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BACKGROUND

1943 United Nations War Crimes Commission

The United Nations War Crimes Commission, which started its work in 1943, developed and maintained individual case files concerning alleged war criminals. Fifteen nations participated in the Commission. The Commission served primarily as a clearinghouse for information provided by countries concerned; it also made recommendations concerning the tribunals to be established, procedures for the tribunals, and the definition of war crimes. It concluded operations in 1945, having submitted its files and recommendations to the participating governments, which had decisionmaking authority. It did not have investigative or prosecutorial authority.

Several aspects of the Commission's work are most relevant to the commission now proposed. First, although the 1943 Commission focused on gathering information, it also made recommendations on policy questions. For example, it recommended that "crimes against humanity" (i.e., acts that arguably did not violate the laws of war as understood at that time) be described as a separate war crime; for the proposed Commission, a possible comparable question is whether "ethnic cleansing" is an independent war crime. The Commission now proposed should have comparable breadth.

Second, the participating governments retained decisionmaking authority on all policy questions, including individual prosecutions, nature of tribunals, and definitions of war crimes. For the Commission now proposed, the Security Council might be appointed to play this role. In any event, the Commission itself should not have decisionmaking authority.

Third, like the 1943 Commission, the proposed Commission should have the latitude to recommend whether an international tribunal is appropriate for every defendant. In keeping with previous declarations by the United Nations, only twenty-two defendants -- those whose war crimes had no "particular geographic location" -- were tried before the International Military Tribunal at Nuremberg, twenty-five before the Tokyo Tribunal. The remainder were tried under the auspices of the states concerned (i.e., those with custody of the defendant or in whose territory the alleged war crime occurred).

Fourth, the 1943 Commission was primarily a clearinghouse for information provided by the governments concerned. The proposed Commission, conversely, should have authority to conduct independent investigations and resources adequate to that task. Allegations received by the 1943 Commission had often been investigated and evaluated by experts in the participating

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governments before the Commission received them. No comparable process has occurred with regard to war crimes violations in the former Yugoslavia.

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HOW WILL THE COMMISSION BE ESTABLISHED?

-- The resolution we have proposed establishes the Commission. The Secretary General will be responsible for developing a plan for the Commission, including its mandate and structure. This plan will be submitted to the Security Council for its approval.

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WHAT WILL BE THE MANDATE OF THE COMMISSION?

-- This will be decided by the Security Council, when it considers the proposal made by the Secretary General.

-- We believe that, like the 1943 Commission, it should be responsible for:

- collecting and collating information about war crimes;
- developing individual case files; and
- recommending to the Security Council whether to proceed with prosecutions and, if so, as to the tribunals and procedures for doing so.

-- The US, and our allies, have consistently opposed trials in absentia. The Commission should make provisions for obtaining custody of potential defendants.

-- The Commission should not serve as a prosecutor. Decisions about whom to prosecute, and in what forum, should be made by the Security Council.

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WOULD THE COMMISSION FOCUS ON WAR CRIMES (IE, VIOLATIONS OF THE GENEVA CONVENTIONS), OR WOULD IT EXAMINE CRIMES AGAINST HUMANITY?

-- Questions about the precise definition of crimes before the Commission are not only premature but hypothetical.

-- The mandate of the Commission will have to be developed through agreement in the Security Council.

-- I can offer a preliminary observation, however. The horrendous events we have witnessed in former Yugoslavia are clear violations of the law of war, as it is codified in the fourth Geneva Convention, to which Yugoslavia is a party. It is quite possible that it will not be necessary to look beyond the fourth Geneva Convention.

BACKGROUND

The International Tribunal at Nuremberg addressed three categories of crimes -- crimes against peace; against the laws of war; and crimes against humanity. The last category referred to acts that were not violations of the laws of war, for example, acts against one's own civilians or in peacetime.

The international community has recognized that the actions in Yugoslavia can be addressed through the laws of war. Security Council Resolution 771, for example, condemns the "violations of international law, including those involved in the practice of ethnic cleansing"; whether "ethnic cleansing" is a separate violation of international law is not addressed.

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WHAT WAR CRIMES HAVE BEEN ALLEGED IN FORMER YUGOSLAVIA?

-- The US report to the Security Council describes numerous allegations of wilful killing, torture, impeding the delivery of food and medical supplies to the civilian population, wanton devastation and destruction of property, and other violations of international law. Under the rubric of "ethnic cleansing," serious violations are occurring, in particular, the forcible expulsion and deportation of civilians.

-- International bodies, including the Security Council and the London Conference, have referred to similar violations.

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IS ETHNIC CLEANSING GENOCIDE?

-- We expect that the Commission we have proposed would, among its responsibilities, investigate whether charges of genocide are applicable in the former Yugoslavia.

-- Whether or not war crimes in Yugoslavia are technically "genocide" (a term defined in international law), the acts described in our report to the UN would constitute war crimes, and the persons responsible should be prosecuted.

BACKGROUND: The Genocide Convention, to which Yugoslavia became a party in 1948, defines "genocide" as the intention to destroy, in whole or in part, a national, ethnical, racial, or religious group, through any of several means (including killing or harming group members; preventing births; transferring children to another group; and inflicting conditions on the group that are "calculated to bring about its physical destruction in whole or in part").

-- Forcible relocation of segments of a population would not, in and of itself constitute genocide.

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WHY DOES THE US NOT FAVOR THE CREATION OF A TRIBUNAL NOW?

-- A tribunal would be premature at this stage. We have not evaluated the information as it pertains to individual defendants, nor are potential defendants in custody.

-- We have consistently stated our opposition to trials in absentia. A prerequisite to a fair tribunal is that the defendant be present and able to assist in the preparation of his defense.

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WHY ISN'T THE US PRESSING FOR AN INTERNATIONAL TRIBUNAL FOR IRAQI WAR CRIMINALS, INCLUDING SADDAM HUSSEIN?

-- We agree that Iraqi war criminals should be prosecuted, as was called for in UN Security Council Resolution 674.

-- National tribunals are the common first resort for the prosecution of war criminals. After WWII, most defendants were prosecuted in national tribunals. For example, only 22 persons were tried before the international tribunal at Nuremberg, for crimes that had "no particular geographical location."

-- Kuwait, as the state in which Iraqi war crimes were primarily committed, expressed its intention to conduct war crimes prosecutions of Iraqis in its custody. DID IT? We urged other concerned nations to take similar steps.

-- We have not taken action with regard to Saddam Hussein or other senior Iraqi officials we can't lay our hands on. A prerequisite to a fair tribunal is that the defendant be present and able to assist in the preparation of his defense.

-- Unlike Iraq, there does not appear to be a suitable national tribunal. The war crimes have occurred in the territory of former Yugoslavia, but tribunals in former Yugoslavia itself do not appear to be appropriate venues for trials of war criminals.

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WHAT ARE "GRAVE BREACHES" OF THE GENEVA CONVENTIONS?

-- UN Security Council Resolution 771 condemns violations of international law, in particular, grave breaches of the Geneva Conventions.

-- Under the terms of the Fourth Geneva Convention, on the protection of civilians and other noncombatants, grave breaches are:

- wilful killing;
- torture or inhuman treatment;
- wilfully causing great suffering or serious injury to body or health;
- unlawful deportation or transfer of unlawful confinement of a protected person;
- compelling a protected person to serve in the forces of a hostile power;
- wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention;
- taking of hostages;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

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WHY DOESN'T THE UNITED STATES FAVOR THE CREATION OF AN
INTERNATIONAL TRIBUNAL FOR THE LIBYAN SUSPECTS IN THE PAN AM 103
CASE?

-- Our position consistently is that defendants should be tried
before appropriate tribunals, with due process, whether those
tribunals are national or international.

-- UN Security Council Resolution called upon Libya to
surrender the suspects. This reflects a decision by the
international community that national tribunals are appropriate
for those defendants.

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WHAT STEPS HAS THE US TAKEN TO INVESTIGATE WAR CRIMES IN YUGOSLAVIA?

-- The Commission we are advocating would be the most effective way to gather and investigate allegations of war crimes.

-- We have submitted a report to the Security Council containing information obtained by our missions in the area. We know that several other countries plan to submit reports, and the Security Council resolution we have proposed calls for additional reports. These provide a solid basis for the Commission to begin its work.

-- To gather that information, we instructed our posts to interview anyone with first-hand knowledge of the situation in former Yugoslavia, including refugees, civilians, government officials, and combatants.

IF NECESSARY

-- When US forces are involved in hostilities, the Department of Defense investigates allegations of war crimes. Obviously, there has been no basis for such investigations in former Yugoslavia. Consequently, unlike Iraq, there has been no expert investigation of allegations of war crimes.

QUESTION - Would participation of US forces in peacekeeping operations trigger this?

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WHY DOESN'T THE US PROSECUTE WAR CRIMINALS IN ITS OWN COURTS?

-- The Security Council has taken the initiative in addressing war crimes in former Yugoslavia. It should decide whether persons accused of war crimes are to be prosecuted and, together with the nations in which war crimes have occurred, in what tribunals.

-- Information concerning war crimes will be gathered and developed by the Security Council, through the Commission we advocate. Unilateral action on the basis of internationally-held information may prove difficult and would not send an appropriate signal.

IF NECESSARY

-- It is questionable whether we would have jurisdiction. It is clear that we have jurisdiction to prosecute enemy prisoners of war (EPWs) under the Uniform Code of Military Justice, which would provide the basis for conducting prosecutions of persons accused of war crimes. Persons accused of war crimes but who are not EPWs -- that is, who are not captured by our military in hostilities or, after being captured by others in combat, are transferred to our government in accordance with the Geneva Convention -- might not fall within the UCMJ.

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