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Commission of Experts Meeting Minutes Session 1

M. Cherif Bassiouni 1937-2017

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Internal Memorandum

TO: The Chairman and Distinguished Members of the United Nations Commission of Experts to Investigate Violation of International Humanitarian Law in the Former Yugoslavia

FROM: M. Cherif Bassiouni, Commission Member

SUBJECT: Discussion Paper for Meeting of November 4-5, 1992, United Nations Headquarters

DATE: October 30, 1992

1. The Commission, established pursuant to Security Council Resolution 780 (6 October 1992), mandates the examination, analysis and investigation of violations of international humanitarian law with a view to presenting evidence of grave breaches of the Geneva Convention and other violations of international humanitarian law.
2. Two specific tasks arise from Security Resolution 780. First, the Commission should "examine and analyse" available data. Second, the Commission should investigate situations disclosed by the examination and analysis of data. The final product to be produced by the Commission should be a detailed report, intended to "present evidence of grave breaches of the Geneva Convention and other international humanitarian law."
3. In light of its responsibilities, the Commission could divide its task into three phases:
 - **Phase One** should consist of the gathering, correlation and analysis of available data supplied by the sources indicated in Security Council Resolution 771 (13 August 1992) and incorporated by reference in Security Council Resolution 780 (6 October 1992). The sources of data include: international and regional bodies, governments, inter-governmental organizations, and non-governmental organizations. A question remains as to whether national organizations, the media, and private communications should be included.
 - **Phase Two** could be devoted to the Commission's own investigation and fact-finding. Such investigation would serve to verify data supplied by the various sources and uncover new information.

numerous organizations. In order for such data to be persuasive and effective, it must be supported and strengthened by verifiable facts. Toward this end, some degree of factual verification would likely be required even at Phase One. Once again, however, personnel, resources and other practical considerations will surely limit such verification in Phase One.

9. Phase One should be accomplished in a relatively short period of time. Whether or not this will be possible, however, will depend on the degree of specific expertise of any staff persons assigned to the Commission by the Secretariat. Additional staff support could be obtained from governments willing to second to the Commission expert personnel in the field of military and criminal justice. Alternatively, the Commission could make use of the volunteer services of academics and lawyers willing to assist the Commission or its individual members.
10. It should be noted that events likely to constitute grave breaches and other violations of international humanitarian law have occurred at different locations and between different combatants from different regions. Moreover, these combatants may be from different groups whose command and control may be uncertain. To contend with these complexities, a military expert who has been in the field with the U.N. forces in the former Yugoslavia should be seconded to the Commission.
11. The Commission must recognize that any type of criminal investigation requires resources, personnel, and the collection and preservation of legally relevant evidence. In order to do so, the Phase One report should outline a plan for Phase Two's eventual gathering and storing of evidence (i.e.; testimony, video recordings, photographs, forensic data, a computer data-base of evidence, etc.). In this respect, the Commission may only be able to suggest some future procedures.
12. In view of the above, it is recommended that the Commission only undertake Phase One as described, subject to any modification deemed appropriate by the Commission. The Commission's report of Phase One should indicate the practical steps necessary to carry out Phases Two and Three, which would require further consideration by the Secretary General or the Security Council before being undertaken.

ITEMS TO BE CONSIDERED FOR THE PROPOSED AGENDA
OF THE MEETING OF 4-5 DECEMBER

[To be forwarded to the Chairman]

1. Opening of the Meeting by the Secretary General;
2. Election of officers, (Vice-Chairman and Secretary);
3. Procedures of the Commission;
4. Goals, stages and timing of the Commission's work;
5. Methodology for data gathering, correlation and analysis (staff assignments);
6. Assignment of tasks among Commission members;
7. Voluntary research and staff assistance by non-U.N. staff and non-U.N. financial resources;
8. Operational and practical questions;
9. Schedule of future meetings;
10. Miscellaneous.

Opening remarks by the The Legal Counsel for the first meeting
of the Commission of Experts established pursuant to
Security Council resolution 780 (1992)

Mr. Chairman, distinguished Members of the Commission, on behalf of the Secretary-General I wish to welcome you to United Nations Headquarters for the inaugural meeting of the Commission of Experts established by the Secretary-General pursuant to the request of the Security Council contained in its resolution 780 (1992).

In requesting the establishment of this Commission, the Security Council has taken an important step towards strengthening the rule of law not only in relation to the grave breaches of the Geneva Conventions and international humanitarian law in the territory of the former Yugoslavia but also in the wider context of the codification and progressive development of international criminal law. It is surely no exaggeration to say that the international community will be closely observing the work of this Commission and its conclusions will be carefully scrutinized by governments, international organizations, humanitarian organizations and individuals around the world.

This Commission is unlike other bodies which have been established by the United Nations to investigate human rights

abuses. In the first place, its mandate gives to it broad powers not only to examine and analyze the information provided under Security Council resolutions 771 and 780 but also the power to obtain information through its own investigations or efforts. In presenting to the Secretary-General its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law, the Commission is clearly called upon to proceed not only as a fact-finding body in the classical sense but also as investigators whose task is to establish the evidence that will enable the Secretary-General to recommend further appropriate steps so that persons who commit or order the commission of grave breaches of international humanitarian law are held individually responsible for such breaches.

Secondly, the Secretary-General has established this Commission pursuant to a request of the Security Council, the organ which, under the Charter, has primary responsibility for the maintenance of international peace and security. Thus, in carrying out its mandate, the Commission is vested with the weight and authority which is attached to the Security Council.

The difficult task of the Commission cannot be underestimated. The information which will be made available by Governments and international organizations, humanitarian

organizations and individuals will be of varying degrees of utility and specificity. The need to gather more detailed information through your own investigations will, no doubt, call for the development by you of innovative working methods and procedures. In this, you can count on the full support of the Secretariat.

The Secretary-General attaches very great importance to and takes a close personal interest in the work of the Commission. Further, I wish to assure you of the fullest cooperation and assistance of the Office of Legal Affairs in your endeavours. In addition to myself, my Deputy Mr. Zacklin will be closely following the day to day functioning of the Commission. The Secretary of the Commission, Ms. Jacqueline Dauchy, is the most senior and experienced member of the Office of Legal Affairs in the servicing of legal bodies within the United Nations system, whether it be ad hoc Committees of the General Assembly or the International Law Commission. She will have as her immediate collaborators, Mrs. Noll-Wagenfeld, Legal Liaison Officer at the United Nations Office Geneva, and Mr. Julio Baez of the Treaty Section of the Office of Legal Affairs.

Mr. Chairman, this first, organizational, meeting takes place less than 30 days after the adoption of resolution 780. A number of documents have been prepared for the Commission by the

Secretariat, most importantly the information which has been received from States, international organizations, humanitarian organizations and individuals. We have included in this documentation the two reports of Mr. Mazowiecki, the Special Rapporteur of the Commission on Human Rights with whom we expect close collaboration. In addition, we have prepared for you a basic listing of international human rights instruments which may be relevant to your work. Undoubtedly you will have further requests for documentation and information which the Secretariat will provide for you.

Mr. Chairman, members of the Commission, it remains for me to wish you well in your important task and to assure you once more of my fullest support and cooperation.

Final

COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO
SECURITY COUNCIL RESOLUTION 780 (1992)

Minutes of the first meeting held at Headquarters
on 4 November 1992, at 11.00 a.m.

The Legal Counsel welcomed the members on behalf of the Secretary-General (see copy of his statement attached).

The Chairman, after highlighting the specific features of the Commission, as envisaged in Security Council 780 (1992), stressed that the Commission did not have a fixed goal. The material it would gather might serve for prosecution purposes but it was also possible that its report would have to stand on its own. Even so, its work would serve a useful purpose as a clear reminder that those involved did not have an unlimited right to use any means of warfare and that the international community recognized its duty to ensure respect for the rules of humanitarian law.

Provisional rules of procedure

With reference to rule 2, Mr. Bassiouni suggested to make use of conference calls and fax facilities.

As regards rule 3, Mr. Opsahl remarked that members would not be able to completely avoid questions. What should be expected from them was restraint. Mr. Bassiouni suggested that the Commission discuss, at the end of each meeting or series of meetings, the type of information it was ready to disclose. The Chairman concurred.

It was suggested that the records referred to in rule 6 take the form of confidential minutes which would be circulated to members of the Commission in English and French.

On rule 7, Mr. Opsahl asked whether it would not be more appropriate to envisage hearings rather than participation of States, organizations, etc. The Chairman, however, pointed out that, while the Commission might organize hearings, the comprehensive and neutral concept of participation was adequate. Mr. Bassiouni felt that, in general, the Commission should welcome all written communications and decide, on an ad hoc basis, on the usefulness of other forms of participation.

It was generally agreed that the Commission should make itself known to Governments and relevant UN organs and international organizations with the purpose of inviting all concerned to offer the information in their possession to substantiate allegations of violations of humanitarian law and that letters to that effect should be sent. At the same time the Commission would discretionarily decide on the ways in which other forms of participation might be enlisted.

As regards rule 8, Mr. Opsahl expressed doubts on the phrase "on its behalf".

Mr. Bassiouni said that, in his understanding, the delegation of authority would refer to the fact-finding functions but not to the evaluation of the evidence. The Chairman said he shared this interpretation.

The Legal Counsel suggested to reformulate paragraph 2 of article 8 as follows:

"The Commission may decide to request States to assist the Commission in the execution of its task to hear witnesses or experts".

The Commission agreed to defer the formal adoption of the rules of procedure until its next series of meetings.

Organization of work

In response to a question from the Chairman on the resources at the disposal of the Commission, the Legal Counsel indicated that resolution 780 (1992) did not provide for the allocation of funds and that the Commission was being serviced out of existing resources. He recalled that, in his report (S/24657), the Secretary-General had reserved the right to seek new appropriations should circumstances make this necessary. The Commission's servicing Secretariat was, at this stage, limited to three persons and would be enlarged if and when required. As for expertise unavailable in the Secretariat, several Governments had made offers which could be taken advantage of, depending on the Commission's needs.

Mr. Opsahl insisted on the urgency of the task to be accomplished by the Commission. Mr. Bassiouni concurred but pointed out that if it was publicized that the Commission was working, had received material, had the necessary supporting staff and had started to prepare evidence, these facts could, in themselves, have a positive impact on all concerned. He suggested that, as a first step, the material received or to be received by the Commission be drawn into a data base and presented the Commission with sample pages of a "Research Methodology for the Examination, Analysis and Verification of

International Humanitarian Law in the Armed Conflict in the Former Yugoslavia and the Ascertainment of Responsibility".

The Chairman pointed out that, in addition to analyzing reports of violations, the Commission would have to determine the law applicable. He recalled, in this connexion, that as regards internal armed conflicts, no rule gave an outside power the right to set up investigative bodies and that, in order to determine the applicable law in any given instance, it was necessary to determine the point in time where a national conflict switched to an international one. Existing law, with the line it drew between internal and international armed conflicts, would have to be interpreted in a way that made it effective in the Yugoslavian situation.

Goals of the Commission

Mr. Bassiouni observed that the Commission was called upon to examine and analyze information and to carry out its own investigation. This should lead to the presentation to the Secretary-General of a report highlighting evidence of grave breaches of international humanitarian law. The Commission should not see itself as an indicting chamber; it should rather make an assessment of types of victimization and try to identify patterns from which it would appear, for instance, that breaches in a certain area were ascribable to civilians, or to irregulars, or to commanding units of militias, etc., or that specific commanding units had repeatedly failed to prevent breaches. It might also single out particularly alarming reports such as reports on the discovery of mass graves and try to verify them by gathering relevant evidence (including, for instance, forensic evidence).

The Chairman warned against proceeding in stages. The Commission should, at all times, have in mind that its work might serve as a basis for establishing the individual criminal responsibility of the perpetrators of certain acts.

Mr. Opsahl stressed that a balance would have to be struck between what was feasible and what was, in the eyes of the public, desirable.

The Chairman concluded that the Commission should endeavour to identify trends and types of criminality, using specific material as illustration. He referred, in this connexion, to the Helsinki Watch report "War crimes in Bosnia-Herzegovina".

The meeting rose at 1.00 p.m.

COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO
SECURITY COUNCIL RESOLUTION 780 (1992)

Second meeting

Held at Headquarters on Wednesday, 4 November at 3.00 p.m.

Name of the Commission

Mr. Bassiouni suggested that the Commission should bear the name "United Nations Commission on violations of international humanitarian law in the former Yugoslavia".

The Secretary remarked that, at this stage, it might be preferable to retain the present title of the Commission.

Relations with the press

Mr. Bassiouni asked if the Commission could enlist the assistance of the press by writing to major newspapers.

The Secretary observed that the newspapers to be contacted might be difficult to select and would probably have to include those published in the area - which would in turn, give rise to problems, among others linguistic ones.

The Chairman suggested that the cooperation of reputable newspapermen might be enlisted through personal informal contacts.

Mr. Bassiouni stressed that the Commission should as soon as possible draw up guidelines for the assessment of information. Evidence obviously differed from information calling for further

verification (such as could be gathered from newspapers) and prima facie evidence did not have the value of evidence coming from a truly reliable source. Regional newspapers might provide a subjective one-sided view of events.

The Deputy Legal Counsel struck a note of caution as regards the relations with the press of a Commission established by the Security Council. He pointed out that DPI/N.Y. distributed daily collections of press clippings which might prove useful to the Commission. DPI/Geneva might be in a position to provide the same kind of service.

If the Commission found inadequate the information received prior to, or after, the time-limit of 6 November set by Security Council resolution 780 (1992), it could write to the President of the Security Council to request further information, specifying, if it deemed it appropriate, the type of sources or material it was particularly interested in. Such a request would reactivate the interest of States.

Possible cooperation with UNPROFOR and neighbouring States

Mr. Bassiouni asked if a liaison could be established between UNPROFOR and the Commission.

The Chairman enquired about the possibility of drawing up a form with rubrics such as "Type of act", "Date", "Place", "Victim(s)", "Perpetrator(s)", "Witnesses", "Proof", "Risk run by witnesses", etc., which could be sent to personnel in the field.

Mr. Opsahl stressed that the provision of such information might be incompatible with the disciplinary rules applicable in the context of peace-keeping operations.

The Chairman agreed that UNPROFOR might put its position at risk if it were known that it was taking part in data-collecting activities, activities which might furthermore be incompatible with its mandate. The problem existed in the context of the European Observer Corps, which, although it was not mandated to do so, had sent reports on breaches of humanitarian law. The Governments of the Twelve, however, were not eager to release that type of information.

Mr. Bassiouni wondered whether Governments should be asked, already at this stage, if they would be prepared to assist the Commission, for instance, by interrogating refugees.

The Chairman stressed that the parties and supporting governments might take offence if such approaches were made and also warned against the risk of jeopardizing the security of the individuals concerned.

Applicable law

Mr. Fenrick, after indicating that he would try to obtain different types of forms used in criminal investigations, said that the determination of the applicable law raised problems of State succession, recognition, differentiation between international and internal armed conflicts, etc. He drew attention to an article recently published in the American Journal of International Law on the legal status of the different parts of Yugoslavia as well as to another article contained in a recent issue of the Review of the ICRC and to documents negotiated with factions in order to determine the applicability of the Geneva Conventions and Protocols. He undertook to prepare for the next meeting of the Commission a study of the above mentioned problems.

The Deputy Legal Counsel, answering a question from Mr. Bassiouni, indicated that no study had been made in the Secretariat on the nature of the conflict. There was no doubt that the hostilities constituted an international armed conflict at least as of 13 July, the date of adoption of Security Council resolution 764 (1992). The resolution made it clear that all parties were bound to comply with the obligations under international humanitarian law but it did not specify what the applicable instruments were, except for a reference to the 1949 Geneva Conventions.

Mr. Fenrick suggested that if no agreement could be reached on the character of the conflict, resort could be had to the concept of crimes against humanity which included, for instance, genocide.

Mr. Bassiouni recalled that the Council, having established the Commission in the discharge of its responsibility for the maintenance of international peace and security, could not mandate it to investigate violations of criminal law which did not threaten international peace and security. The Commission had to read its competence in the light of the responsibilities of the Security Council. If, prior to a certain date, the conflict was not of an international character, it did not fall under the Geneva Conventions and the applicable law was either internal law or Additional Protocol II or the rules on crimes against humanity as embodied in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and recognized in the practice of some States (Canada, Australia and the United Kingdom).

The Chairman asked if, in this context, jurisdiction was national or universal.

Mr. Bassiouni recalled that at Nürnberg and Tokyo, no problem of sovereignty arose since Germany and Japan had surrendered unconditionally. He suggested to await Mr. Fenrick's report on the applicability of the Geneva Conventions and to then see if possible loopholes could be filled by resorting to the law on crimes against humanity, or to the rules contained in the locally applicable criminal codes.

The Deputy Legal Counsel indicated that if the Commission anticipated the need for such studies, it should so indicate so that scientific institutes could be approached and the necessary resources requested.

After a brief exchange of views on the possibility of enlisting the help of the Max Planck Institute Comparative Criminal Law Center in Freiburg and the assistance of the Chicago University, the meeting rose at 5.30 p.m.

COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO
SECURITY COUNCIL RESOLUTION 780 (1992)

Minutes of the third meeting

Held at Headquarters on Thursday, 5 November at 2.00 p.m.*

The Commission agreed on the following:

- (1) the Commission's current title will be retained, at this stage;
- (2) a request for information of the type described in paragraph 1 of Security Council resolution 780 (1992) will be sent by the Chairman to (i) all Permanent Missions to the United Nations and to the United Nations Office at Geneva; (ii) relevant intergovernmental organizations (EC, CSCE); (iii) relevant United Nations Offices (UNHCR, UNICEF); relevant non-governmental organizations (ICRC, Amnesty International, Helsinki Watch, Geneva-based NGO's concerned with human rights, etc.).
- (3) arrangements will be made by the Secretariat for the preparation of a data base collating the information received so far;
- (4) the Secretariat will prepare the draft of an interim report which could, if the need arose, be submitted to the Security Council.

* The morning meeting was cancelled to allow the Commission to meet first with the Secretary-General and immediately thereafter with Ambassador Hans Corell, one of the three Rapporteurs of the CSCE Mission under the Moscow Human Dimension Mechanism.

After seeking and obtaining the agreement of Mr. Mbaye, the Commission decided that it would hold its next series of meetings at the Palais des Nations in Geneva on 14, 15 and 16 December 1992 (with a possible of extension of two days).

The Commission intends to hold a further series of meetings during the week starting on 8 February 1993 and to meet again during the second or third week of March.

The Commission then discussed and approved a note intended for the Press (see attached press release).

The meeting rose at 4.00 p.m.

United Nations

Press Release

Department of Public Information • News Coverage Service • New York

SC/5497

5 November 1992

COMMISSION OF EXPERTS EXAMINING REPORTS OF VIOLATIONS

IN FORMER YUGOSLAVIA CONCLUDES FIRST MEETING

The Commission of Experts established by the Security Council to examine reports of violations of international humanitarian law in the former Yugoslavia today concluded its first two-day meeting during which it discussed organizational and procedural concerns and began dealing with methodological and substantive issues.

Over the course of the meeting, which began on 4 November, the Commission met with Secretary-General Boutros Boutros-Ghali and with Ambassador Hans Corell of Sweden, a member of the Conference on Security and Cooperation in Europe (CSCE) Mission under the Moscow Human Dimension Mechanism. It also reviewed the report and recommendations of that Mission.

The Commission has decided to undertake a factual analysis of existing reports as well as a legal analysis of applicable law. It is in the process of identifying practical problems inherent in the identification and eventual investigation of alleged incidents. It will meet shortly in Geneva to continue those tasks.

Before the Commission are all available communications regarding such alleged violations, including information received from the Governments of Australia, Austria, Bosnia and Herzegovina, Canada, Colombia, Croatia, Russian Federation, United States, Venezuela and Yugoslavia. Information has also been received from United Nations sources, including Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, as well as from the International Conference on the Former Yugoslavia, the CSCE and a number of non-governmental organizations. Those include Helsinki Watch, the World Campaign to Save Humanity and Amnesty International.

In calling for the Commission's establishment, the Security Council, in resolution 780 (1992) of 6 October, also appealed to States and relevant organizations to make information available to the Commission by 6 November regarding the violation of humanitarian law, including grave breaches of the Geneva Conventions, within the territory of the former Yugoslavia. A letter conveying that request had been sent by the Secretary-General to all concerned.

The members of the Commission, who were appointed by the Secretary-General on 26 October, are: Prits Kalshoven (Chairman), Cherif Bassiouni, William Fenrick, Judge Keba Mbaye and Torkel Opsahl.

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