage was allegedly out of proportion to what was reasonably necessary in light of valid military objectives. Therefore, the battle of Dubrovnik was chosen for a study of the laws of war as applied to the destruction of cultural property. Annex XI.A was prepared under the direction of Commissioner Fenrick by Major Oyvind Hoel, Norwegian Armed Forces; Dr. Colin Kaiser, Consultant to the Commission of Experts; Major Terje Lund, Norwegian Armed Forces; and Lieutenant-Colonel Dominic McAlea, Canadian Armed Forces.



conflict and an art historian were sent to Dubrovnik to investigate alleged damage to cultural property and civilians. The study attempted to determine when attacks on civilians and cultural property occurred and to ascertain the number of civilian deaths and injuries, as well as the extent of damage to civilian property and particularly cultural property. The study also attempted to attribute responsibility for violations of the law of armed conflict that occurred in the area. In the preparation of the annex, the team relied on the following evidence: oral and written statements of eyewitnesses; hearsay statements; photographs and videotapes; unexploded ordnance; reports from investigations conducted by national bodies, such as the civilian police, or other UN bodies, such as UNESCO; and a local criminal court judgment. In addition, the team sought out secondary sources of information to supplement its evidence.

Annex XII is a seven-page report on the radiological investigation of alleged nuclear waste dumping in UNPA Sector West, Croatia.<sup>157</sup> The allegations were not supported by the empirical results of this study, and there was no time to follow up subsequent claims by the Krajina Serbs about other sites.

The Secretary-General acknowledged in a letter to me the receipt of the annexes and their distribution to the Security Council:

I take this opportunity to reiterate my gratitude and appreciation for the work done by the Commission of Experts, as well as the skill, time and effort invested in the preparation of its Final Report and voluminous Annexes. I wish, in this connection, to single out the International Human Rights Law Institute . . . which, under your direction, established the data-base as the core project of the Commission.

The material and information collected and recorded in the data-base, now transferred to the Tribunal, will not only assist in the prosecution of persons responsible for serious violations of international humanitarian law, but will constitute

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<sup>157</sup> Annex XII was prepared under the direction of Commissioner Fenrick by Captain J.J.H.M. Limbourg and Sergeant Major C.C.L. Daelman of the Royal Netherlands Army Nuclear, Biological, and Chemical School.

a permanent documentary record of the crimes committed in the former Yugoslavia, and thus remain the memorial for the hundreds of thousands of its innocent victims.<sup>158</sup>

### THE COMMISSION'S TERMINATION

On April 30, 1994, the Commission indicated in writing to the Secretary-General that in the event of its discharge, the date should be July 31 of that year, in light of the Commission's proposed action plan. Some six months earlier, in its *Second Interim Report* (October 1993) to the Security Council, the Commission had outlined a plan of work based on a termination date of July 31, 1994. Thus, the Commission believed that the Security Council and the Secretary-General were in agreement on the appropriateness of this date. Also in October 1993, the Commission prepared its 1994 budget and submitted it to the OLA.<sup>159</sup> The budget closing date was likewise July 31, 1994. As late as November 2, 1994, I visited in New York with Mr. Fleischhauer and Mr. Zacklin, former and current OLA officials, respectively, and discussed the proposed budget. I also met with the Secretary-General at that time to brief him on the Commission's work and plan of action. No question was ever raised about the termination date of July 31, 1994.

Nonetheless, on December 13, 1993, then Under-Secretary-General for Legal Affairs and UN Legal Counsel Carl-August Fleischhauer had requested by letter that the Commission terminate its activities by April 30, 1994. No Security Council resolution ordered the termination of the Commission. Indeed, as noted earlier, Security Council Resolution 827, which established the Tribunal, stated that "pending the appointment of the Prosecutor of the International Tribunal," the Commission "should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva

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<sup>158</sup> Letter from Boutros Boutros-Ghali, Secretary-General of the United Nations, to M. Cherif Bassiouni, President, International Human Rights Law Institute, DePaul University, Jan. 4, 1995.

<sup>159</sup> See *supra* note 25 and accompanying text.

Conventions and other violations of international humanitarian law as proposed in its interim report."<sup>160</sup> Between the time of Fleischhauer's request and the Commission's termination, there was no prosecutor in office, only an acting deputy prosecutor without any legal or investigatory staff.<sup>161</sup> Thus, the Secretariat's decision of December 13 violated the spirit, if not the letter, of Resolution 827. Ironically, only a few days after the OLA's notice of termination, the General Assembly commended the Commission for its work and supported its continuation.<sup>162</sup>

The untimely termination had damaging results. The Commission cut short several of its investigations. For example, as previously mentioned, the Commission could not continue its exhumation of the mass graves in Ovcara and Pakracka Poljana. Additionally, the rape investigation needed to continue for at least two more months in order to be sufficiently comprehensive. Because this investigation had to end on March 31, 1994, over two hundred interviews throughout the former Yugoslavia alone could not be conducted.<sup>163</sup> Lastly, the premature termination did not give Yugoslavia the opportunity to present information and evidence that the government had indicated it would provide, nor was there time for Yugoslavia's report, submitted in May 1994 to the United Nations,<sup>164</sup> to be taken into account in the Commission's *Final Report*.

By letter dated March 2, 1994, the Deputy Legal Counsel in charge of the OLA, Ralph Zacklin, requested that the Commission transfer all of its documents and the contents of the database to the

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<sup>160</sup> S.C. Res. 827, *supra* note 10, preambular ¶ 10 (citation omitted).

<sup>161</sup> See *supra* note 11.

<sup>162</sup> *The Situation in Bosnia and Herzegovina*, U.N. GAOR, 48th Sess., U.N. Doc. A/48/L.50 (1993).

<sup>163</sup> There were approximately 200 more victims from Croatia and Bosnia-Herzegovina to be interviewed in Croatia, 7 Serbian victims to be interviewed in Belgrade, and an unspecified number of victims to be interviewed in Turkey at the request of the Turkish government. The Commission was left with having to ask the respective governments to conduct the interviews themselves and send the information to the prosecutor. Whether the governments did so is not known.

<sup>164</sup> *Yugoslavian Report*, *supra* note 53.

prosecutor's office. The Commission fully complied with this request and the transfer was complete by the time the Commission submitted its *Final Report* to the Secretary-General. As a result of the quick and unexpected transition, there was little opportunity for the Commission to review its work with the office of the prosecutor, which then consisted only of Acting Deputy Prosecutor Graham Blewitt and some secretarial staff.<sup>165</sup> Fortunately, since the appointment of Judge Goldstone, excellent collaborative relations have been established; members of the IHRLI staff and I have met with members of the prosecutor's staff in the Hague to discuss some of the Commission's findings and the database. This collaborative relationship was acknowledged by the Tribunal in its first annual report.<sup>166</sup> Furthermore, I worked closely with Prosecutor Goldstone and his staff in reviewing the annexes to make sure that they did not contain material that would be prejudicial to the prosecution. During this process, the prosecutor and his staff gave me their fullest cooperation, which I gratefully acknowledge.

### CONCLUSION AND ASSESSMENT

The creation of the Commission of Experts by the UN Security Council was unprecedented. This step set the stage, and served as a model, for the Rwanda Commission, which was established in July 1994,<sup>167</sup> as it will for similar undertakings in the future. A new, action-oriented body of this sort required a great deal of support from the UN structure, which the latter was not prepared to give. There were, of course, understandable administrative reasons for some of the Commission's start-up difficulties. To this, one must add the problems of a cumbersome UN bureaucracy and the fact that the OLA, which serviced the

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<sup>165</sup> Since the summer of 1994, Morten Bergsmo (Norway), William Fenrick (Canada), and Lieutenant-Colonel Anton Kempnaars (Norway) have joined the prosecutor's staff. Their presence ensures some continuity.

<sup>166</sup> The relationship between the Commission and the office of the prosecutor is acknowledged in *Tribunal Annual Report*, *supra* note 33, ¶¶ 157-158.

<sup>167</sup> See *supra* note 3.

Commission, was saddled with too much to do and had too few people to do it. Beyond that, however, it is hard to explain certain bureaucratic hurdles and delays that the Commission experienced. Above all, it is difficult to understand why no resources were made available by the General Assembly and why so few voluntary contributions were obtained from governments. If the Iran-*contra* investigation in the United States cost over \$40 million, how could a \$1.3 million trust fund be sufficient in the context of such large-scale victimization as has occurred in the former Yugoslavia? Perhaps in the future, the Security Council should allocate from its peacekeeping budget a sum for such commissions when it establishes them.

The premature termination of the Commission cannot be explained. Could it have been a purposeful political action to prevent the further discovery of the truth? Or was it simply an unwise administrative decision. Or perhaps it is the nature of the UN beast—part political, part bureaucratic—that accounts for what I believe to be an unconscionable outcome, no matter what the reason. It should be stated, however, that since the appointment of Hans Corell as Under-Secretary-General for Legal Affairs and Legal Counsel in February 1994, relations between the OLA and the Commission were excellent. Mr. Corell's support is gratefully acknowledged.

Despite the difficulties surveyed in this article, the Commission produced some extraordinary results. Without the foundation laid by the Commission, Prosecutor Goldstone would have had nothing to start with in the pursuit of his prosecutorial endeavors, even though many specific investigations will need to be conducted to convert the Commission's findings into indictable cases. The high visibility of the Commission and its work gave it credibility, which in turn gave the United Nations credibility. It also gave impetus to the Tribunal. Above all, the Commission established a significant, public record of violations that no one can ignore. Now justice is in the hands of the Tribunal. As stated in the *Final Report*:

It is particularly striking to note the victims' high expectations that this Commission will establish the truth and that the International Tribunal will provide justice. All sides expect this. Thus, the conclusion is inescapable that peace in the future

requires justice, and that justice starts with establishing the truth. The Commission would be remiss if it did not emphasize the high expectation of justice conveyed by the parties to the conflict, as well as by victims, intergovernmental organizations, non-governmental organizations, the media and world public opinion. Consequently, the International Tribunal must be given the necessary resources and support to meet these expectations and accomplish its task. Furthermore, popular expectations of a new world order based on the international rule of law require no less than effective and permanent institutions of international justice. The International Tribunal for the Prosecution of Persons Responsible for Serious Violation of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 must, therefore, be given the opportunity to produce the momentum for this future evolution.<sup>168</sup>

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<sup>168</sup>*Final Report, supra* note 24, ¶ 320 (citation omitted).