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Commission of Experts

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APPROVED

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

SECOND SESSION (GENEVA, 14-16 DECEMBER 1992)

First meeting

Monday 14 December 1992, 11 a.m.

The Chairman suggested that the Commission proceed on the basis of the attached provisional agenda.

It was so agreed.

Chairman's report on activities carried out since the first session (3)

The Chairman, first reporting on his contacts with various personalities in and outside Geneva, indicated that the ICRC had gathered a considerable amount of detailed information in the course of visits to camps and places of detention but was only prepared to release to the Commission information that had been made publicly available. As regards the London Conference, Mr. Vance, Co-Chairman of the Conference, had urged that the Commission take action in relation to the reported mass graves in the former Yugoslavia. As for Mr. Mazowiecki, whose mission was to evaluate the human rights situation in the countries involved and to report thereon to the Commission on Human Rights and to the Security Council, agreement had been reached on the division of work as follows:

(1) The mass grave at Ovchara on which Mr. Mazowiecki had reported after his second visit to former Yugoslavia was to be investigated under the responsibility of the Commission;

(2) Sites not visited so far would be initially investigated under the responsibility of Mr. Mazowiecki; if the results of the preliminary investigation so warranted, the relevant information would be passed on to the Commission.

The Chairman then drew attention to the resolution adopted by the Commission on Human Rights at its second special session (attached) and in particular to paragraphs 10 and 13 thereof, as well as to the resolution adopted on 4 December by the Third Committee of the General Assembly (attached) and in particular to paragraphs 16, 17, 18 and 19 (c) thereof.

The urgent and repeated calls made on the Commission to assume responsibility for the investigation of mass graves had led to the conclusion of a contract between the United Nations and the NGO "Physicians for Human Rights", which provided for the sending to the area of a team of four members having the status of experts on mission to investigate the mass grave near Vukovar. The work was expected to proceed in three phases and the team was to be accompanied during part of the first phase by the Commission on Human Rights Special Rapporteur on Extrajudicial

Summary and Arbitrary Executions, who had been requested by Mr. Mazowiecki to carry out a preliminary investigation into other reported sites of mass graves.

From his contacts with permanent representatives in Geneva and with representatives of the press, the Chairman had gathered the impression that there was a lack of clarity as to what the Commission was expected to do. While activities such as the investigation of mass graves elicited a great deal of interest and while offers of assistance had come from various quarters, questions had been asked as to the time frame within which the mandate should be discharged and as to the purpose of the whole exercise. The establishment of an ad hoc tribunal had been urged in this context. The Edimburg summit had discussed the matter, although inconclusively. The CSCE had received from the Corell/Türk/Thune mission a report in which the Rapporteurs recommended (1) the establishment, on an urgent basis, of a commission of governmental experts to conduct police investigations in preparation for criminal prosecution and (2) the setting up of an ad hoc tribunal whose statute would be elaborated by the present Commission.

Subsequently the CSO had asked the Commission of Experts to give particular attention to the principle of personal responsibility for war crimes and examine how this principle could be put into practice by an ad hoc tribunal. In this connexion, Ambassador Corell had indicated that his mission would draw up the statute of an international tribunal and had invited the Commission of Experts to report on its findings. At Stockholm, it had been agreed, further to a German initiative, that the Corell mission would "refine the proposals on making the principle of personal accountability effective, including the possibility of the establishment of an ad hoc tribunal, and to do so through continuing consultations with the Commission of Experts", the last part of the text being a Dutch addition.

As for the UNHCR, it had agreed to communicate information in the form of written accounts, on the understanding that the names and other sensitive elements would be withheld.

Finally the Chairman had received the visit of representatives of "brothers for Peace" and of an association of women from Bosnia and Herzegovina as well as letters describing the plight of women and girls in the area concerned.

In conclusion, the Chairman struck a note of caution as to the trustworthiness of the information before the Commission: it appeared that allegations of systematic rape were not corroborated by statements made by women to the delegates of the ICRC who had visited camps in Bosnia Herzegovina. Furthermore the International Organization of Journalists had come to the conclusion that there was a tremendous amount of disinformation on all sides. There were also allegations of interference in mass graves, aimed at shifting responsibility from one side to the other.

Mr. Bassiouni, after thanking the Chairman for his excellent report, stressed that the Commission, having a very broad mandate, needed to clarify its approach to its task and to develop a methodology to fit this approach. At the same time, it should be mindful not to create the impression that nothing tangible was being accomplished, thereby causing embarrassment to the Security Council and to the Secretary-General. It was all the more important for the Commission to impose itself as there were other bodies or authorities, including the Commission on Human Rights and its numerous Special Rapporteurs and the CSCE, which might endeavour to fill the vacuum, each following its own direction and thereby contributing to the creation of a chaotic situation. The Commission should live up to the expectations of the Security Council. Any indecisiveness on its part would encourage other fora to take its place. He urged that the Commission assert its primacy by enlisting the assistance of other entities and organise its work so as to keep abreast of developments, including the growing influx of basic documentation.

The Chairman explained that the Commission on Human Rights, in the discharge of its general mandate to examine the situation of human rights all over the globe, would provide valuable assistance to the Commission, through its Special Rapporteurs, by conducting preliminary investigations, which it would then be up to the Commission to pursue further whenever appropriate. As for the CSCE, it had no link of subordination with the Security Council and had its own political goals. The Commission was not in a position to impose itself on such an entity and could only make sure that its role was duly taken into account.

Mr. Opsahl stressed that the Commission could only retain its credibility if it rapidly reached a consensus on the way to approach its work. Given the urgency of the problems at stake, its image could only suffer from procrastination.

Mr. Fenrick said that if the Commission's output was well founded in law, thoroughly researched and well substantiated and at the same time expeditiously produced, there would be no room for concern over the CSCE's role.

Mr. Opsahl warned against exaggerating the element of competition between the various fora involved, as all of them actually reflected the policies of their respective member States.

The Chairman agreed that a good end-product should be produced in the minimum amount of time. He wondered however if this goal was attainable with the Commission's current terms of reference. He suggested that this issue be reverted to in connection with point 6 of the provisional agenda.

Adoption of the rules of procedure (4)

Rule 3

The Chairman suggested that rule 3 of the draft rules of procedure be amended to make it workable in practice. The requirement in the last sentence was far too rigid.

Mr. Bassiouni proposed that the disclosure of information be left to the discretion of the Chairman.

Mr. Opsahl said that a distinction should be made between confidential and non-confidential information.

Mr. Mbaye supported Mr. Opsahl's view and further remarked that rule 3 should reflect the difference between describing facts and taking a position. He proposed to re-formulate rule 3 accordingly.

Rule 8

The Legal Counsel suggested, in the light of the discussion which had taken place at the first session, to delete the words "on its behalf" in paragraph 2.

Rule 10

Mr. Mbaye suggested that the text provide for the possibility of appointing a Rapporteur. As regards paragraph 2, he warned against weakening the status of the end product of the Commission's work by anticipating dissenting opinions.

The Commission requested the Secretariat to submit in writing revised texts for rules 3 and 10.

Minutes of the first session (5)

The Commission approved its minutes subject to a few corrections in the minutes of the second and third meetings (see final version attached).

The meeting rose at 5.50 p.m.

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

SECOND SESSION (GENEVA, 14-16 DECEMBER 1992)

Second meeting

Monday 14 December 1992, 3 p.m.

The first part of the meeting was devoted to the showing of a documentary produced by the BBC and devoted to the activities in the former Yugoslavia of a convicted criminal by the name of Arkan.

Terms of reference of the Commission (6)

Question of interim report to the Secretary-General (7)

Mr. Bassiouni observed that the Commission had a mandate couched in very broad terms and considerable latitude in interpreting it. The problems in carrying out the mandate were mostly, in his view, of a methodological nature.

The Chairman felt that it was the purpose of the exercise which called for clarification. Mr. Bassiouni's approach focused on the intellectual exercise involved while his own concern related to the environment and purpose of that exercise.

Mr. Bassiouni agreed that the word "evidence" was a source of ambiguity: the gathering of evidence might aim at demonstrating the existence of a certain pattern of criminality but it could also be intended for prosecution purposes. Did the Security Council expect from the Commission an indication that there were grave breaches or did it want specific evidence such as an investigation body would need for trial? If the latter was the case, the Commission was faced with two possibilities: it could either investigate all reported cases or investigate a random sampling of cases to evidence types of violations. Given the means at the Commission's disposal, the latter alternative seemed to be the only realistic one.

It was important for the Commission to know what purpose the ultimate product was intended to serve because the answer would have implications for the methodology to be applied.

Mr. Fenrick pointed out that the Secretary-General knew even before the Commission was established that there had indeed been violations of international humanitarian law committed in the territory of the former Yugoslavia, and that the Commission had to interpret its mandate in a meaningful way. Given its composition, it should focus on legal analysis and evidentiary underpinning, bearing in mind however the practical constraints under which it was working. In his opinion, the only question to which the mandate gave rise was whether the Commission should stop once it had gathered a reasonable amount of evidence of grave breaches or go further and propose other solutions, such as the establishment of a tribunal.

Mr. Opsahl agreed that there was a link between the purpose to be achieved and the method to be employed. In his opinion, the mandate did not call for enlargement or clarification. What the Commission needed was resources. He recalled that, in his opening statement at the Commission's first session, the Legal Counsel had made it clear that the Commission was requested to proceed not only as a fact-finding body but also an investigation body called upon to establish evidence, the purpose being to enable the Secretary-General to recommend further appropriate steps so that persons who committed or ordered the commission of grave breaches were held primarily responsible for their acts. It was up to the Commission to determine in the light of its resources whether all or some of the allegations presented to it should be investigated and to give advice on further steps, including the possibility of establishing an international tribunal. He saw no need to seek a clarification of the mandate, particularly at this early juncture.

Mr. Mbaye concurred with this view. The Commission had to determine its course of action on the basis of its mandate and to correlate its goals and its resources. It should firstly, analyse the allegations received from various sources; secondly, identify the cases involving breaches of norms of humanitarian law and indicate which norms had been violated; and thirdly, address the question of imputability by identifying a person, a regular or irregular unit, a militia, etc. It would be for the Secretary-General, once he had before him the conclusions of the Commission, to indicate if matters should be pursued further and in what direction.

The Chairman observed that the political context had changed since the adoption of resolution 780 (1992) and that concern had therefore arisen that the Commission might be sidetracked.

Mr. Fenrick pointed out that the positions taken in the framework of the CSCE were not universally shared. He did not however exclude the possibility of mentioning those positions in an interim report.

The Chairman said that Arab countries had taken a stand similar to that of the CSCE and that it was by no means clear how the Security Council would react if it was now confronted with the idea of an international tribunal.

Mr. Mbaye stressed that the Commission should stick to its mandate and leave it to the Security Council to modify that mandate if it deemed it appropriate.

Mr. Opsahl questioned the conclusion that the ideas of an international tribunal was gaining ground. He wondered if the international community was not rather orienting itself towards the use of force.

The Legal Counsel said that, irrespective of possible changes of attitude as regards the situation in Yugoslavia and the question of an international criminal tribunal, the Commission had from its parent body an unchanged mandate and should abide by it. The complexity of the language used in paragraph 2 of Security Council resolution 780 (1992) was probably indicative of differences of views within the Council and of the reluctance of important States to go beyond that language. In the discharge of its investigation task however, the Commission had considerable latitude provided it kept the scope of its efforts within reasonable limits; it was in particular free to confine itself to the top layers of authority or to go to lower levels, bearing in mind the deterrent effect expected from its work. While the Secretary-General might conceivably ask for recommendations on the next phase of the exercise, the Commission would be ill-advised to go back to the Security Council and thereby take the risk of losing the Council's confidence.

Mr. Bassiouni concurred with the Legal Counsel. The available information was very far from allowing any conclusion as regards individual responsibility. Rather than raising unwarranted expectations by advocating the creation of an international tribunal, the Commission should play to the maximum its deterrent role and submit an interim report which, while acknowledging the insufficiency of the available information, would indicate that the files analyzed so far revealed serious evidence of victimization. It could then proceed to a selection of specific cases of investigation. While, ideally, attention should focus on chains of command and the policy-making level, this approach did not fit the realities of a situation in which the Yugoslav army appeared to withdraw immediately after removing the enemy, thus allowing irregulars and regulars to move in. From the limited facts available, there emerged a discernible pattern of establishing plausible deniability, i.e. making sure that the army officers were away from the scenes of atrocities so that no linkage could be established.

The Chairman wondered if the time had already come to submit an interim report to the Security Council. While the information before the Commission pointed in the direction of the Serbs and while public opinion and the report of some States including the United States were similarly oriented, the Commission should be wary of presenting a report which would not be based on sufficiently corroborated evidence and would thus simply be used for political purposes. It was essential to present the Security Council with a balanced view. He suggested that, for the purpose of the interim report, the Commission should select one event in relation to which it was in a position to go beyond the layer of assertions. The investigation of the Vukovar mass grave would hopefully be a case in point.

According to Mr. Fenrick, there was an unquestionable need for a prompt interim report which would focus on the part of the mandate concerning the examination and analysis of available data and the legal analysis conducted so far. The report could

further indicate that the next step would be to penetrate below the layer of factual assertions and conduct in-depth investigations - which would require considerable resources. Referring to Mr. Fleischhauer's observations, he pointed out that culpability would probably be more difficult to establish at the command level than at the level of the persons who had actually committed criminal acts.

Mr. Mbaye said he shared the views of the Legal Counsel concerning the Commission's mandate. As for the interim report, he doubted whether it should be confined to one part only of the mandate, namely the examination and analysis of the available information. In his opinion, it would be better to follow the Chairman's approach.

Mr. Fleischhauer, responding to a request for clarification, said that although the term "grave breaches" was used as a term of art in the Geneva Conventions, nothing indicated that the Security Council had used it in a restrictive sense. Referring to the timing of the interim report, he informed the Commission that in the framework of informal consultations of the Security Council, the question had been asked when the Commission of Experts would come up with the results of its work.

The Chairman concluded that the need for an interim report was generally recognized. Since there was not enough time to complete the investigation of the Vukovar mass grave before the submission of such a report some time in January, the more modest approach focusing on the part of the mandate on examination and analysis of reports was the only feasible one. He however warned against producing figures on the numbers of victims since such figures resulted from unverified allegations. He furthermore felt that the interim report should reflect the activities which had been conducted in Geneva since the first session, as he had described them at the previous meeting.

Mr. Bassiouni fully agreed that specific facts or figures should be avoided. However the report should indicate that it was possible to obtain from various sources the kind of detailed information the Commission did not have. By way of illustration, he referred to the reports of France, the United States and the Human Rights Watch. He added that despite practical and logistical obstacles, the Commission must at least briefly go to the area not for the purpose of conducting investigations but to meet with different governmental authorities. Its credibility would otherwise be undermined.

The Chairman wondered how the projected visit would fit in the calendar which the Commission had set to itself for the production of an interim report. He further observed that Mr. Mazowiecki had not derived much help from his interviews with leaders in the area and that the negotiations conducted in the framework of the International Conference on the former Yugoslavia might not be facilitated by encounters between the authorities in the area and a Commission whose aim was to establish guilt.

Mr. Fleischhauer, while agreeing that a trip to the area would enhance the Commission's credibility warned against staging a counterproductive media event. In his view, priority should be given to the presentation of an interim report. The Commission could however announce in the report its intention to go to the area once it had completed the analysis of the information before it.

Mr. Opsahl said that the interim report should cogently explain the reasons why the Commission had not yet gone to the area. It should also reflect what had been done so far, and describe the needs of the Commission and the ways of meeting these needs, including by taking advantage of the many offers for help which had been received so far.

Mr. Fenrick agreed that if the intention was to produce the interim report by mid January, the visit to Yugoslavia would have to be deferred. This did not detract from the importance of such a visit and in particular of meetings with the persons responsible for the war crimes commissions in each of the countries concerned. The funding argument should not be viewed as the decisive one.

Mr. Zacklin said that the interim report should elaborate on the investigation of the Vukovar mass grave, particularly in view of the deterrent effect of such an investigation. As for the argument that the Commission's credibility would be enhanced if it visited the area, he pointed out that the Commission could discharge its investigation responsibilities through other entities, as indeed it had done by entrusting the Physicians for Human Rights with a specific mission. He finally remarked that visits to the area should be carefully planned and aim at concrete and substantive results if they were not to turn into meaningless public relations events.

Mr. Mbaye concurred.

Mr. Bassiouni supported the idea of announcing with some specificity in the interim report the Commission's intention to go to the area and its plans in this respect. He further suggested that the Chairman send a letter to the Permanent Representatives of the countries in the area that had established commissions to investigate crimes and that this be reflected in the interim report.

Policies concerning relations with the media (8)

The Chairman said that this question could be disposed of by simply adopting rule 3 of the rules of procedure in the new version worked out further to the discussion of the previous meeting.

The Commission adopted rule 3 as revised.

It then adopted rules 8 and 10 as revised.

The rules of procedure as adopted are attached.

The meeting rose at 6 p.m.

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

SECOND SESSION (GENEVA, 14-16 DECEMBER 1992)

Third meeting

Tuesday 15 December 1992, 10 a.m.

The Chairman pointed out that the Commission obviously did not have the means to investigate every one of the reports before it. A selective approach was the only realistic one and it was indeed along those lines that the team of Physicians for Human Rights would have to proceed since as many as 175 bodies were reported to be buried in the Vukovar mass grave. In this connection, he informed the Commission that, in a communication addressed to Mr. Mazowiecki and Dr. Snow, the Croatian authorities had welcomed the PHR mission, offered their full assistance and expressed the wish to have a representative included in the team. The PHR team was ready to accept a representative of the Croatian authorities as an observer but not as a member. It had already met with a medical examiner who had provided a limited amount of ante mortem data.

Planning of the Commission's future work (9)

Organization of the Commission's work (10)

The Chairman suggested to first deal with the gathering of documentation and computerization of information. He indicated that more and more governments were submitting their reports in a systematic and well organized form.

Mr. Opsahl asked whether it was intended to continue or to revise the arrangements made at the first session for the computerization of the documentation - a task which was of some urgency. He then drew attention to reports of systematic rape on both sides; the press spoke of 50.000 women having been impregnated. Such reports could be verified by doctors.

The Chairman pointed out that under the cooperation arrangements he had previously described, a reported criminal situation should first be investigated under Mr. Mazowiecki's responsibility. The Commission then had to take over, if the results of the preliminary investigation so warranted. The urgency of the situation referred by Mr. Opsahl had certainly not escaped Mr. Mazowiecki's attention.

Mr. Fenrick thanked Mr. Bassiouni for the progress made on the computerization of information. He insisted on the need to urgently assess the Commission's requirements in this respect and determine whether the work should henceforth be done in Geneva or could more profitably be carried out with the facilities Mr. Bassiouni had access to. Referring to informal offers of assistance received from governments, he suggested to enlist the

help of small teams of investigators to perform certain investigative functions under the Commission's control.

Mr. Mbaye thanked Mr. Bassiouni for the valuable and interesting work he had accomplished on a voluntary basis. If at all possible, existing arrangements should be maintained. He suggested to look at each of the 162 entries contained in Mr. Bassiouni's document in order to select those which should be mentioned in the Commission's interim report and warranted further investigation.

The Chairman, after indicating, in reply to Mr. Fenrick, the thrust of Canada's offer of assistance and outlining the conditions under which the UN could avail itself of such offers, said that continuing the computerization work at DePaul University was unacceptable on account of the link existing between the University concerned and one of the members of the Commission.

Mr. Fenrick pointed out that Mr. Bassiouni had the necessary facilities to do the work.

Mr. Mbaye observed that Mr. Fenrick had done an excellent report on one of the aspects of the Commission's mandate and that there was no reason why another member could not similarly be entrusted with the carrying out of a specific task for the Commission.

Mr. Opsahl said that Mr. Bassiouni's document was very useful and asked why the continuation of the present arrangements was unacceptable.

The Chairman replied that, to the extent that these arrangements had financial implications for the United Nations, they had the odd result of enabling a member of the Commission to earn an additional amount of money.

Mr. Bassiouni strongly objected to the suggestion that he had made money out the current arrangements with DePaul University. He had worked hard on an entirely voluntary basis. By deliberately ignoring the work carried out under the arrangements arrived at in New York, the Chairman was acting in an unacceptable and insulting way.

The meeting was suspended at 10.55 a.m.; it was resumed at 11.15 a.m.

The Chairman apologized for the use of terms that could be misinterpreted. It had never been his intention to accuse Mr. Bassiouni of trying to get extra money for himself. What was at stake was an accounting problem which had led to a misunderstanding. He suggested that the necessary steps be undertaken to establish as soon as possible in Geneva a unit with the required equipment which would continue the work initiated

at DePaul University. In the interim period, the current arrangements would be maintained.

It was so agreed.

The Chairman recalled that there were various options offered to the UN in enlisting the services of individuals. One such option was secondment; it had been resorted to in the case of Mr. Mazowiecki. Another option, illustrated by the Physicians for Human Rights arrangement, was to conclude a contract with an organization specifying the rights and obligations of the parties including matters of copyright, the legal status of the officials of the organization, etc.

Mr. Opsahl noted that the parties to the PHR contract (attached) were the NGO itself and the United Nations. In his view, the co-contractor should be the Commission, as an independent body, and not the Secretary-General or the Security Council.

The Chairman pointed out that the Commission had no autonomous legal personality. The fact that the UN was the co-contractor in no way detracted from the Commission's freedom of action. Article I should be interpreted in that light. Account should also be taken of the cooperation agreement with Mr. Mazowiecki's mission, as described at a previous meeting.

Mr. Fenrick asked if arrangements could be made to enlist the services of investigation teams seconded for short periods.

Mr. Zacklin explained that there was no legal difficulty about structuring contractual relationships for the work needed by the Commission. As evidenced by the PHR contract, new models could be invented. The normal method was to contract for the services of an individual (under a Special Service Agreement) or for the services of a contractor. Another formula was the non-reimbursable loan agreement under which a government made services available at no cost to the Organization. The services could otherwise be funded through the establishment of a trust fund.

Mr. Fenrick observed that an arrangement could be arrived at with UNPROFOR (which was composed of national contingents) with a view to allowing Canada to send a few persons in the field to conduct investigations on behalf of the Commission, it being understood that the financing would be a matter for the Canadian authorities.

The Chairman observed that UNPROFOR was under the authority of Mr. Goulding and that, furthermore, the Commission should not confine itself to UN protected areas.

Mr. Zacklin explained that Mr. Goulding would find it difficult to instruct UNPROFOR to conduct activities which were not provided for in its mandate.

Mr. Fenrick suggested that one of the members of the Commission be included in the investigative teams in the capacity of Special Rapporteur. Creative arrangements could be arrived at to enable the Commission to discharge its mandate.

Mr. Opsahl noted with satisfaction that the Commission could resort to various types of arrangements to carry out its task. He recalled that, in New York, the Secretary-General had indicated that a formal agreement with UNPROFOR would not be easy to arrive at and that cooperation should rather be ensured at an informal level. He insisted on the need to keep in mind the cooperation arrangements arrived at with Mr. Mazowiecki when discussing further actions to be undertaken on the Commission's behalf. The Commission should assess its needs first for the completion of the database and then for the second stage of its work which consisted in conducting supplementary investigation and determining the applicability of the Geneva Conventions.

Mr. Mbaye insisted that the Commission could only assess its needs if it was clear about its tasks. In his opinion, the Commission should start from the information before it and then conduct investigations in the field or hear witnesses on those cases which, in its view, called for verification. He illustrated his point by referring to the report submitted by the United States which was mentioned on p. 27 of Mr. Bassiouni's document. The alleged facts seemed to him to be sufficiently serious to warrant further investigation. The selection process was an essential phase of the work.

The Chairman agreed that indeed, some of the most serious events could be identified on the basis of Mr. Bassiouni's paper. He warned that the sending of investigative teams might give rise to a number of difficulties and would require a balanced approach. On the question of rape, the arrangements on the division of work between the Commission and Mr. Mazowiecki's team should be adhered to: at the moment there were only allegations and it would be for Mr. Mazowiecki to determine in a preliminary way whether those allegations had substance to them. The Commission was however not precluded from initiating investigations in relation to breaches of humanitarian law which Mr. Mazowiecki might not perceive as falling within its mandate, a case in point being the destruction of Dubrovnik.

Mr. Bassiouni suggested that as a first step, the Commission should look at the information in the database and then develop a methodology. He pointed out that in constructing the database, it was important to allow for the inputting of additional information in relation to each incident and to avoid multiple recording of the same incident - a very likely occurrence since a specific piece of information could be picked up by a variety of sources (national media, governmental authorities and non-governmental organizations). The date of occurrence and the location were very helpful in this respect.

As a rule, reports did not identify the aggressor nor provide information on the unit or group suspected. It was therefore very difficult to establish chains of command and command responsibility. In the absence of information on military activities (whereabouts of military units, order of battle, movements of militias and civil or military units), it was possible to identify massive victimization but much more difficult to determine whether such victimization occurred in the context of an armed conflict and to whom it was attributable.

He suggested that the brief assessment of the data received appearing on p. 21 of his submission might usefully be included in the Commission's interim report.

Some governmental reports gave the impression of being based on more information than they actually provided. The Commission could at some point, after taking the required steps to ensure confidentiality, request the governments which had presented such reports to supplement them. The reports of NGOs were much more detailed. Thus the Helsinki Watch had, for every reported fact, names of victims, of witnesses and sometimes of aggressors which it would be ready to release if confidentiality was ensured. Towards the end of the database, there was a heading entitled "Location description". This was a key aspect since a particular military unit had to be connected with the location of a crime in order to establish individual responsibility. On the Croatian side, there were four uniformed units. On the Serbian side, the situation was more complicated since there were four reported irregular units; furthermore the police sometimes acted on its own. Only very seldom was it possible to indicate the unit and the senior officers present. Information on the victims was more extensive and could be expanded if it proved possible to develop a methodology to acquire data from the field - which would allow the Commission to confine itself to making random spot checks to verify the data at a later stage. The problem of the witnesses was also a serious one.

Once facts were established, the Commission would still have to address the question of their characterization in relation to the Geneva Conventions and other humanitarian law instruments.

Turning to the organization of the work, he said that the support staff in Geneva which would be responsible for the continuation of the documentary analysis, should weed out duplication and allegations of dubious reliability. The Commission would probably not be able to investigate more than a few cases and might wish to take a policy decision on the kind of random verification it wanted to engage in, concentrating, for instance, on the more serious types of violations. Alternatively, it could try to discern a certain pattern of behaviour based on a policy such as the policy of ethnic cleansing.

He reiterated his view that a documents centre should be established to cope with the considerable amount of material the Commission would need for verification purposes. He finally drew attention to section VII of his submission which contained an assessment of the various reports, described the features of a computerization policy and raised some methodological questions.

The Chairman endorsed the idea of concentrating on a few items out of the database.

Mr. Bassiouni said that section IV of his submission was intended to facilitate the task of the Commission by providing a sampling of the patterns of grave breaches adduced from the database.

The Chairman, referring to the first paragraph of section IV, warned against ascribing to the Serbians, already at this stage, responsibility for the majority of the reported breaches.

Mr. Bassiouni agreed that this matter would have to be pondered at the time of the preparation of the interim report.

Mr. Mbaye proposed that the analysis of the material received and the database be attached to the interim report. He further suggested to include in the database a "Suspected perpetrator" entry.

Mr. Bassiouni pointed out in reply that in those cases where there was a suspected perpetrator, the information had been provided. These cases however were rare. One of the difficulties was that more than 50 per cent of the reports came from other than Serbian sources, so that the information seemed for the most part to be anti-Serbian. In view of the size of the armed forces of Serbia, the number of violations attributable to them could statistically be expected to be higher. These caveats would have to be reflected in the interim report. The Commission should also bear in mind that its identification of suspects could be challenged and that a cautious approach was therefore advisable.

The Chairman pointed out that the Federal Government had sent in a report on the violations which had been committed by the other side. Another report was to be submitted by the Military of Yugoslavia, which considered the initial reports incomplete. The Commission should therefore soon have in its hands additional material coming from that side if not from Serbia itself.

Mr. Mbaye, replying to Mr. Bassiouni, said that in its search for the truth, the Commission should not shy away from tentative indications on the identity of suspected perpetrators. If initial suspicions proved unfounded, the investigation would simply orient itself in another direction.

The meeting rose at 12.35 p.m.

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 DePaul University, it was concluded that Mr. Bassiouni would seek the assistance of the Max-Planck for the domestic applicable criminal law of Serbia, Slovenia, Croatia and Bosnia-Hercegovina at no cost to the Commission. Further the Commission designated Mr. Bassiouni to examine and analyze the material assembled by the Secretariat and received from other sources, and to present a report to the Commission at its December meeting. The Commission would seek funding from the Secretariat of between \$7000-9000 to contract with DePaul University's International Human Rights Law Institute, of which Mr. Bassiouni is President, to conduct the necessary research and correlation of data. Confidentiality was stressed by the Commission.

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

SECOND SESSION (GENEVA, 14-16 DECEMBER 1992)

Fourth meeting

Tuesday 15 December 1992, 3.30 p.m.

The Chairman informed the Commission that in the framework of Mr. Mazowiecki's mission, two female doctors would leave for the former Yugoslavia at the beginning of January to investigate reports on the mistreatment of women. He further reported that he had received a letter from the University of Essex (UK) which was working on the definition of ethnic cleansing and its characterization as a crime against humanity.

The rest of the meeting was devoted to a description by Mr. Thoolen (Chief, UNHCR Centre for Documentation on Refugees) of the Human Rights Information and Documentation systems (HURIDOCs)¹ and to an exchange of views on the extent to which these systems would fit the requirements of the Commission, in the light of its mandate and of its interest in establishing patterns of criminality.

Mr. Mbaye warned against using too refined techniques for the analysis of the material before the Commission. He felt that the HURIDOCs methodology might call for unnecessary detailing of information and that, at the present stage, the simpler approach reflected in the database submitted to the Commission by Mr. Bassiouni was sufficient.

Mr. Bassiouni recalled that he had at the first session volunteered to develop a database on an urgent basis in order to meet the Commission's concern that an interim report might have to be submitted at short notice to the Secretary-General. This concern had not disappeared with the production of the existing database. The interim report which would presumably have to be produced in a near future would have to refer to all submissions before the Commission and not only to those received by November 15. He expressed readiness to continue the time-consuming and thankless task he had undertaken, provided the cut off date was January 15. After that, a Geneva-based team would have to take over. The programmes would be handed over to the Secretariat.

¹ The relevant documentation is available for consultation in the Secretariat.

The Legal Counsel, after thanking Mr. Bassiouni for the extremely useful work he had diligently carried out, observed that although there was no legal or technical obstacle to the continued involvement, as a temporary arrangement, of DePaul University, the Commission would probably be viewed by the ACABQ as making less than optimum use of scant resources if it permanently relied in Geneva on a database produced in Chicago, unless it could be established that there was no other way of proceeding. He promised to explore possible alternative avenues and to report to the Commission as soon as possible.

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The meeting rose at 6 p.m.

COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO
SECURITY COUNCIL RESOLUTION 780 (92)

SECOND SESSION (GENEVA, 14-16 DECEMBER 1992)

Fifth meeting

Wednesday 16 December 1992, 11 a.m.

The Chairman informed the Commission that he had received the visit of a Minister of the Federal Republic of Yugoslavia, Prof. Rakic, who seemed confident that the forthcoming elections in Serbia would be won by Mr. Panic. Mr. Rakic had undertaken to provide the Commission with summary information on criminal proceedings against the members of the Yugoslav army who had stayed in Bosnia-Herzegovina after that army had withdrawn, in violation of a law recently enacted by the Federal Government. The Chairman further informed the Commission that in reply to questions from Ambassador Corell who wanted to know the Commission's reaction to the plans developed within the CSCE (see the minute of the first meeting, p. 2), he had indicated that the Commission had decided not to try to expand its mandate but considered itself empowered to engage in consultations on the refinement of the principle of personal responsibility. He intended to convey this understanding in a letter he would send to Ambassador Corell on behalf of the Commission and suggested that Professor Bassiouni be designated in that letter as the point of contact between the Commission and Ambassador Corell.

It was so agreed.

Mr. Opsahl expressed the hope that Ambassador Corell and Mr. Bassiouni could meet at his Institute in Oslo.

Mr. Bassiouni recalled that in a recent statement at the CSCE, Mr. Eagleburger had insisted that war criminals be identified by name and brought to trial. He further referred to the criticisms addressed to the Commission by the Association européenne - Droit contre raison d'Etat.

The Chairman pointed out in reply that the Commission's terms of reference and capabilities were limited. He further recalled that the Association européenne - Droit contre raison d'Etat was opposed to ad hoc bodies and maintained that Mr. Opsahl and himself, as members of the Fact-finding Commission provided for in article 90 of Additional Protocol I, should not have accepted to sit in the Commission.

Mr. Bassiouni observed that, failing the agreement of the protagonist countries, the jurisdiction of any tribunal set up by the CSCE could only be based on the notion of universality of jurisdiction. The situation would be different if the tribunal was established by the Security Council under Chapter VII (an approach which seemed to be gaining ground in the

Council). He then suggested that steps be taken to store the mass of material which the Commission was likely to receive in forthcoming months.

The Chairman referred in this context to the visit of a Minister of the Republic of Kosovo who had submitted a voluminous dossier on violations of human rights in this Republic.

Mr. Fenrick enquired about the offers of assistance which had been received from Governments.

The Chairman replied that, aside from the offer of assistance of DePaul University of which the Commission had already taken advantage, an offer had been made by the Permanent Representative of Canada for assistance in the form of teams of lawyers to conduct criminal investigations.

Mr. Opsahl suggested that the Commission first define its requirements and then find ways of meeting these requirements. He also insisted on the need for close coordination between the various fora dealing with questions related to the former Yugoslavia. He then referred to the draft resolution co-sponsored by some fifty States which had recently been adopted by the Third Committee of the General Assembly under item 97(c) of the Assembly's agenda. This text made mention of the Commission of Experts and commended Mr. Mazowiecki for his reports. It ascribed primary responsibility to the Government of Serbia for the practice of "ethnic cleansing" and thereby seemed to pre-empt the conclusions which the Commission would arrive at.

Mr. Fenrick suggested to distinguish between in-house requirements and the Commission's needs in terms of outside assistance.

Mr. Mbaye observed that the priority task was to analyse the documentation. The Commission would then have to identify the cases for which it needed additional information. Such information could be obtained through investigation on the spot and the hearing of witnesses either by members of the Commission or by other persons acting on behalf of the Commission. The required liaison with the other entities or individuals dealing with the question would have to be maintained.

The Chairman agreed that the Commission's needs were twofold: additional personnel and effective liaison.

Mr. Opsahl referred to the evaluation of requirements as contained in Mr. Bassiouni's written submission. He further observed that the Commission needed assistance in the form of funds and contractual arrangements.

Mr. Zacklin said that the programme budget implications, as assessed by the Secretariat, of the Commission's work in 1992-1993 were set out in document A/C.5/47/68. There had not been major objections to the contents of that document in the ACABQ. The recommendations of the ACABQ to the Fifth Committee were not yet known.

Mr. Bassiouni pointed out that the Commission, despite its narrow mandate, was arousing growing expectations and should rise up to these expectations. In order to cope with the anticipated deluge of documentation, he suggested to establish a document centre, manned by a documentalist and a clerk and equipped with a fast photocopying machine. He added that in order to maintain the current pace of work on the database, six junior lawyers supervised by an experienced lawyer would have to be assigned to the analysis of the documentation and two computer operators to its computerization. He wondered if Canada, Norway and the United States could not each fund a two-person team, the three teams being supervised either by an experienced lawyer or by a Commission member, who would be responsible for developing guidelines concerning the analytical work as well as criteria (seriousness of the act, identity of the perpetrator, strength of the evidence) for the subsequent selection of cases requiring further investigation. Somebody should furthermore be assigned to the task of following and coordinating the work being carried out under the aegis of the Commission and in other fora so as to avoid duplication and allow the Commission to always be abreast of on-going developments. On the basis of the database, the Chairman should determine, with or without the Commission's assistance, the cases to be further investigated and turn to those channels which were in a position to provide the required assistance in this respect. A systematic rather than ad hoc approach was indispensable for an unemotional handling of allegations.

Mr. Fenrick warned that offers of assistance from States might be for narrowly circumscribed tasks of a specialized nature and limited periods of time and could therefore not be relied upon for the preparation of the database.

Mr. Mbaye endorsed Mr. Bassiouni's suggestions, adding that an important concern in identifying the cases to be investigated in depth should be to determine whether patterns of behaviour were sufficiently consistent to reveal genocide or ethnic cleansing. He further suggested to set aside isolated cases as well as cases based on second hand allegations or providing no indication as to the alleged perpetrator and to concentrate on cases which were of special significance on account of their particularly abhorrent character, of the numbers of victims involved or of the rank of the alleged perpetrators. A list of such cases could be presented to the Chairman who would then select those warranting further investigation and submit its selection to the Commission. The analysis of the information should be

carried out under the direct responsibility of the Commission, the necessary funds being provided by Governments or universities. Only for work requiring specialized expertise should seconded personnel be resorted to.

Mr. Fleischhauer explained that the Secretariat of a new body like the Commission was built up through an evolutionary process. It had to start modestly and gradually expand as the workload increased. The Commission should itemize its needs and ascertain what offers of assistance it had already received and could still enlist. The Office of Legal Affairs would then explore ways of channelling to the Commission the help available within and outside the Secretariat, and, if necessary, obtaining new resources through the financial organs of the Organization.

Mr. Bassiouni suggested that the task of analyzing the information be entrusted to a private foundation which would finance the costs through a grant. One could also envisage that the work be carried out on a decentralized basis and divided among members of the Commission assisted by lawyers from their respective universities, the coordination being ensured in Geneva.

The meeting rose at 1.00 p.m.

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

SECOND SESSION (GENEVA, 14-16 DECEMBER 1992)

Sixth Meeting

Wednesday, 16 December 1992, 15.30 p.m.

Question of an interim report to the Secretary-General(7) (continued)

The members of the Commission as well as its Secretary discussed the attached draft outline of an interim report.

Further to questions raised by Messrs. Opsahl and Mbaye, it was agreed that the question of the Commission's Mandate would be discussed under the section "Interim conclusions".

It was also agreed that the question of the anticipated needs of the Commission for its future work would be dealt with under section V (Projected Plan of Work).

Mr. Fleischhauer stated that in all likelihood the Secretary-General would pass the interim report to the Security Council and that the Commission would be informed of the Council's reaction.

Organization of the Commission's work (10) (continued)

The Commission agreed to base itself, in evaluating its anticipated needs, on a period of nine months starting on 1 January 1993, as envisaged in the Programme Budget for the Biennium 1992-1993 (A/C.5/47/68).

Mr. Bassiouni mentioned that there were three aspects to consider:

- (i) Examination and legal analysis of the reports submitted to the Commission;
- (ii) Selective investigations, either
 - (a) by the Commission itself; or
 - (b) at the Commission's request.
- (iii) Production of evidence by the Commission, i.e. for prosecution purposes.

As regards the third aspect, he suggested that a feasibility study be conducted to determine what was achievable. As to the other two aspects, the Commission should be able to make an accurate projection.

Mr. Opsahl said that the Commission was a fact-finding body and that its mandate clearly covered the third aspect mentioned by Mr. Bassiouni. He however, agreed that it was difficult at this stage to quantify the corresponding needs.

Mr. Fenrick observed that, while it might be difficult to make accurate projections as to the needs of the Commission, there would be merit in providing some tentative indications in the interim report as regards, for instance, the assistance of investigative teams.

Mr. Bassiouni, pointed out that the needs of the Commission depended on what it was expected to do. The word "evidence" could be interpreted in a general sense or as referring to evidence such as would be needed for prosecution purposes.

Mr. Mbaye stated that this question should be raised, particularly as the French text of Security Council resolution 780 (1992), which used the word "preuve", did not entirely correspond to the English text.

Mr. Opsahl said that, in his opinion, the word "evidence" was intentionally used loosely and broadly in the resolution, to give the Commission and the Secretary-General as much leeway as possible.

Mr. Fenrick enquired about the role of individual members of the Commission.

The Chairman said that Mr. Fenrick could be entrusted with functions as rapporteur once the Commission got to the stage of on-site investigations. Mr. Bassiouni was to draft certain parts of the interim report and to maintain contacts with the Corell Mission. For the time being, he did not foresee other assignments for individual members.

Mr. Opsahl asked to what extent individual members could answer requests for information on allegations submitted to the Commission.

The Secretary of the Commission indicated that documents bearing a UN symbol number were clearly in the public domain.

Mr. Fleischhauer, referring to ways of obtaining additional resources for the Commission, said that a trust fund could be established and governments and institutions invited to contribute. Alternatively or additionally, individual members of the Commission could approach possible donors for grants which would of course have to be used as prescribed by the donors. As for human resources, additional

personnel to be assigned to the Commission might be paid from the trust fund, provided the conditions of the grant allowed it. Such personnel would be hired on a contractual basis with consultancy status. Secondment from other organizations or national administrations posed no difficulties as long as the persons concerned were available. The financing could be ensured from grants or from budgetary appropriations. The seconded personnel would enter into a contract with the United Nations with consultancy status. Non-reimbursable loan agreements could also be envisaged as a last resort.

Office space should be found on neutral ground. The work of the Commission had to be perceived as being completely impartial and could not take place in a permanent mission. This point should be borne in mind when deciding on the place where the work on the database was to proceed.

Replying to a question of Mr. Mbaye, the Chairman indicated that United States of America had offered the Commission the services of two military officers to go into the former Yugoslavia to conduct investigations on behalf of the Commission. It was clear that offers of assistance could not be automatically accepted.

Mr. Zacklin stated that no matter what form of assistance was offered by Governments, NGOs, private organizations or individuals, the ultimate decision rested with the Commission. If the Commission decided to accept a specific offer, the United Nations would have to arrange for a contractual relationship allowing the United Nations to exercise control over the entity concerned and the end product. In the case of the contract with the NGO "Physicians for Human Rights", the contract clearly stated that the organisation concerned could not do anything with the product of its work that did not come under the control of the Commission. United Nations procedures were designed so as to ensure that assistance was provided in a completely neutral way.

Mr. Zacklin added, further to a request for clarification from the Chairman, that two bodies set up under Security Council resolution 687 relied to a very substantial degree on assistance from outside. The decisive criterion was whether the work performed was proper work and whether the United Nations could vouch for it. Indeed, the contractual relationship did not guarantee anything. But once such a contractual relationship has been established, the United Nations was in a position to exercise control.

Mr. Bassiouni suggested that the Commission should not accept the services of government officials from any country which might appear to be biased. For the first stage of its work, the Commission needed a nucleus of junior lawyers to analyze the documentation. To cover the expenditures, the Commission should opt for the trust fund solution. He inquired whether the Commission might resort to a dollar-a-year type of

contract to hire young academics or young legal researchers whose salaries would be paid by their institutions for one year.

Mr. Fleischhauer replied that there would be no problem with that formula. However, the Commission should bear in mind the two following points: (i) acceptance of assistance from any individual should be decided on a case-by-case basis by the Commission and (ii) there should always be a contract with the United Nations, so as to give the Organization and the Commission full control over persons and end product. He suggested that the Commission ask the Secretary-General to establish a trust fund as soon as possible and mentioned as a precedent the trust fund established by former Secretary-General Javier Perez de Cuellar, in order to facilitate access to the International Court of Justice. While this initiative had been widely acclaimed, contributions were slow to come. Interim arrangements might therefore have to be made before a trust fund could be relied upon for the financing of the Commission's activities.

Mr. Zacklin added that many States were keenly interested in the work of the Commission and very eager to see the Commission get down to business. The trust fund formula would provide them with an opportunity to demonstrate their support in a tangible form.

It was agreed that the question of the establishment of a trust fund could usefully be raised in the interim report.

Mr. Fenrick suggested that the Commission should at its next session formulate a general policy on offers of assistance. To that end, it should have before it indications on offers received so far and on the Chairman's reaction to them. It might be useful to determine whether the services of government officials (investigators or lawyers) were acceptable or not, so that all concerned would be properly warned.

Mr. Bassiouni asked if it would be possible for the Office of Legal Affairs to draw up a policy paper on offers of assistance. He then indicated, that he had obtained from the Italian Government \$800,000 for a special trust fund for the activities of the Crime Prevention and Criminal Justice Branch of the United Nations. He wondered if he should pursue with the Italian Government the possibility of a voluntary contribution from that Government for the financing of the Commission's activities.

Mr. Fleischhauer said that he saw no reason, from a strictly legal point of view, to discourage the Italian Government from making such a contribution. Once a concrete offer was made, it would be for the Commission, with the assistance of the Office of Legal Affairs, to take a stand on it.

Mr. Bassiouni indicated that Mr. George Soros had offered a grant to his Institute to continue the work initiated in November, on the understanding that whatever had been accomplished would be passed on to Geneva. Mr. Soros was furthermore willing to contribute to a trust fund. He asked if he could proceed with his negotiations with Mr. George Soros.

There were no objections.

Mr. Opsahl suggested that the Chairman write to governments to inform them of the Commission's needs and encourage offers of assistance tailored to actual requirements.

The Chairman stated that thus far there had only been one offer in writing. Governments were most certainly aware of the Commission's needs and efforts to prompt offers of assistance would probably be unsuccessful.

Mr. Zacklin indicated that the Office of Legal Affairs would prepare a paper outlining the various ways of channelling assistance in the form of financing and human resources to the Commission.

Dates of future sessions (12)

The Commission agreed to hold its third session on 25 and 26 January 1993 to, inter alia, consider and adopt an interim report to the Secretary-General.

Mr. Bassiouni suggested that the third session should be partly devoted to a discussion of the documentation system.

The Commission then tentatively agreed to hold its fourth session from 1 to 3 March.

Mr. Fenrick suggested that the Commission could plan a visit to the former Yugoslavia in February if no meetings were to be held during that month. At its third session it could, on the basis of the updated database, start considering the locations where investigative teams might be sent at a later stage.

Adoption of a press communiqué on the Commission's second session(11)

After a brief exchange of views, in which the Chairman, Mr. Fenrick, Mr. Mbaye, Mr. Bassiouni and Mr. Zacklin took part, it was decided that the Secretariat, would under the Chairman's control prepare a press release, of which copies would be sent to all the members.

Closure of the second session (14)

The Chairman declared closed the second session of the Commission of Experts.

The meeting rose at 5.10 p.m.

OUTLINE OF INTERIM REPORT

- I. Mandate and background of the Commission
(Dauchy, Bassiouni will send some notes by December 28)
- II. References to the Commission by other United Nations bodies and inter-governmental organizations (Dauchy)
- III. Establishment of the Commission:
 - a - New York organisational meeting
 - b - Geneva
(Kalshoven and Dauchy)
- IV. Activities of the Commission :
 - a - Chairman's activities and contacts in Geneva
(Kalshoven)
 - b - Submissions received by the Secretariat and by the Commission (Dauchy)
 - c - Description of database (Bassiouni)
 - e - Summary analysis of data received (Bassiouni)
 - f - Outline of legal issues (Fenrick, Kalshoven, Bassiouni)
- V. Projected plan of work
 - a - Establishment of a documentary system and more elaborate database in Geneva
 - b - Projections of personnel and other resources needed and systematization of analysis and eventual investigations
 - c - Recruitment of personnel
 - d - Establishment of criteria and work procedure for legal and investigative personnel
 - e - Systematization of cooperation and contacts with other appropriate bodies and agencies of the UN, other inter-governmental organizations and governments
 - f - Planning and preparation of the Commission's field trip to the area of the conflict
- VI. Anticipated needs of the Commission for its future work
- VII. Interim conclusions

TIME TABLE

1. Partial reports by Fenrick and Bassiouni to be sent to the Chairman by January 4
2. Chairman's first draft of the interim report to be received by the members January 12
3. Meeting of the Commission to review the draft interim report January 16
4. Second draft to be circulated to the Commission by January 20
5. Submission of the interim report to the Secretary-General by January 25.