



Edited by
William A. Schabas

International Criminal Law

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International Criminal Law

Volume III

Edited by

William A. Schabas

Professor of International Law, Middlesex University, London

Emeritus Professor of Human Rights Law

National University of Ireland Galway

Chairman, Irish Centre for Human Rights



INTERNATIONAL LAW

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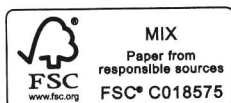
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Part I

The Ad Hoc and ‘Hybrid’ Tribunals,
and National Systems

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

*M. Cherif Bassiouni***

THE COMMISSION'S ESTABLISHMENT

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

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

** Former Chairman and Rapporteur on the Gathering and Analysis of Facts, Commission of Experts Established pursuant to Security Council Resolution 780 (1992); Professor of Law and President, International Human Rights Law Institute, DePaul University, Chicago, Illinois, United States; President, International Association of Penal Law, Paris, France; President, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy; J.D., Indiana University 1964; LL.M., John Marshall School of Law 1966; S.J.D., George Washington University 1973; Dottore in Guirisprenzenza Honoris Causa, University of Torino 1979; Docteur en Droit (d'Etat) Honoris Causa, University of Pau 1988.

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

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

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

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

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

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

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

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tribunal.⁵ Through Resolution 808, the Security Council

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

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

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

⁶ *Id.* ¶ 1.

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

Pursuant to Resolution 808, the Secretary-General submitted a report to the Security Council on May 3, 1993.⁸ The *Secretary-General's Report* includes the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.⁹ On May 25, 1993, the Security Council unanimously approved Resolution 827, establishing an International Tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia," and it adopted the proposed statute without change.¹⁰ The Security Council stated further that

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

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

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

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

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

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

THE COMMISSION'S MANDATE AND COMPOSITION

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

to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia[.]¹²

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

¹² S.C. Res. 780, *supra* note 1, ¶ 2.

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

Resolution 780 reiterated the Council's previous request in Resolution 771 that governments and organizations submit reports to the Security Council containing information relating to violations of international humanitarian law, including grave breaches of the Geneva Conventions of 1949.¹⁴ The later resolution, however, called upon governments, UN bodies, intergovernmental organizations (IGOs), and nongovernmental organizations (NGOs) to make such information available specifically to the Commission of Experts.¹⁵ Subsequently, in Resolution 787, the Security Council welcomed the establishment of the Commission and requested it "to pursue actively its investigations" of "grave breaches . . . and other violations of international humanitarian law."¹⁶ Resolution 787 also reasserted the UN's condemnation of all violations of international humanitarian law, including the practice of "ethnic cleansing" and the deliberate obstruction of the delivery of food

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

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

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

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