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ANNEX IX.B
RAPE PILOT STUDY (SARAJEVO)

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I. INTRODUCTION

1. A Cooperation Service Agreement relating to the employment of the Canadian War Crimes Investigation Team, dated 16 June 1993, and agreed to by the representatives of the United Nations and the Government of Canada, provides the legal framework for a pilot study on the issue of rape to be conducted in Sarajevo.
2. Three people, two military police investigators and one military lawyer conducted the pilot study. All members of this sub-team are female.
3. The rationale for attempting the pilot study in Sarajevo was that the State Commission for Gathering Facts on War Crimes in the Republic of Bosnia and Herzegovina (BiH) and the League for the Help of Victims of Genocide are located in Sarajevo. During a visit in April by the Commission's Chairman and Rapporteur for On-site Investigations, conversations with members of these groups indicated that they had already collected, and could make available, a substantial amount of information on this issue.

II. OBJECTIVE

4. The original objective of the pilot study was to prepare a report assessing the feasibility of prosecuting alleged perpetrators and, if practicable, their superiors in certain individual rape cases.

III. METHODOLOGY

5. It is useful to outline the actual work done in Sarajevo in order to convey the practical possibilities of such an investigation.

(a) Thursday, 24 June 1993 - the team arrived in Sarajevo in the early afternoon. A meeting was held with the four interpreters assigned to the group. After assessing the linguistic capabilities and temperaments of the interpreters, two women were selected to work on this project. Due to the dangers and difficulties of travelling to and from the Holiday Inn, it was decided that the interpreters should also stay at the hotel. This turned out to be a wise decision, since they were extensively employed in translating statements in the evenings, which would have been impossible outside the Hotel due to lack of electricity.

(b) Friday, 25 June 1993 - a morning meeting was held with representatives of the State Commission for Gathering Facts on War Crimes in the Republic of Bosnia and Herzegovina and the League for the Help of Victims of Genocide. As a result of that meeting, the team received a computer list of the information held by, as understood at the time, the League, which was described as the organization which coordinated all available information on this issue. The list was in Bosnian and divided into five parts: victims, witnesses, incidents, alleged perpetrators, and documents. At that meeting, the team also met Mrs. Azra Smajović the Vice-President of the League and its representative on the BiH War Crimes Commission. Arrangements were made with her to visit the Koševo Clinic, where a number of victims of rape had been treated and where the league files were kept. The team had been informed previously by the On-site Rapporteur that during his and the Chairman's earlier visit the League had stated that it had 89 files on named individuals who had been raped. Mrs. Smajović during this meeting indicated that she believed that only about 15 victims might still be available in Sarajevo for interviews.

(c) Saturday, 26 June 1993: Work continued on the translation and inputting of information from the list. In the afternoon, a visit was made to the Koševo Clinic. Dr. Šimić, the Head of Gynaecology and Obstetrics, gave the team a tour of those facilities. He indicated that 24 women had been treated in the past year as a result of rape and five had received abortions. None of them were currently hospitalized. He did, however, introduce the team to a 13-year old girl who he had operated on for a ruptured appendix, but who had suffered other internal injuries as a result of being raped. Dr. Šimić indicated that she was not yet strong enough to be interviewed, but that if we contacted him later in the week he would arrange for an interview. The team then went to another building in the Koševo Clinic complex, which was the headquarters of the League. There the Team met with Mrs. Smajović and Dr. Šadija Hadžisović, a psychologist and the head of the League. After some discussion, we established that the League had only nine files, seven of which related to women who had been raped. These files consisted of a single information sheet which was filled out on the victim. The team was informed that all the same material was available in the files of the Bosnian War Crimes Commission. Arrangements were made to obtain access to the files at the earliest possible date.

(d) Sunday, 27 June 1993: All the material was entered into notebook computers provided by the Commission. The team had developed a simplified database programme, based on the Chairman's information sheets. Unfortunately, even this more simplified version proved unworkable under "field conditions"; consequently, the investigators developed an even simpler, but workable, format. Information was sought from various UN sources regarding the rape issue.

(e) Monday, 28 June 1993 - the two investigators obtained permission to take the 105 files identified by the Bosnian War Crimes Commission as relating to rape to UNPROFOR Sarajevo Sector to be photocopied. It is perhaps useful to emphasize the great amount of time it takes in Sarajevo to achieve tasks which might take only a few hours in a more normal European or North American context. There were no telephones, in most cases no electricity, and severe restrictions on movement due to sniper fire and shelling, in addition to having to work through interpreters.

(f) Tuesday, Wednesday, 29-30 June 1993: Translated and input information from the file.

(g) Thursday, 1 July 1993: Investigators conducted an interview of the young girl in the Kosevo Clinic who had been identified as a victim of rape. Dr. Šimić also informed the investigators that another woman who was four months pregnant had just come in that day asking for an abortion. She was identified by him as a rape victim who had been recently exchanged by the Bosnian-Serb authorities as part of a personnel exchange. He indicated that he would speak with her and ask if she would agree to be interviewed. Work also began on correlating the information being translated and input. Two primary candidates for interviewing were selected. Preliminary discussions with representatives of the Bosnian War Crimes Commission and the League indicated that it would be impossible for them to make those two people, or indeed any other victims, available for interviews.

(h) Friday, 2 July 1993: A formal request was conveyed to the Bosnian War Crimes Commission that the two victims identified be made available for an interview. It was decided that the best time and location would be 0900h on Monday at the Bosnian War Crimes Commission's offices. The translating and input of information from files continued.

(i) Saturday, 3 July 1993: The team was confined to hotel for most of

the day due to heavy shelling. UNPROFOR vehicles were not on the streets. The translation, input and correlation of reports was continued.

(j) Saturday, 4 July 1993: The team leader went to the Koševo Clinic to determine if the woman identified by Dr. Simić was available to be interviewed. Unfortunately, due to the influx of patients as a result of the heavy shelling the day before, she had already been released. The translation, input, and correlation of the reports was continued.

(k) Monday, 5 July 1993: The investigators went to the Bosnian War Crimes Commission offices to conduct the two interviews. Regrettably, the Bosnian War Crimes Commission indicated it had been unable to arrange the interviews. The translation, input, and correlation of reports received was continued.

6. The methodology followed by the team was to first obtain all relevant information in the possession of local groups in order to avoid unnecessary delays and duplication of effort. This material was then translated with priority being given to those files where it was indicated, or seemed most likely, that the victim was still available to be interviewed. The information from these files was then input in a simple, but effective, database to enhance preservation, correlation, and future use of the information. Concurrently, as victims became available, and if they were willing to speak to investigators, interviews were conducted. These interviews were recorded on audio and video tape. It was the intention of the team, had circumstances permitted, to also interview other witnesses to specific incidents.

IV. RESULTS

7. The team acquired a print-out of the BiH War Crimes Commission's database containing all the information identified as relating to the issue of rape. The database is organized into five categories, listing 126 victims, 113 incidents, 252 alleged perpetrators, 73 witnesses, and 100 documents.

8. In addition, the team acquired copies of all the files in the possession of the BiH War Crimes Commission and identified as relating to rape. A total number of 105 were obtained. All the material obtained from the BiH War Crimes Commission was in Bosnian and had to be translated. A first review of these files indicated that approximately eighty relate to allegations of rape. At best, these files consist, of copies of victims' handwritten statements. At worst, they contain a newspaper article or a government statement. The most complete file contains a single statement from a victim or a witness. The information has been translated, input, and incorporated into the analysis of, Annex IX, Rape and Sexual Assault.

9. The team had a video and audio record of the interview of the 13 year-old girl who was identified as a victim of rape.

V. LEGAL ANALYSIS

10. The 1907 Regulations Respecting the Laws and Customs of War on Land, recognized as customary international law, provide at article 46: "Family honour and rights, the lives of persons . . . must be respected." It is submitted that in the context and language of the times, this clearly indicates that rape, as a contravention of "family honour," is not permissible conduct.

11. Under Geneva Conventions I and II, Wounded and Sick on Land and Wounded, Sick and Shipwrecked at Sea, the protection provided to women from rape is a combination of the prohibition under article 12 against "violence to their persons" and the injunction that they be "treated humanely" and "be treated with all consideration due to their sex."

12. Women combatants are protected against rape while being held as prisoners of war under articles 13 and 14 of Geneva Convention III, which provide:

"Prisoners of war must at all times be treated humanely. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention . . . prisoners of war must at all times be protected, particularly against acts of violence . . . and against insults Prisoners of war are entitled in all circumstances to respect for their honour. Women shall be treated with all the regard due to their sex"

13. This analysis has as its foundation, the opinion of the Commission of Experts, expressed in paragraph 45 of its Interim Report (S/25274) of 10 February 1993 that:

". . . the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the former Yugoslavia."

Even if this were not the case, the Federal Republic of Yugoslavia, as a successor state to the former Socialist Federal Republic of Yugoslavia, as well as Croatia, Slovenia, and BiH, by declaration, are bound by common article 3 of the Geneva Conventions of 1949, prohibiting . . . "violence to life and person . . . [and] . . . outrages upon personal dignity, in particular humiliating and degrading treatment" . . . and article 4[2] of Protocol II of 1977 to the Geneva Conventions of 1949, prohibiting . . . "outrages upon personal dignity, in particular . . . rape, enforced prostitution and any form of indecent assault." Rape is a war crime. In conflicts to which international humanitarian law applies, it is prohibited by both customary law and specific treaties.

14. It is only in Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War that rape is specifically and directly prohibited. Article 27 provides: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Any such act which "wilfully causes great suffering or serious injury to body or health" constitutes a grave breach under article 146 of Geneva Convention IV.

15. Articles 75 and 76 of 1977 Additional Protocol I to the Geneva Conventions of 1949 contain specific prohibitions against rape, enforced prostitution and indecent assault of any woman, whether a combatant or a non-combatant. These articles prohibit:

". . . outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault . . . threats to commit any of the foregoing acts . . . Women shall be the object of special respect

and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."

16. As breaches of international humanitarian law, rape and those offences associated with it, in addition to constituting domestic offences, are clearly punishable under the domestic legislation of the former republics of Yugoslavia to the extent that legislation incorporates, in particular, the Geneva Conventions and Protocol I.

17. To the extent that rape and those other offences associated with it constitute grave breaches of the Geneva Conventions and Protocol I, other States, pursuant to article 147 of Geneva Convention IV and articles 80, 88 and 89 of Protocol I, are required to take prosecutorial action in regard to those persons against whom a case has been made. Alternatively, those States have a duty to cooperate in extraditing such persons.

18. Most recently, a number of such offences have been identified as falling within the jurisdiction of the International Criminal Tribunal, established to try serious war crimes committed in the territory of the former republics of Yugoslavia since January 1991.

19. The essential elements of the offences of rape, enforced prostitution and indecent assault are not specified in the applicable law. It is suggested that it is reasonable to take the approach that rape requires evidence of vaginal penetration, but that indecent assault encompasses all other forms of sexual assault on both male and female persons. Enforced prostitution of female persons is prohibited under both Geneva Convention IV and Protocol I. Enforced prostitution of male persons is only directly prohibited under Protocol I, though a strong argument can be made that such a prohibition is incorporated under a more general heading. The essential element of enforced prostitution would appear to be the forcing of an individual to engage in various forms of sexual relations with a number of partners. It is considered that there is no requirement for an "exchange" of services of a sexual nature for benefits. There is however a distinction between enforced prostitution and multiple acts of rape. The former would be more appropriately charged when an individual is held for a period of time by an individual, several individuals, or an organization and forced to engage in sexual relations with multiple partners. Individuals, themselves, might not actually rape a victim, but could nevertheless be involved in keeping them in a situation of enforced prostitution. The individuals who engaged in sexual acts with a victim of enforced prostitution might also be charged with rape or indecent assault.

20. The responsibility for such violations of international humanitarian law would rest with the individual perpetrators, but also, through the doctrine of command responsibility, with those higher in the chain of command who not only organized or condoned such action but also those who failed to deter or punish such action by troops or other individuals under their command. The standard commanders will be held to is: did they know, or ought they to have known (a wilful blindness/recklessness standard) that such actions were occurring and, being in a position or otherwise obligated to prevent such violations, did they fail to take the appropriate action.

VI. PROSECUTION DIFFICULTIES

21. Rape and other associated offences of a sexual nature are notoriously underreported in almost every society. This underreporting is exacerbated in direct proportion to the degree a society denigrates a victim for the offence perpetrated upon him or her. This cultural impact must be taken into account when trying to obtain reports of rapes, as well as while conducting interviews

with the victims and seeking the agreement of the victims to testify before a tribunal or similar body.

22. In order to obtain reports of rape incidents from victims it is recommended that long-term contacts be established with medical, social, and religious organizations, which may be more readily contacted by victims and which could assist them during the traumatic decision to report the rape and process of reporting. It is also recommended that a standard method of obtaining information from, and tracking the location of, victims and witnesses be developed in conjunction with such organizations in order to maximize the preservation and usefulness of the initial reports received.

23. Consideration must be given as to whether a victim's identity can be fully protected before and during trial proceedings, and whether a victim's testimony can, in some cases, be given outside a tribunal setting (i.e. in another location, or in a "commission evidence" setting).

24. It would also be useful to explore the extent to which the culture of a particular victim would permit testimony relating to other rapes and sexual assaults which she or he may have witnessed, even if the victim will not testify to what happened to her or himself.

25. Even with victims who are willing to give statements or testimony, there may be severe difficulties in obtaining from them sufficient details to substantiate convictions. For example, with relatively young and/or innocent victims with no prior sexual knowledge and/or experience, obtaining a description of what happened to them can be very difficult. There is a lack of concepts and terminology and a description may be: "then many men hurt me down there". It is recommended that techniques such as the use of anatomically-correct dolls be relied upon in interviews once it is established this is culturally acceptable.

26. A consequence of such difficulties is that the completion and retention of medical documents substantiating reports of rape become even more vital.

VII. LESSONS LEARNED

27. The most important lessons learned from this pilot study are:

(a) although the information obtained from the Bosnian War Crimes Commission is a useful starting point, it is neither as extensive nor as comprehensive as the team was led to believe. Also it was not being gathered and organized to assist in conducting investigations of offences nor in preparing prosecutions;

(b) information is available from a variety of sources, both local and international (i.e. UNPROFOR) but it is considerably less than "advertised". In addition, it is not being preserved, collected, and organized with the idea that it be useful for prosecution. To achieve that goal, dedicated personnel, most effectively those with police investigatory and law of armed conflict backgrounds, should be deployed as soon as possible in a pre-prosecution investigatory phase; and

(c) small teams, including a high proportion of female personnel, deployed for extended periods in specific geographic locations would be the most effective means of gathering such information.