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United Nations Commission of Experts Established Pursuant to Security Council Resolution 780

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The United Nations Commission of Experts Established Pursuant to Security Council
Resolution 780 (1992)

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CURRENT DEVELOPMENTS

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

I. HISTORICAL ANTECEDENTS

Throughout modern history, there have only been three internationally established commissions to investigate war crimes and prepare for eventual prosecutions before international and national judicial bodies: the 1919 Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War (1919 Commission),¹ the 1943 United Nations War Crimes Commission (UNWCC), and the Commission of Experts established pursuant to Security Council Resolution 780 (1992) to investigate violations of international humanitarian law in the former Yugoslavia (Commission of Experts).² Even though there are no connections among the three bodies, there is enough historical precedential value in the first two as the antecedents of the Commission of Experts to warrant a brief examination.³

The 1919 Commission

After World War I, the Preliminary Peace Conference established the 1919 Commission while it was preparing the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).⁴ Each of the five great powers (the British Empire, France, Italy, Japan and the United States) named a member to the 1919 Commission and five other members were elected from among other powers having a special interest in the matter.⁵ The 1919 Commission was to investigate the responsibility of those who violated the laws and customs of war essentially as embodied in the 1907 Hague Convention,⁶ as well as

¹ See REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE BY THE COMMISSION ON THE RESPONSIBILITIES OF THE AUTHORS OF WAR AND ON ENFORCEMENT OF PENALTIES (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), *reprinted in* 14 AJIL 95 (1920) [hereinafter 1919 COMMISSION REPORT].

² SC Res. 780 (Oct. 6, 1992), *reprinted in* 31 ILM 1476 (1992).

³ There is no reason to believe that the Security Council had these two antecedents in mind when it established the Commission of Experts.

⁴ Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, 11 Martens (ser. 3) 323, 2 Bevans 43.

⁵ THE TREATIES OF PEACE, 1919–1923, at 3 (Carnegie Endowment for International Peace, 1924).

⁶ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]. The 1919 Commission's responsibility was to investigate the following:

1. The responsibility of the authors of war.
2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.

what the Commission considered to be crimes against the "laws of humanity."⁷ These words appear in the Preamble of the 1907 Hague Convention and are commonly known as the Martens Clause.⁸ The 1919 Commission, like the 1992 Commission of Experts, was to present evidence of criminality to an international criminal tribunal that in this case was to prosecute German military personnel for war crimes.⁹

Article 228 of the Treaty of Versailles provided that "the German government recognizes the right of the Allied and Associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Furthermore, Article 229 provided for the Allies' right to establish national war crimes tribunals to try alleged German war criminals and Article 230 required the full cooperation and legal assistance of Germany in those proceedings.

In addition to providing for a judicial body to prosecute war criminals, Article 227 of the Treaty of Versailles established the responsibility of Kaiser Wilhelm II for the "supreme offence against international morality and the sanctity of treaties," for which the Kaiser was to be prosecuted separately from the other war criminals. However, the Kaiser sought refuge in the Netherlands, which considered him nonextraditable on the grounds that the offense charged in the Treaty was essentially a "political offense," as it was within the prerogative of national sovereignty for a head of state to decide to go to war.¹⁰ The Allies did not try to secure his surrender.

4. The constitution and procedure of a tribunal appropriate for the trial of these offences.

5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.

1919 COMMISSION REPORT, *supra* note 1, 14 AJIL at 95. See also M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 148 (1992).

⁷ See 1907 Hague Convention, *supra* note 6, Preamble. Because the United States and Japan objected to the concept of international criminal responsibility for violations of the "laws of humanity," this basis for international criminal responsibility was not pursued. 1919 COMMISSION REPORT, *supra* note 1, 14 AJIL at 144-50; Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, Ann. II (Apr. 4, 1919), *reprinted in* 14 AJIL at 127. In 1919 the eventual prosecutions for crimes against humanity related to conduct by Turkish officials against the Armenian and Greek minorities in 1915-1919. Article 230 of the Treaty between the Allied and Associated Powers and Turkey, Aug. 10, 1920, *reprinted in* 2 THE TREATIES OF PEACE, *supra* note 5, at 789, 15 AJIL 179 (Supp. 1921), required Turkey to surrender such accused persons for trial. However, this treaty was never ratified and the surrender of the accused never occurred. Instead, the treaty was replaced by the Treaty of Peace with Turkey, July 24, 1923, *reprinted in* 2 THE TREATIES OF PEACE, *supra*, at 959, 18 AJIL 1 (Supp. 1924), which did not contain a provision similar to Article 230 of the unratified treaty but was accompanied by a "Declaration of Amnesty" for all offenses committed between August 1, 1914, and November 20, 1922. See M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991).

⁸ 1907 Hague Convention, *supra* note 6, preambular para. 6.

⁹ One of the differences between the two bodies is that the 1919 Commission was established contemporaneously with the drafting of the Treaty of Versailles, which provided for an international tribunal, while the 1992 Commission of Experts was established some six months before the establishment of the International Criminal Tribunal for the Former Yugoslavia. See SC Res. 827 (May 25, 1993), *reprinted in* 32 ILM 1203 (1993).

¹⁰ See Quincy Wright, *The Legality of the Kaiser*, 8 AM. POL. SCI. REV. 121 (1919). The Kaiser lived in retirement until his natural death.

The 1919 Commission investigated cases and incidents involving over twenty thousand persons and contemplated the prosecution of some twelve thousand that it believed might have committed war crimes. But when the Allies' political will for international as well as national prosecutions in their own countries eroded, the plans for an international tribunal or national war crimes tribunals set up by the Allies were abandoned in favor of token national prosecutions in Germany. Thus, two years after conclusion of the Treaty of Versailles, the Allies, essentially for political reasons, decided not to establish a war crimes tribunal pursuant to Articles 227, 228 and 229. Instead, the Allies deferred to Germany for the prosecution of a limited number of German violators.¹¹ The 1919 Commission's final list of persons to be prosecuted was reduced to 896 accused. However, Germany's reluctance to prosecute a large number of its own military and the dwindling resolve of some of the Allies brought the list of 896 down to 45 persons who were to be tried before the Criminal Senate of the Imperial Court of Justice sitting in Leipzig.¹²

In December 1919, Germany's parliament had passed a special law to carry out the provisions of Articles 227, 228 and 229 of the Treaty of Versailles. But when the plans for an international tribunal and Allied national war crimes tribunals were abandoned in favor of German prosecutions, two public acts were promulgated, in March 1920 and May 1921, respectively, to give the Imperial Court of Justice special jurisdiction to conduct national trials of cases referred to the court by the Allies.¹³ Since the Prosecutor General of the Imperial Court of Justice had the ultimate authority to initiate prosecutions, the forty-five cases presented by the Allies were further reduced to twelve that were actually tried.¹⁴ Of the twelve cases, six resulted in acquittals.¹⁵

Although the armistice had been signed on November 11, 1918, the trials at Leipzig did not begin until May 23, 1921.¹⁶ During the three-year interim, world public opinion changed and the interest in prosecutions subsided.¹⁷ Additionally, German public opinion supported the accused officers and soldiers.¹⁸ In fact, the German people reacted with "indignation that German judges could be found to sentence the war criminals and the Press brought all possible pressure to bear on the court."¹⁹ Consequently, the Allies decided after all to prosecute accused war criminals in national trials according to Article 229 of the Treaty of Versailles.²⁰ However, the Allies did not extradite any of the accused Germans, with the exception of Belgium,²¹ and France was the only Allied country to conduct *in absentia* trials.²²

Although the Leipzig Trials were a failure, they nonetheless serve as an important historical precedent for war crimes trials. Moreover, the Leipzig Trials

¹¹ See generally CLAUDE MULLINS, *THE LEIPZIG TRIALS* 23–24 (1921); JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* (1982); James W. Garner, *Punishment of Offenders against the Laws and Customs of War*, 14 *AJIL* 70 (1920).

¹² See MULLINS, *supra* note 11, at 26–27.

¹³ See BASSIOUNI, *supra* note 6, at 201 n.41.

¹⁴ See MULLINS, *supra* note 11, at 35–36.

¹⁵ See BASSIOUNI, *supra* note 6, at 201.

¹⁶ *Id.* at 202.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* 51–52 (1948) [hereinafter *HISTORY OF UNWCC*].

²⁰ BASSIOUNI, *supra* note 6, at 202.

²¹ *Id.*

²² *Id.*

helped establish a principle: "to put on record before history that might is not right, and that men whose sole conception of the duty they owe to their country is to inflict torture upon others, may be put on their trial."²³

Europe was tired and drained from the war and wanted peace. Most politicians felt that the war should be consigned to history and its effects not linger. Prosecutions would be contrary to such an approach. Political leaders deemed justice for the victims and the advancement of international justice, which was advocated by many, to be deleterious to political realism.²⁴ Thus, impunity triumphed de facto over the earlier resolve of the Allies to have an uncompromising and uncompromised international justice system function independently of political considerations. That missed opportunity, however, haunted the world after World War II.²⁵ Indeed, compromised justice always haunts succeeding generations.

The 1943 United Nations War Crimes Commission

The United Nations War Crimes Commission was established during World War II by a diplomatic conference held at the Foreign Office in London.²⁶ The term "United Nations" referred to the Allies, since the United Nations Organization had not been established at that time. The UNWCC functioned by authority of the governments of the Allied powers, which established it as a consequence of the declaration signed in St. James Palace on January 13, 1942.²⁷ The Moscow Declaration of October 30, 1943, affirmed the St. James Declaration, which reflected the Allies' intention to prosecute war criminals.²⁸ Both declarations called for the prosecution and punishment of those responsible for the "atrocities conducted during the war."²⁹

The UNWCC produced valuable legal research, provided advice to governments on how to set up and conduct international and national prosecutions, and served as a clearinghouse for information submitted by governments. The UNWCC received "dossiers" from different governments and, when satisfied with the sufficiency of their contents, recommended that the persons in question be prosecuted.³⁰ It also communicated the "dossiers" to certain governments for eventual

²³ MULLINS, *supra* note 11, at 231. See also BASSIOUNI, *supra* note 6, at 202.

²⁴ See, e.g., WILLIS, *supra* note 11.

²⁵ This is evidenced by the difficulties in setting up the post-World War II prosecutions. See, e.g., ROBERT H. JACKSON, REPORT OF THE UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS (1949) [hereinafter JACKSON REPORT].

²⁶ See generally HISTORY OF UNWCC, *supra* note 19.

²⁷ Inter-Allied Declaration, Jan. 13, 1942, reprinted in PUNISHMENT FOR WAR CRIMES: THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES PALACE, LONDON ON 13 JANUARY 1942, AND RELATED DOCUMENTS (United Nations, New York, undated).

²⁸ Declaration on Security, 9 DEP'T ST. BULL. 308 (1943), reprinted in 38 AJIL 5 (1944). President Roosevelt, Prime Minister Churchill and Premier Stalin signed the statement on October 30, 1943.

²⁹ 1943 FOREIGN RELATIONS OF THE UNITED STATES 448. In 1943 the major Allied powers in Europe were England, France, the United States and the USSR, but several other powers were also deemed Allied. Ultimately, 19 of them acceded to the London Charter of August 8, 1945, which was one of the bases for the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279 [hereinafter London Agreement].

³⁰ The UNWCC examined 8,178 "dossiers," which listed 24,453 accused, 9,520 suspects and 2,556 material witnesses. HISTORY OF UNWCC, *supra* note 19, at 508-09. By 1948, European countries and the United States brought a total of 969 cases in their respective courts. The 969 cases involved 3,470 accused, of whom 952 were sentenced to death, 1,905 were imprisoned and 613 were acquitted of all charges. *Id.* at 518.

prosecutions. But the work of the UNWCC was not relied upon in the prosecutions carried out before the International Military Tribunal for the Prosecution of the Major War Criminals of the Axis (IMT).³¹ That prosecution was essentially a United States-led operation headed by Justice Robert Jackson, who set up his own investigation supported by the U.S. occupation forces in Germany.³²

Justice Jackson's investigative operations also supplied information and support to the other three Allies: France, the United Kingdom and the Soviet Union. However, each of these countries essentially conducted its own investigations, though the United Kingdom and France made some use of UNWCC material. Understandably, however, since most of the UNWCC's material originally came from governments, its "dossiers" did not always have anything to add to what had been submitted, even though the UNWCC had a committee to carry out "investigations." After the IMT proceedings, the four major Allied powers conducted "Subsequent Proceedings" in their respective zones of occupation in Germany pursuant to Control Council Law No. 10.³³ Other proceedings also took place before national tribunals.³⁴ But the work of the UNWCC, although meritorious, was not heavily relied upon in the "Subsequent Proceedings" for the reasons stated above.³⁵

The work of the UNWCC was particularly relevant to the various treaties of peace concluded between the Allies and the separate Axis powers, which contained provisions concerning prosecutions of war criminals. One example, which serves as an illustration of the blatant disregard of the UNWCC's work, concerned Italy.³⁶ The UNWCC found that 1,286 accused Italian war criminals should be prosecuted by the Allies pursuant to Italy's treaty of surrender.³⁷ After the Allies withdrew from Italy, the UNWCC expected the Italian Government to carry out the prosecutions. The UNWCC had extensive documentation on crimes committed by the Italians in Ethiopia in 1936, in Libya during the war, and also during Italy's war with and partial occupation of Yugoslavia and Greece. The evidence pre-

³¹ See generally TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1949).

³² See JACKSON REPORT, *supra* note 25. See generally TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS (1992).

³³ Allied Control Council Law No. 10, Dec. 20, 1945, CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE NO. 3, Jan. 31, 1946, at 50, reprinted in BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE 488 (1980). For U.S. proceedings, see FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955 (1989); TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NÜRNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949).

³⁴ See BASSIOUNI, *supra* note 6, at 213; JEAN PIERRE MAUNOIR, LA REPRESSION DES CRIMES DE GUERRE DEVANT LES TRIBUNAUX FRANÇAIS ET ALLIÉS (1956); HENRI MEYROWITZ, LA REPRESSION PAR LES TRIBUNAUX ALLEMANDS DES CRIMES CONTRE L'HUMANITÉ ET DE L'APPARTENANCE À UNE ORGANISATION CRIMINELLE (1960); Willard B. Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AJIL 299 (1948).

³⁵ An estimated 16,000 persons were prosecuted at the "Subsequent Proceedings" by the four major Allies that occupied Germany, each one setting up its own proceedings with different substantive laws and procedures for each court. See Remigiusz Bierzanek, *War Crimes: History and Definition*, in 3 INTERNATIONAL CRIMINAL LAW 29 (M. Cherif Bassiouni ed., 1987).

³⁶ The Treaty of Peace with Italy, Feb. 10, 1947, 4 Bevans 311, 61 Stat. 1245, provides in Article 45 that Italy has a duty to extradite any of its nationals charged with war crimes. Ethiopia, Greece and Yugoslavia repeatedly requested the extradition of war criminals, but were refused first by the United States and the United Kingdom as occupying forces in Italy, and then in 1946 by the Italian Government. See BASSIOUNI, *supra* note 6, at 227-28.

³⁷ See HISTORY OF UNWCC, *supra* note 19, at 511.

sented by these respective Governments through the UNWCC was ignored, both by the Allies between 1944 and 1946 and by the Italian Government thereafter. Therefore, no extradition or prosecution ever ensued. The reasons for this situation were essentially political.

The Results of the Earlier Commissions

The 1919 Commission conducted a significant number of investigations and the 1943 UNWCC produced a great deal of evidence and information. The evidence and information accumulated by these two bodies were to be used in connection with international prosecutions and also national prosecutions. But this result did not obtain. It should be emphasized that, when the establishing powers originally set up these investigatory bodies, it was with the intention that they should produce evidence for prosecutions to take place before international and national tribunals. It was neither the paucity nor the inadequacy of evidence which precluded that result but, rather, the change in political will of the powers that had set up these institutions. After World War I, the major European Allies and the United States did not wish to antagonize Germany and its people any further. As to the aftermath of World War II, the Nuremberg IMT was the focus of attention. The United States dominated these proceedings but made no use of the UNWCC; nor did the four major Allies in the "Subsequent Proceedings" pursuant to Control Council Law No. 10. After the IMT proceedings, the USSR, England and France went their separate ways for their own reasons. Other national proceedings did not utilize the work of the UNWCC, which was effectively terminated in 1947, as it had never enjoyed enough international political support for its work.

II. THE 1992 COMMISSION OF EXPERTS

The 1992 Commission of Experts was not the first investigative commission related to the region of the former Yugoslavia. Early in the twentieth century, the Carnegie Endowment for International Peace established a commission of international personalities to investigate alleged atrocities committed against prisoners of war and civilians during the First Balkan War of 1912 and the Second Balkan War of 1913.³⁸ At the start of the Second Balkan War, the Commission investigated the conflict and the conduct of those involved in order to give the western world a "clear and reliable picture of what was going on in the affected region."³⁹ After overcoming considerable political and practical obstacles in the region, the Balkan Commission conducted several fact-finding missions and eventually produced a substantial report based on their findings. The reported atrocities of 1912 and 1913 bear a haunting resemblance to those which were committed between 1991 and 1994.⁴⁰

³⁸ THE OTHER BALKAN WARS 6 (Carnegie Endowment for International Peace, 1993) [hereinafter BALKAN WARS]. The Carnegie Endowment appointed seven members to the Commission from the following countries: the United States, Britain, Germany, Austria-Hungary, Russia (one from each), and France (two). *Id.* All of the members were prominent figures in the international peace movement at the time. *Id.*

³⁹ *Id.*

⁴⁰ A comparison of the *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, reprinted in BALKAN WARS, *supra* note 38, and the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (May 27, 1994) [hereinafter Final Report], reveals uncanny similarities in the processes of victimization in that region.

Mandate and Links to the International Criminal Tribunal for the Former Yugoslavia

The Commission of Experts, unlike its historical antecedents described above, received its mandate from what appeared to be a unified Security Council. Thus, its legal and moral authority was unprecedented. Its broad and comprehensive mandate fully encompassed all of the violations that occurred in the conflict in the former Yugoslavia. No time limit was established for its work and expectations of justice by world public opinion were high. The Security Council authorized the establishment of the Commission of Experts in Resolution 780 of October 6, 1992, which defined its mandate by stating that the Council:

2. *Requests* the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.⁴¹

Previously, on August 13, 1992, the Security Council had adopted Resolution 771, which set the stage for establishing the Commission of Experts in Resolution 780. Resolution 771 required member states to submit reports on violations of international humanitarian law, but other than some of the parties to the conflict, only the United States submitted a report. While the Commission of Experts was not originally set up in October 1992 with the specific view that it would be the first step in the establishment of an ad hoc war crimes tribunal, that prospect was nonetheless contemplated by several members of the Security Council.⁴² Indeed, the subsequent stages in the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) revealed the nexus between the Commission and the Tribunal, though no formal institutional links were developed.

In view of this lack of a formal connection, there were some early doubts as to whether the mandate of the Commission of Experts was to gather "evidence," as that word is understood in criminal prosecutions, or whether the term "evidence" in its mandate was only meant to be demonstrative of the type of violations that occurred in the context of the conflict. Since a tribunal had not yet been estab-

⁴¹ SC Res. 780 (1992), *supra* note 2, operative para. 2. The Secretary-General appointed five members on October 25, 1992: Professor Frits Kalshoven (the Netherlands) as chairman; Professor M. Cherif Bassiouni (Egypt); Commander William J. Fenrick (Canada); Judge Keba M'Baye (Senegal); and Professor Torkel Opsahl (Norway). Professor Kalshoven resigned from the Commission for medical reasons in August 1993, and Professor Opsahl, who was briefly the acting chairman, passed away in September. Therefore, on October 19, 1993, the Secretary-General appointed Professor Bassiouni as chairman and Professor Christine Cleiren (the Netherlands) and Judge Hanne Sophie Greve (Norway) as new members. Even though he is a naturalized U.S. citizen, Professor Bassiouni, a native-born Egyptian, was listed as being from "Egypt," because it was felt that no representative of the permanent members of the Security Council should be on the Commission.

⁴² The United States introduced Security Council Resolution 780, as well as its predecessor Resolution 771. The United States wanted the Commission called "War Crimes Commission" or to have the words "war crimes" as part of the name, which would have been reminiscent of the 1943 UNWCC and the Nuremberg proceedings. The U.S. position was based on its expectation that the Commission would pave the way for an eventual tribunal, but largely because of the opposition of the United Kingdom, a compromise on the name "Commission of Experts" was reached in the Security Council.

lished, it was assumed by some that the latter was the case. Whether the Commission should or could have focused its efforts on securing prosecution-oriented criminal evidence from its inception depended not only on the existence of a tribunal and its eventual rules of evidence, but also on the availability of adequate resources, which at the time were insufficient for such purposes.⁴³ However, once the ICTFY was established in May 1993, the Commission of Experts sought to focus its work on the pursuit of prosecution-oriented evidence. Thus, it reinforced its links with the Tribunal. This effort was continued until the Commission terminated its activities.

On February 22, 1993, following the submission of the Commission's (first) Interim Report,⁴⁴ the Security Council took the first step in establishing an ad hoc International Criminal Tribunal for the former Yugoslavia. Resolution 808 (1993) provided that the Security Council "[d]ecides that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."⁴⁵ The Council cited three proposals drafted in anticipation of the establishment of such a tribunal.⁴⁶ It also referred to the conclusion of the Commission's (first) Interim Report that the establishment of an ad hoc international tribunal would be "consistent with the direction of its work."⁴⁷ Whether the Security Council merely cited the Commission's anticipation that an international tribunal would be set up for support, or whether it was also convinced by the contents of the (first) Interim Report that such a tribunal was needed, is not known. However, there is no doubt that France took the lead in the initiative,⁴⁸ strongly supported by the United States. Italy's contribution was also very useful.⁴⁹ Moreover, having sent three investigative missions to the former Yugoslavia, the CSCE was both supportive and influential in the outcome.⁵⁰

Pursuant to Resolution 808 (1993), the Secretary-General submitted a report to the Security Council on May 3, 1993,⁵¹ containing a proposed statute of the international tribunal. It is a comprehensive text clearly written and easy to understand, consisting of thirty-four articles with accompanying commentary on

⁴³ See "Resources of the Commission," *infra* p. 801.

⁴⁴ Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274, at 20, para. 74 (Feb. 10, 1993) [hereinafter First Interim Report].

⁴⁵ SC Res. 808 (Feb. 22, 1993). See generally Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122.

⁴⁶ The proposals considered were submitted by the Committee of French Jurists, a commission of Italian jurists and the Permanent Representative of Sweden on behalf of the Conference on Security and Co-operation in Europe (CSCE). See UN Docs. S/25266, S/25300 and S/25307, respectively (1993). All three proposals relied, in part, on M. CHERIF BASSIOUNI, DRAFT STATUTE INTERNATIONAL CRIMINAL TRIBUNAL (Nouvelles Études Pénales No. 9, 1992).

⁴⁷ First Interim Report, *supra* note 44.

⁴⁸ See UN Doc. S/25266 (1993).

⁴⁹ See UN Doc. S/25300 (1993).

⁵⁰ See UN Doc. S/25307 (1993). The drafting of the statute involved significant consultations with governments, nongovernmental organizations and individual experts. The work was under the supervision of Carl-August Fleischhauer, then Under-Secretary-General and Legal Counsel of the United Nations and now a judge of the International Court of Justice, and Ralph Zacklin, Deputy Legal Counsel of the United Nations.

⁵¹ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1159 (1993) [hereinafter Report of the Secretary-General].

each article.⁵² On May 25, 1993, the Security Council unanimously passed Resolution 827, which established an international tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia," and adopted the Secretary-General's proposed statute without amendment.⁵³ Under the terms of the tenth preambular paragraph of Resolution 827, the Commission of Experts was asked to continue its work "on an urgent basis," pending the appointment of a prosecutor. Thus, Resolutions 808 and 827 clearly establish the connection between the Commission and the Tribunal in that Resolution 808 refers to the Commission's recommendation that a tribunal be established as a logical extension of its work, and Resolution 827 refers to the continuation of the Commission's work presumably as the basis for the Prosecutor's forthcoming activities.

Owing, however, to political difficulties in appointing a prosecutor, which lasted until July 1994, the relationship between the two organs was necessarily unpredictable. The first Prosecutor was appointed by the Security Council in October 1993, but he never took office and notified the Secretary-General of his resignation on January 17, 1994.⁵⁴ Meanwhile, believing that the Prosecutor would take office in February 1994, Carl-August Fleischhauer, then United Nations Legal Counsel, notified the Commission on December 13, 1993, that its work should end on April 30, 1994.⁵⁵ On July 8, 1994, the Secretary-General nominated another Prosecutor to fill the vacancy left by the resignation of the first appointee.⁵⁶ Between January 17 and August 15, 1994, there was no prosecutor in office. Therefore, the termination of the Commission without a prosecutor in office was not within the spirit of Resolution 827, which was to establish continuity between the two organs.

Nevertheless, at the appointed date for the completion of its work, April 30, the Commission turned over its data base and all of its documents and materials to the Office of the Prosecutor, which started its work on the basis of the Commission's material and used some of the personnel that had been associated with the Commission. Thus, the passage from the Commission to the Office of the Prosecutor of the ICTFY was promptly effectuated, though without a gradually phased transition.⁵⁷

⁵² The Commission of Experts contributed to the Report of the Secretary-General, *supra* note 51, with respect to the formulation of the applicable law consistent with its statements in its First Interim Report, *supra* note 44.

⁵³ SC Res. 827, *supra* note 9. Several governments had wanted to introduce amendments to the proposed statute, but it was feared that such a process would only delay its adoption. Therefore, no amendments were allowed, though the resolution itself contained a few substantive additions.

⁵⁴ The Secretary-General, under Article 16(4) of the Tribunal's statute, has the prerogative of nominating candidates for the Council's appointment. Report of the Secretary-General, *supra* note 51, at 42. He formally nominated M. Cherif Bassiouni in August 1993. The Council had decided to act on the nomination by consensus instead of by vote. This first nominee did not, however, obtain the consensus of the Council's members. In July 1994, the Secretary-General appointed Justice Richard Goldstone of the Supreme Court of South Africa and the Security Council unanimously accepted the appointment. See text at and note 56 *infra*. Justice Goldstone took office on August 15, 1994.

⁵⁵ No decision had been taken by the Security Council as of the date of Mr. Fleischhauer's letter to terminate the Commission, which the Council itself had created.

⁵⁶ See *supra* note 54.

⁵⁷ See "Termination of the Commission," *infra* p. 802.

Applicable Law

In its (first) Interim Report, the Commission addressed various questions pertaining to the applicable law. Such questions were particularly relevant to the Commission's determination of what to focus on in its investigations of evidence of "grave breaches of the Geneva Conventions and other violations of international humanitarian law."⁵⁸

The Commission articulated its views on certain legal questions, concluding that for its purposes it would consider the conflict as a "conflict of an international character," and therefore subject to the international law of armed conflict.⁵⁹ The international law of armed conflict consists of the relevant rules of customary international law contained in the 1907 Hague Convention on the Regulation of the Laws and Customs of War on Land⁶⁰ and the codification contained in the 1949 Geneva Conventions⁶¹ and the 1977 Additional Protocols.⁶² In addition, the Commission concluded that the following also applied: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;⁶³ the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;⁶⁴ and "crimes against humanity," as established in conventional and customary international law.⁶⁵

The Commission consistently held the view that, irrespective of whether all or part of the conflict over all or part of the territory would be deemed a conflict of an international or a noninternational character, there were sufficient international legal norms applicable to all of the violations that were committed. Furthermore, the Commission held that genocide and "crimes against humanity" were proscriptive norms of *jus cogens*, which applied at all times and places regardless of the parties to the conflict or its characterization. The Commission also consistently took the view that, pursuant to its mandate, it would not consider any legal issues pertaining to the parties' claims regarding the legitimacy of the use of force. In short, the Commission did not deal with claims of "aggression" and "self-defense," but only with conduct in connection with the *jus in bello* and other violations of international humanitarian law in the course of the armed conflict irrespective of its characterization.

⁵⁸ SC Res. 780, *supra* note 2, operative para. 1.

⁵⁹ First Interim Report, *supra* note 44, at 13–14, paras. 37–45. For a recent survey of legal issues, see Jordan Paust, *Applicability of International Criminal Laws to the Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1994).

⁶⁰ 1907 Hague Convention, *supra* note 6.

⁶¹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

⁶² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 UNTS 3, *reprinted in* 16 ILM 1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 UNTS 606, 16 ILM at 1442.

⁶³ Dec. 9, 1948, 78 UNTS 277.

⁶⁴ May 14, 1954, 249 UNTS 240.

⁶⁵ See Charter of the International Military Tribunal, Art. 6(c), annexed to the London Agreement, *supra* note 29; International Law Commission, Report on Principles of the Nuremberg Tribunal, UN GAOR, 5th Sess., Supp. No. 12, at 11, UN Doc. A/1316 (1950); see also BASSIOUNI, *supra* note 6, at 479–99.

It should be noted that after the breakup of the former Yugoslavia, the Federal Republic of Yugoslavia, Slovenia, Croatia, and Bosnia-Herzegovina considered themselves to be successor states to the former Yugoslavia, which had ratified the 1949 Geneva Conventions and the 1977 Additional Protocols, and that they were therefore bound by the 1949 Geneva Conventions.⁶⁶ Furthermore, Slovenia, Croatia, and Bosnia-Herzegovina explicitly declared themselves bound by both the Conventions and the Protocols.⁶⁷

Other formulations of applicable law are found in the (first) Interim Report (paras. 47–54). In its Final Report, the Commission noted with satisfaction that many of its legal formulations had found their way into the statute of the ICTFY concerning the applicable law.⁶⁸ However, the Commission took it upon itself to clarify certain legal issues in the Final Report, so as to demonstrate the legal bases on which it had relied in its work. It thus explained its understanding of “genocide,”⁶⁹ “crimes against humanity,”⁷⁰ “command responsibility,”⁷¹ “superior orders,”⁷² “reprisals,”⁷³ and “rape and other forms of sexual assault,”⁷⁴ as related to the facts it had examined and reported. The Commission also emphasized its understanding that Protocols I and II to the Geneva Conventions apply, even though the statute of the ICTFY does not specifically refer to them.⁷⁵

Interestingly, both the 1919 Commission and the 1943 UNWCC also dealt with questions of applicable law in their earlier sessions, as well as in their final reports. Because it was more investigation oriented and composed primarily of military personnel, the 1919 Commission was less concerned about questions of law than the 1943 UNWCC, which had more jurists and diplomats as members and staff. Both, however, contributed to the advancement of international humanitarian law. Without the 1919 Commission’s efforts to articulate the concept of “crimes against the laws of humanity,” “crimes against humanity,” as defined in Article 6(c) of the Nuremberg Charter, would not have been easily charged and prosecuted after World War II.⁷⁶ Similarly, it is hoped that the work of the Commission of Experts on the applicable law will contribute to the jurisprudence of the ICTFY and to future legal developments in international criminal law.

The Work of the Commission of Experts

The Commission of Experts worked on three tracks: (1) developing a data base for information and evidence received and its analysis; (2) conducting on-site

⁶⁶ First Interim Report, *supra* note 44, at 13, para. 38.

⁶⁷ Slovenia, Croatia and Bosnia-Herzegovina, respectively, signed separate declarations with the International Committee of the Red Cross. The three countries succeeded to the 1949 Geneva Conventions and the 1977 Additional Protocols on the following dates: Slovenia, March 26, 1992; Croatia, May 11, 1992; and Bosnia-Herzegovina, December 31, 1992. See First Interim Report, *supra* note 44, at 13, para. 38; Final Report, *supra* note 40, at 32, para. 125.

⁶⁸ Final Report, *supra* note 40, at 16, 18, paras. 56, 62.

⁶⁹ *Id.* at 24–27, paras. 87–101.

⁷⁰ *Id.* at 20–24, paras. 72–86.

⁷¹ *Id.* at 16–17, paras. 55–60.

⁷² *Id.* at 18, paras. 61–62.

⁷³ *Id.* at 18–19, paras. 63–66.

⁷⁴ *Id.* at 27–29, paras. 102–09. See also Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424 (1993).

⁷⁵ See Report of the Secretary-General, *supra* note 51.

⁷⁶ M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 CO-LUM. J. TRANSNAT’L L. 457 (1994).

investigations; and (3) relying on certain governments to conduct investigations on its behalf. Notwithstanding limited resources and personnel, discussed below, and the early difficulties encountered by the Commission, some of which were simply due to the novelty of the enterprise, its record of accomplishment is noteworthy. In less than eight months, from July 1993 to March 1994, the Commission undertook thirty-five field missions,⁷⁷ conducted several extensive investigations, gathered a large amount of evidence and information, and produced several major reports⁷⁸—all of which constitutes a starting point for the Prosecutor of the ICTFY.

At its second session, held in Geneva in December 1992, the Commission formally elected two rapporteurs to be principally responsible for the first two investigative techniques. M. Cherif Bassiouni was elected Rapporteur for the Gathering and Analysis of the Facts and William J. Fenrick was elected Rapporteur for On-Site Investigations. The chairman of the Commission was responsible for follow-up with governments on specific matters. In October 1993, at the Commission's eighth session, other members were asked to fulfill certain specific tasks: Judge Keba M'Baye was to be Rapporteur for the Destruction of Cultural Property; Judge Hanne Sophie Greve was to be Rapporteur on the Prijedor Area; and Professor Christine Cleiren was to prepare a special report on the legal aspects of rape and sexual assault.

Gathering and analysis of the facts. The Rapporteur on the Gathering and Analysis of the Facts established a data base at DePaul University's International Human Rights Law Institute (IHRLI), which relied on an average of thirty-two lawyers and law students, in the course of time, to input the data and prepare analyses and reports on different topics. By the time the data base was transferred to the Office of the Prosecutor of the ICTFY, on April 30, 1994, it had received sixty-four thousand pages of documents⁷⁹ submitted by governments, intergovernmental organizations, nongovernmental organizations and other sources.

In addition, a special library of video tapes was established, containing over three hundred hours of tape. These tapes were produced by different public and private television networks in several countries, including those from the "warring factions" and private sources. The archive of video tapes was set up mostly through the voluntary contribution of Linden Productions of Los Angeles, California, which also translated tapes in foreign languages and prepared written transcripts with technology that permits the juxtaposition of printed images and corresponding text.⁸⁰

The reports produced by the legal analysts of IHRLI, which are annexes to the Commission's Final Report, are on the following subjects: "The Military Structure of the Warring Factions,"⁸¹ "Special Forces,"⁸² "Ethnic Cleansing,"⁸³ "The Battle

⁷⁷ Final Report, *supra* note 40, at 10, paras. 23–24.

⁷⁸ The Annexes to the Final Report are expected to be over 3,000 pages long.

⁷⁹ To keep track of the 64,000 pages of documents, an elaborate system was established for recording the documents as they were received.

⁸⁰ In addition to being a visual record, the archive of video tapes also helps witnesses identify places and persons, including perpetrators. The Office of the Prosecutor is exploring the use of this technology, provided by IHRLI and Linden Productions.

⁸¹ Final Report, *supra* note 40, at 29–33, paras. 110–28.

⁸² *Id.*

⁸³ *Id.* at 33–37, paras. 129–50.

and Siege of Sarajevo,”⁸⁴ “Detention Facilities,”⁸⁵ “Rape and Other Forms of Sexual Assaults,”⁸⁶ and “Mass Graves.”⁸⁷

The data-base operation was wholly funded by private sources. The total costs, as of April 30, 1994, exceeded one million dollars. The data-base program and its contents, the video archive, and all of the original documents were delivered to the Office of the Prosecutor of the ICTFY.

Neither the Commission nor IHRLI verified the information that they received from the different sources identified above. However, in preparing reports and the annexes to the Final Report, the staff of IHRLI made an effort to verify the plausibility of the information, eliminate duplicates and check facts deriving from multiple sources. This verification process validates the macroanalytical conclusions contained in the reports and annexes. However, each item of information cannot be advanced as having evidentiary reliability in criminal proceedings, at least according to common law rules of evidence. But after October 1993, the Commission became more active in seeking out information and in verifying its source and content. Thus, the Commission developed certain investigative projects whose purpose was to confirm some of the information received from the various sources described above.⁸⁸

On-site investigations. A number of exploratory missions were conducted under the direction of Commander Fenrick, the Rapporteur for On-Site Investigations. Several important projects were carried out: (1) an investigation in Sarajevo, which consisted of a law of war study focusing on a single incident and a pilot rape investigation; (2) a mass-grave exhumation in United Nations Protected Area (UNPA) Sector West, Croatia, from which nineteen bodies were exhumed; (3) an attempt to conduct a mass-grave exhumation at Ovčara (Vukovar, UNPA Sector East, Croatia); (4) a radiological investigation in UNPA Sector West; (5) an investigation of the battle of Dubrovnik concerning the destruction of cultural property and other aspects of the law of war; and (6) an investigation of the “Medak Pocket” incident (UNPA Sector South, Croatia).⁸⁹

The Ovčara (Vukovar) mass-grave exhumation was not completed because of local political obstacles.⁹⁰ The Commission learned in November 1992 that a mass grave contained approximately two hundred bodies of presumably murdered Croats who were at the Vukovar hospital on November 20–21, 1991, when the Yugoslav National Army (JNA) and Krajina Serb militias took control of the hospital and the city. After months of negotiations between representatives of the Commission and the Serbian political authorities in control of the Krajina area, the Commission received several written approvals from the highest political authorities to conduct the investigation.⁹¹ However, when the team of sixty-five military engineers, investigators and forensic experts arrived in October 1993, a local Serbian militia commander informed them that the so-called Republika

⁸⁴ *Id.* at 43–46, paras. 183–94.

⁸⁵ *Id.* at 51–55, paras. 216–31.

⁸⁶ *Id.* at 55–60, paras. 232–53.

⁸⁷ *Id.* at 61–62, paras. 254–64.

⁸⁸ Under the direction of Commissioner Greve, the Prijedor project, which started with information gathered in the data base, produced direct information and evidentiary statements.

⁸⁹ On the Medak Pocket incident, see Final Report, *supra* note 40, at 49–51, paras. 210–15.

⁹⁰ *Id.* at 62–65, paras. 265–76. The Commission, however, conducted several field investigations at the site with the aid of experts from Physicians for Human Rights. The team confirmed the existence of the mass grave and videotaped the site and some of the remains found near the surface. The team also collected some evidence in the nature of statements and other tangible evidence.

⁹¹ *Id.* at 62–63, paras. 265, 267–69. The Croatian Government cooperated with the Commission on this investigation, as well as other activities conducted in that state.

Serb-Krajina ("RSK") parliament had decided to postpone the dig until a political solution to the conflict in the former Yugoslavia was found.⁹² After further discussions, in November 1993, the president of the "RSK" agreed in writing to the exhumation on the condition that an observer be present, to which the Commission agreed.⁹³ Owing to the winter weather, however, the team could not resume work until the spring of 1994 (April 10, 1994, was the chosen date), when termination of the Commission prevented the pursuit of this investigation.⁹⁴ The Commission transferred all documents pertaining to the Ovčara mass grave to the Office of the Prosecutor of the ICTFY. The United Nations Protection Forces (UNPROFOR) have remained in control of the area since October 1993. The site has thus far remained intact.⁹⁵ It is expected that the Office of the Prosecutor of the ICTFY will pursue this investigation.⁹⁶

Concurrently with the Ovčara (Vukovar) investigation described above, the Commission conducted a similar one in Pakračka Poljana.⁹⁷ In March 1993, the Commission learned of mass graves in this area, which reportedly contained seventeen hundred bodies presumed to be inhabitants of the Serb-Krajina area killed by Croats.⁹⁸ Physicians for Human Rights confirmed the possible existence of a mass grave after a preliminary site survey.⁹⁹ After extensive exploration, the investigators discovered only nineteen bodies—sixteen male and three female—which were buried in nine separate graves in the same field.¹⁰⁰ Being a rural area, Pakračka Poljana did not have proper morgue facilities for post-mortem examinations. Consequently, the bodies were properly reburied in an appropriately identified area guarded by UNPROFOR until such time as the Office of the Prosecutor of the ICTFY can conduct post-mortem examinations.¹⁰¹

The mass-grave investigations required difficult logistical preparation and organization, as well as significant personnel and financial resources, which were contributed by a few governments.¹⁰² Mass-grave exhumations are like complex archaeological expeditions requiring labor-intensive, methodical work. The forensic experts from Physicians for Human Rights used the most current technological equipment, such as sophisticated electronic mapping procedures to allow the team to measure and map precisely the entire grave-site area, artifacts, human remains, and other objects. In addition, still photography and video cameras recorded all activity at the grave site, the forensic methods utilized, and the identification of objects found. As in archaeological work, after the area was cleared of

⁹² *Id.* at 63–64, paras. 271–73.

⁹³ *Id.* at 64, para. 275. The Croatian Government was given the same privilege.

⁹⁴ See text at and note 139 *infra*.

⁹⁵ Final Report, *supra* note 40, at 65, para. 276. The grave site is protected by soldiers from a nearby Russian UNPROFOR unit.

⁹⁶ In view of the fact that the Federal Republic of Yugoslavia and the so-called Serb Republic of Krajina have not yet recognized the competence of the ICTFY, it is doubtful whether the Krajina Serb authorities will authorize exhumation by the Office of the Prosecutor.

⁹⁷ Final Report, *supra* note 40, at 65–66, paras. 277–84. The cooperation of the Government of Croatia made this investigation possible.

⁹⁸ *Id.* at 65, para. 277.

⁹⁹ *Id.*, para. 278.

¹⁰⁰ *Id.* at 65–66, para. 281.

¹⁰¹ *Id.* at 66, para. 283. The grave site was protected by a unit of UNPROFOR's Jordanian battalion until July 1994, when Croatia requested that the area be placed under the control of its army, the H.V.

¹⁰² The contributing Governments were Canada, the Netherlands, and the United States. Sixty-five persons were directly involved in these operations.

growth and topsoil, small tools and brushes were used to expose the remains.¹⁰³ At all times during the process, precautions were taken to ensure that evidence was properly preserved and that the remains were kept in a way that would enhance preservation.¹⁰⁴

Three separate investigative projects were also undertaken under the direction of three members of the Commission. First, Commissioner Greve conducted a comprehensive study of the Prijedor area, which resulted in the accumulation of several hundred pages of testimony from victims and witnesses located in several counties. The testimony focused on "ethnic cleansing" and other violations of international humanitarian law in that region of Bosnia.¹⁰⁵ A confidential summary report was delivered to the Office of the Prosecutor of the ICTFY shortly after the Commission officially terminated its work and the project is expected to produce the bases for some early prosecutorial action. Second, Commissioner M'Baye conducted an investigation into the destruction of cultural property, focusing on Dubrovnik and the Mostar Bridge.¹⁰⁶ Third, Chairman Bassiouni directed a rape investigation in Croatia.¹⁰⁷

The rape investigation was the first of its kind to have been conducted in time of war. The thirty-five persons involved included thirty-one women from eleven countries. The all-female team of investigators consisted of experienced prosecutors (and one criminal defense lawyer), with the support of female mental health specialists (with the exception of two male psychiatrists). The legal investigative team and the mental health team were all volunteers. The Commission, however, provided administrative staff and translators. The group was divided into eleven teams, which operated in five cities contemporaneously and interviewed 223 victims and witnesses. The evidence that they secured took the form of interviewers' reports, which were submitted to the Office of the Prosecutor of the ICTFY.¹⁰⁸

The rape investigation was supplemented by other investigations conducted by certain governments for and on behalf of the Commission. The information obtained by the government-sponsored investigations, together with the information contained in the data base, formed the bases of the Commission's findings on that question in its Final Report.¹⁰⁹

The Commission concluded in its Final Report that rape was essentially used by one of the "warring factions" against another of the "warring factions" in a systematic way that implied a policy of, at least, omission, if not commission.¹¹⁰ Because of the significance of the evidence accumulated by the Commission and

¹⁰³ For an in-depth report on the exhumations, see Annexes X.A (Ovčara) and X.B (Pakračka Poljana) to the Commission's Final Report, *supra* note 40.

¹⁰⁴ See special reports pertaining to on-site investigations in the following annexes to the Final Report, *supra* note 40: X.A (Vukovar, Ovčara, UNPA Sector East, Croatia); X.B (Medak and Dubrovnik, UNPA Sectors East and West); and XII (radiological investigation, UNPA Sector West, Croatia).

¹⁰⁵ Final Report, *supra* note 40, at 37–43, paras. 151–82. The evidence obtained was turned over to the Office of the Prosecutor of the ICTFY.

¹⁰⁶ *Id.* at 66–68, paras. 285–97.

¹⁰⁷ See *id.*, Ann. IX.A, Sexual Assault Investigation.

¹⁰⁸ The Commission, by agreement with the Acting Deputy Prosecutor, Graham Blewitt (Australia), decided not to take formal statements of victims and witnesses in order not to prejudice the Prosecutor's subsequent work and also not to have statements that could be used later to impeach witnesses at trial. This was not the Commission's only concern. Concern for the victims' and witnesses' safety and privacy, as well as their emotional state, was paramount. The project was funded by a contribution from the Netherlands.

¹⁰⁹ See Final Report, *supra* note 40, at 55–60, paras. 232–53.

¹¹⁰ *Id.* at 60, paras. 251–53.

the large number of victims desirous of testifying, it is expected that the Office of the Prosecutor will give this particularly heinous crime its utmost attention and highest priority. But the nature of this crime is such that the Prosecutor will have to provide effective security measures to protect victims and witnesses, as well as provide for measures to ensure their privacy.¹¹¹

Investigations conducted by governments. The Governments of Austria, Germany and Sweden employed government lawyers and police investigators to conduct investigations for and on behalf of the Commission. The Austrian investigation covered over 453 cases involving various aspects of violations of international humanitarian law. A special investigation in that country dealt with seven rape cases. In addition, the Government of Austria funded the Boltzman Institute's investigation of "ethnic cleansing" in Zvornik (Bosnia), for which over five hundred refugees in Austria were interviewed by the institute's staff.¹¹² The investigation in Germany focused on the Prijedor area and was part of the investigation on that area conducted by Commissioner Greve.¹¹³ Sweden conducted 153 police interviews of victims of violations of international humanitarian law, of whom 34 were rape victims.

By agreement with these Governments, the information they provided was not entered into the data base at IHRLI, in order to preserve confidentiality and privacy. However, the information was forwarded by the Commission to the Office of the Prosecutor of the ICTFY. Additionally, quite a few governmental submissions to the Commission contained detailed reports and interviews with victims and witnesses. Among them are reports from the United Kingdom concerning victims and witnesses from the Prijedor area and, more particularly, former detainees from the Omarska prison camp. The United States presented several hundred pages of reports and summaries of testimony of victims and witnesses, a large number of them from the general areas of Brčko and Prijedor. Detailed submissions were received from the Governments of Bosnia and Hercegovina, Croatia and the former Republic of Yugoslavia, which also included reports of violations of international humanitarian law committed against Serbs in Krajina and eastern and western Slavonia (Croatia), and Serbs in Bosnia.

Field missions conducted by the Commission. The Commission conducted thirty-five field missions during the period from March 1993 to March 1994. They included some of the investigations described above, as well as exploratory and preparatory missions for some of the Commission's projects. The field missions also included the gathering of evidence and receipt of information from the "warring factions," various organizations in the respective countries, UNPROFOR,¹¹⁴ and the European Community Monitoring Mission.¹¹⁵

¹¹¹ The Rules of Procedure and Evidence for the ICTFY ensure the support and protection of victims and witnesses.

¹¹² See Final Report, *supra* note 40, Ann. IV, pt. 3.

¹¹³ Final Report, *supra* note 40, at 37-43, paras. 151-82.

¹¹⁴ At first, UNPROFOR did not provide the Commission with information on violations of international humanitarian law on the grounds that it was contrary to its mandate. The Civil Police of UNPROFOR (CIVPOL) also did not give the Commission detailed reports of its investigations until after April 1993, when more information was forthcoming, though sketchy. In September 1993, the situation changed and UNPROFOR started to conduct some detailed investigations, particularly on the Medak Pocket incident, *supra* note 89, and the Stupni Do incident, which involved the destruction of a village and the brutal killing of a large number of its inhabitants.

¹¹⁵ Regrettably, the European Community Monitoring Mission has never had a centralized documentation center where all of its reports could be kept and cataloged.

Cooperation with governments, UN bodies, intergovernmental organizations and nongovernmental organizations. The Commission cooperated with a wide variety of sources of information, which are mentioned in its two interim reports¹¹⁶ and its Final Report.¹¹⁷ This cooperation contributed significantly to the Commission's work. However, notwithstanding Security Council Resolutions 771 and 780, relatively few governments supplied the Commission with information. They were Albania, Australia, Austria, Belgium, Bosnia-Herzegovina, Burkina Faso, Canada, Colombia, Croatia, Denmark, the Federal Republic of Yugoslavia, France, Germany, Iran, Italy, Kenya, the Netherlands, Norway, Russia, Saudi Arabia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Arab Emirates, the United Kingdom, the United States and Venezuela.¹¹⁸ Of these, even fewer supplied detailed or legally relevant information. They were Austria, Germany, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States. The Commission cooperated most closely with the office of the Commission on Human Rights' Special Rapporteur on the Former Yugoslavia, Tadeusz Mazowiecki, and the respective staffs of the two bodies were in daily contact. Cooperation could not have been at a better or more amicable level. UNPROFOR and its CIVPOL division cooperated with the Commission in the field, but neither group provided substantive information about violations because of UNPROFOR's mandate.¹¹⁹

As for intergovernmental organizations, the United Nations High Commissioner for Refugees and the International Committee of the Red Cross¹²⁰ did not give the Commission substantive information. Because such organizations have specific mandates that, for the most part, do not include gathering or providing information on violations of international humanitarian law, the Commission did not have the benefit of acquiring additional and possible corroborative information from them.

Several nongovernmental organizations (NGOs), however, provided information and assistance in many respects. For example, they assisted the Commission during its field missions, such as the investigation of rape and sexual assault of January–March 1994.¹²¹ Particularly, Physicians for Human Rights gave the Commission valuable assistance in connection with the mass-grave investigations.¹²² Other NGOs, such as Human Rights Watch Helsinki, were very useful to the Commission because of the specificity of their reports. These reports were supple-

¹¹⁶ First Interim Report, *supra* note 44, at 9, paras. 17–21; Second Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/26545, at 8, paras. 20–24 (Oct. 6, 1993) [hereinafter Second Interim Report].

¹¹⁷ Final Report, *supra* note 40, at 9, 10, 12, paras. 18, 25, 37.

¹¹⁸ The information received from the "warring parties" was useful. In many cases, the information was quite detailed and accompanied by statements of victims and witnesses. The Governments of Bosnia-Herzegovina and Croatia were particularly cooperative.

¹¹⁹ See text at and note 114 *supra*. A question arises with respect to UN missions using military personnel, such as UNPROFOR, whether common Article 1 of the four Geneva Conventions, which requires all parties to enforce the Conventions, includes the duty to report at least "grave breaches" when military forces are placed under UN command.

¹²⁰ For a recent commentary on the workings of the International Committee of the Red Cross by a staff member, see MICHÈLE MERCIER, *CRIMES SANS CHÂTIMENT* (1994).

¹²¹ See Final Report, *supra* note 40, at 57–60, paras. 241–53. These NGOs identified victims and witnesses, established contact between them and the Commission and provided them with material and psychological support.

¹²² See text at notes 99–103 *supra*.

mented by the media.¹²³ The information in the data base derives essentially from all of these sources.

Reports of the Commission. The Commission issued two interim reports.¹²⁴ The first two reports and the work of the Commission were noted in resolutions of the Security Council, the General Assembly, the Commission on Human Rights, the office of the Special Rapporteur on the Former Yugoslavia, and other UN bodies. The Commission also produced a Final Report, which will be supplemented by twenty-two annexes (numbered I through XII, with subsections).¹²⁵ The Secretary-General not only expressed his full agreement with the Commission's conclusions in the Final Report, but also supported the publication of the annexes in his letter of transmittal of the Final Report to the Security Council.¹²⁶ Particularly, he stated that the annexes "as a whole constitute an integral part of the report."¹²⁷ The Secretary-General then informed the Security Council that "the Chairman requested that the annexes be published, although for cost purposes and given their volume (approximately 3,000 pages), it was suggested that they be published in English only and funded from the remaining surplus in the Trust Fund of the Commission of Experts."¹²⁸ Thus, it is expected that the United Nations will soon publish the annexes.

Resources of the Commission. To fulfill its mandate, the resource needs of the Commission were significant, considering the massive amount of victimization that occurred over an extensive area in this conflict.¹²⁹ Yet the General Assembly, which is the competent UN body in that regard, did not allocate resources for the Commission's investigative work or the data base. As a result, the chairman and members of the Commission had to seek the assistance of governments and volunteers in conducting the investigations, which was a difficult and time-consuming task. But it was the assistance of certain governments in contributing personnel and funds that allowed the Commission to carry out its work.

The Commission was also limited in personnel. Only the chairman worked full time. However, Commissioners Fenrick and Greve and Professor Opsahl devoted an exceptional amount of their time to the Commission and its work. For the first few months, the staff consisted of two UN-assigned Secretariat professionals and one secretary. Later, an additional professional Secretariat person, a secretary

¹²³ See, e.g., ROY GUTMAN, *A WITNESS TO GENOCIDE* (1993).

¹²⁴ First Interim Report, *supra* note 44; Second Interim Report, *supra* note 116.

¹²⁵ Final Report, *supra* note 40. The annexes consist of the following: (I) Rules of Procedure of the Commission; (I.A) The Database and Documents Received; (I.B) List of Missions Undertaken by the Commission; (I.C) List of Non-Governmental Organizations which assisted or collaborated with the Commission; (II) Rape and Sexual Assault: A Legal Study; (III) Military Structure; (III.A) Special Forces; (IV) The Policy of "ethnic cleansing"; (V) The Prijedor Report; (VI) Study of the Battle and Siege of Sarajevo; (VI.A) Sarajevo Investigation; (VII) Medak Investigation; (VIII) Prison Camps; (IX) Sexual Assault; (IX.A) Sexual Assault Investigation; (X) Mass Graves; (X.A) Vukovar (Ovčara, UNPA Sector East, Croatia); (X.B) Investigations in UNPA Sectors East and West, Medak and Dubrovnik; (XI) Destruction of Cultural Property Report; (XI.A) The Battle of Dubrovnik and the Law of Armed Conflict; and (XII) Radiological Investigation (UNPA Sector West, Croatia).

¹²⁶ Final Report, *supra* note 40, at 2.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 71, para. 310. The Commission identified in its Final Report 715 prison camps, 187 mass graves allegedly containing between 5 and 3,000 bodies, and almost 800 rape victims by name or number. In addition, there were 1,673 unnamed rape victims in the data base. General reports indicate 200,000–250,000 persons killed, over 50,000 cases of torture and an estimated 20,000 rape cases. There have also been large-scale destruction of public, private and cultural property; pillaging and looting; and many other violations of international humanitarian law.

and an administrative officer were provided. The Commission also enjoyed the valuable assistance of two seconded professionals, Lt. Col. Anton Kempenaars (the Netherlands) and Morten Bergsmo (Norway). Judge Jean-Paul Laborde (France) was seconded to the Commission for the month of April.

In conducting its field investigations, the Commission benefited from support personnel seconded for specific missions by three Governments: Canada provided military lawyers and investigators; Norway provided two military lawyers, who worked on the Dubrovnik investigation; and the Netherlands provided a military unit of thirty-three combat engineers, including two radiological experts. Among the combat engineers was a unit of three men specializing in the discovery of unmarked graves whose experience proved invaluable in the mass-grave investigation in UNPA Sector West, Croatia.¹³⁰ Physicians for Human Rights, a U.S.-based organization, provided several successive teams who worked on the Ovčara (Vukovar) mass grave and the mass-grave exhumation in UNPA Sector West, Croatia.¹³¹ The latter exhumation could not have been undertaken without this organization's help. All of the contributed personnel costs were covered by their respective governments.

In May 1993, the Secretary-General established a Voluntary Trust Fund to finance the Commission's investigatory work. The contributions received between May 1993 and April 1994 totaled \$1,320,631.¹³² As stated above, the balance of about \$230,000 in the fund at the termination date (less some final expenses) was to be used to publish the annexes to the Commission's report.¹³³

The contributed costs by the United Nations exceeded \$1.5 million and consisted mainly of salaries and travel expenses. As of August 31, 1993, the Commission ceased to have an independent budget and the costs of its personnel and other administrative expenses were covered by the Office of Legal Affairs. As of September 1, a portion of these costs had to be assumed by the Voluntary Trust Fund owing to a lack of resources.

Termination of the Commission. As stated above, the Security Council stated in Resolution 827 (1993) that the Commission should continue its work "on an urgent basis" pending the appointment of a prosecutor for the ICTFY.¹³⁴ The Commission's (second) Interim Report of October 6, 1993, outlined a work program planned to last until July 31, 1994. This program and its projected concluding date had been communicated to the Secretary-General by the Commission.¹³⁵ Thus, when the Legal Counsel notified the Commission of its termination, effective April 30, 1994, it was a surprise. Curiously, only two days later, on December 15, 1993, the General Assembly not only commended the Commission for its work, but supported its continuation, stating that it "[e]ncourages the Commission of Experts, in cooperation with the Prosecutor of the International Tribunal on the former Yugoslavia, to facilitate the work of the International Tribunal, including the establishment of a record of violations such as ethnic cleansing and systematic rape."¹³⁶ However, nothing ever came of this decision.

¹³⁰ *Id.* at 65–66, paras. 277–84. See text at notes 100–01 *supra*.

¹³¹ See Final Report, *supra* note 40, at 65–66, paras. 277–84.

¹³² For a list of participating countries and the amounts contributed, see *id.* at 12, para. 35.

¹³³ See text at note 128 *supra*.

¹³⁴ See text following note 53 *supra*.

¹³⁵ On August 29, 1993, the Commission submitted a nonpaper to the Secretary-General that included a termination date of July 31, 1994. Furthermore, the Second Interim Report, *supra* note 116, reflected a plan of action based on that date.

¹³⁶ UN Doc. A/48/L.50 (1993) (with 109 states voting in favor). Interestingly, the Governments of Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia wanted the Commission to continue its work. Croatia even sent a formal letter to the Security Council.

The Commission deemed the termination date of April 30, 1994, to be premature, in light of the anticipated date of July 31.¹³⁷ This earlier termination curtailed some investigations, particularly that of rape and sexual assault, which needed to be continued for two months.¹³⁸ The early termination also caused the cancellation of mass-grave exhumations in Ovčara¹³⁹ and Marino Selo (UNPA Sector West, Croatia), and the identification of the nineteen bodies discovered in the mass grave at Pakračka Poljana,¹⁴⁰ all of which had been planned to start on April 10.

In addition, the premature end of the Commission did not permit the type of transition between the Commission and the Office of the Prosecutor of the ICTFY that would have made it possible to transfer the Commission's experience and data base to the Prosecutor with a minimal loss of time.¹⁴¹ In early March 1994, the Office of Legal Affairs requested that the Commission conduct the transfer, which was complete by the time the Commission submitted the Final Report to the Secretary-General.¹⁴²

CONCLUSION

The work of the Commission of Experts is unique in the history of the United Nations and its accomplishments bring credit to the Organization. Perhaps because of its uniqueness, the Commission's beginnings were difficult. In time, some of the difficulties were overcome. It is a tribute to the commitment, diligence and ingenuity of the members, staff and others who assisted the Commission in its work that so much was done with so little in such a limited amount of time.

Although politics is always a factor in the work of such bodies, there was no direct political interference in the Commission's work. However, the lack of resources and bureaucratic difficulties, which are part of UN organizational life, led to delays and frustrations. Some saw in these delays and difficulties the hidden hand of a political agenda designed to cripple or slow the Commission's work. Others, more familiar with United Nations realities, shrugged off such speculation. But, as with so many things in life, the truth probably lies somewhere in between.

Once the Tribunal was established, there was unnecessary uncertainty about the role and future of the Commission and its relationship to the Tribunal. Three

¹³⁷ The Commission notified the Secretary-General of its views concerning the premature termination and its consequences. However, it appeared that several members of the Security Council, particularly permanent members including the United States, favored earlier termination.

¹³⁸ The rape and sexual assault investigation continued until the last possible moment, March 31, 1994. However, there were an estimated 200 more victims in Croatia from Bosnia and Hercegovina as well as Croatia to be interviewed, 7 victims from Serbia to be interviewed in Belgrade, and an undetermined number of victims to be interviewed in Turkey at the request of the Turkish Government. The chairman urged the respective Governments to conduct them and to send the findings to the Office of the Prosecutor of the ICTFY, but thus far there appears to have been no follow-up on this suggestion, perhaps because these Governments may not have wanted to assume the task in the absence of the Commission.

¹³⁹ Final Report, *supra* note 40, at 62–65, paras. 265–76.

¹⁴⁰ *Id.* at 65–66, paras. 277–84.

¹⁴¹ As Ambassador Rick Endforth once told me, a proper transition should have been "like a relay race where the two runners run side by side while one passes the baton to the other." However, after the appointment of Justice Goldstone, close cooperation was promptly established.

¹⁴² Final Report, *supra* note 40, at 12, para. 33.

options existed: (1) the Commission could continue to work until a certain date (that date was indeed established by the Commission as July 31, 1994); (2) it could be folded into the Tribunal's framework and become the investigatory arm of the Prosecutor; or (3) it could receive a new mandate, whereby it would focus on the larger picture and on policies and patterns of violations of international humanitarian law.¹⁴³

The significance of an eventual new and broader mandate for the Commission is obvious, as the Prosecutor must necessarily focus on specific cases. Consequently, there is a need for continuing to investigate such policies and practices as "ethnic cleansing,"¹⁴⁴ "systematic rape,"¹⁴⁵ the use of "special forces,"¹⁴⁶ and other questions of law and facts pertaining to issues of genocide¹⁴⁷ and crimes against humanity.¹⁴⁸ None of these options, however, seem to have been found acceptable by some permanent members of the Security Council. Some of them felt that the continuation of the Commission might interfere with the work of the Prosecutor of the ICTFY, which would be a valid consideration if the new mandate were not carefully defined and judiciously carried out. Because this option was not accepted, the larger picture may regrettably be lost. Such a loss will be particularly tragic if the ICTFY is able to prosecute only a limited number of cases, which may not necessarily include senior commanders and political decision makers.

The Commission's establishment is, however, an important precedent that was already relied upon in the establishment of a similar commission for Rwanda on July 1, 1994.¹⁴⁹ As such, its experience and work will be significant to future UN work and the pursuit of international justice. Ultimately, permanent institutions of international justice are needed.¹⁵⁰

The International Law Commission has been working since 1947 on a Draft Code of Crimes against the Peace and Security of Mankind¹⁵¹ and a statute for an

¹⁴³ Professor Herman Schwartz, among others, publicly advocated a "truth commission." There is much merit to this suggestion. See Herman Schwartz, *What Can We Do about Balkan Atrocities?*, N.Y. TIMES, Apr. 9, 1993, at A27. The truth, however much of it can be objectively discovered and stated, is only one component. Two additional ones must follow: justice in the declarative and retributive senses and compensation of victims. On the justice component, see Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991). For the victim-compensation component, see United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, GA Res. 40/34 (Dec. 11, 1985), reprinted in INTERNATIONAL PROTECTION OF VICTIMS (Nouvelles Études Pénales No. 7, M. Cherif Bassiouni ed., 1988) and the commentaries on the declaration contained therein. Several governments had suggested including provisions on victim compensation in the Tribunal's statute, but some members of the Security Council opposed it. Resolution 827 at least provides that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law." SC Res. 827, *supra* note 9, operative para. 7.

¹⁴⁴ See Final Report, *supra* note 40, at 33–37, paras. 129–50.

¹⁴⁵ *Id.* at 55–60, paras. 232–53.

¹⁴⁶ *Id.* at 29–33, paras. 110–28.

¹⁴⁷ *Id.* at 24–27, paras. 87–101.

¹⁴⁸ *Id.* at 20–24, paras. 72–86.

¹⁴⁹ SC Res. 775 (July 1, 1994). However, no contacts were established between the Rwanda Commission and members of the Commission of Experts. Thus, the opportunity to transfer valuable knowledge and experience was lost.

¹⁵⁰ See generally M. Cherif Bassiouni, *Enforcing Human Rights through International Criminal Law and through an International Criminal Tribunal*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 347 (Louis Henkin & John Lawrence Hargrove eds., 1994).

¹⁵¹ See, e.g., Tenth Report on the Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/442 (1992); COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991

international criminal tribunal.¹⁵² The experiences of the Commission and the ICTFY will certainly prove relevant to these efforts. They will be among the bases relied upon by governments and world public opinion to judge the merits of establishing a permanent international criminal justice system. Just as Nuremberg and Tokyo are judged by their historical legacy,¹⁵³ so will the Commission and the ICTFY be judged. But, above all, we must establish truth and try to provide justice. The parties to the conflict expect it, particularly the victims and witnesses.¹⁵⁴ Impunity cannot be the reward of those who plan, order or commit such international crimes.

As one who has seen and heard so many terrible accounts of atrocities, I must bear witness to such events. We cannot fail at the very least to bring truth to light. That is why the premature ending of the Commission was, in my judgment, a mistake, for it is unlikely that any other body will pursue the overall investigations that the Commission undertook. Lord Wright, chairman of the UNWCC, stated the following in 1948:

Over the whole earth there seems to hang a black storm cloud of war under which the nations cower. If the storm breaks and the waves of war beat against the lands, the power of law is not likely to sweep back the ocean, but the atrociousness of the tempest may be weakened in some degree by the effect of the lessons and rules derived from the last war. Even in the fury of the passions the small still voice of justice and of conscience may, however faintly, be heard, if prudence and humanity are of no avail even in this boasted age of civilisation. Must we again recur to the days of Attila or Genghis Khan or Tamerlane?¹⁵⁵

The challenge to a new world order remains to be met, but justice is its foundation. Indeed, without justice, there can be no lasting peace in this or any other conflict. To paraphrase George Santayana: are we condemned to repeat our mistakes because we refuse or are unable to learn from the lessons of the past?

M. CHERIF BASSIOUNI*

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (Nouvelles Etudes Pénales No. 11, M. Cherif Bassiouni ed., 1993).

¹⁵² See Report of the International Law Commission on the work of its forty-sixth session, UN Doc. A/49/10 (1994); Revised Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc. A/CN.4/L.490 & Add.1 (1993); see also M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987); BASSIOUNI, *supra* note 46.

¹⁵³ In his final report on Nuremberg, Justice Jackson stated that he was "consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future." See JACKSON REPORT, *supra* note 25, at 440. See also M. Cherif Bassiouni, *Nuremberg: Forty Years After*, 18 CASE W. RES. J. INT'L L. 261 (1986); *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, in 80 ASIL PROC. 56 (1986) (panel and discussion).

¹⁵⁴ Final Report, *supra* note 40, at 72, para. 320.

¹⁵⁵ HISTORY OF UNWCC, *supra* note 19, at iv.

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