UN War Crimes Commission and International Law: Revisiting World War II Precedents and Practice

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Abstract: The history of international legal institutions has largely ignored the early activities of the United Nations, specifically of the United Nations War Crimes Commission (UNWCC). Based on an assessment of its work and with access to new archival evidence, contemporary international legal institutional design could benefit significantly from revisiting the commission's achievements, particularly the principle of complementarity identified in the Rome Statute of the International Criminal Court, and support for domestic tribunals for war crimes and crimes against humanity. The article begins by examining the history, multilateral basis for, and practical activities of the commission. Subsequently, it assesses its contemporary relevance. Finally, it analyses—with reference to modern literature on complementarity—the degree to which the commission's wartime model provides positive examples of implementation of the principle that could be replicated today, with particular reference to domestic capacity-building and international coordination.

Keywords: International Criminal Court; complementarity; war crimes; crimes against humanity; international organizations; United Nations; legal capacity-building.

Nuremberg's legacy is powerful. Samantha Power, in her discussion of the foundations of the International Criminal Tribunal for the former Yugoslavia (ICTY), commented that it drew so heavily upon the 'memory of Nuremberg' that even the architecture, judicial pomp, and physicality of the courtroom in which trials took place 'seemed deliberately chosen to harken back to the UN tribunal's functional parent'.[1]

An exclusive focus on an image of trials that, by and large, resembles the Nuremberg Tribunal distorts the actual legacy of postwar criminal justice. Why? The four-country Nuremberg International Military Tribunal considered 24 cases, but in 1943-48 the 17-country UN War Crimes Commission (UNWCC) approved 8,178 cases involving over 36,000 individuals in almost 2,000 war crimes trials for prosecution at a score of national civil and military tribunals, across the Allied states. Commission members submitted thousands of cases to the UNWCC, and when their charges were approved, they acted to pursue prosecutions in their own jurisdictions, leading to trials of Axis personnel from generals to low-ranking military and civilian perpetrators, in states from China to Norway. As part of a larger modern ignorance of the wartime experience,[2] the Allies organised an extensive administration as part of the nascent United Nations to coordinate and support the

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[1] SAMANTHA POWER. *A PROBLEM FROM HELL*, 484 (2002)

[2] See DAN PLESCH AND THOMAS G. WEISS, *WARTIME HISTORY AND THE FUTURE UNITED NATIONS* (2015).

prosecution of war crimes, carefully making sure that cases against them were well-founded and in line with domestic and international legal standards.

This body of legal practice changes the paradigm of international criminal justice, which has hitherto focused on international tribunals,[3] which have achieved much in the twentieth and early twenty-first centuries but come with another set of problems, particularly those surrounding speed, trial completion, multilateral participation, and cost. The breadth and depth of the UNWCC's work provides overlooked examples of political practice and law, which offer a range of intriguing precedents and possible structures that can inform contemporary legal practice.

This article begins by outlining the UNWCC's history, with a particular focus on the ways in which its institutional structures contributed to success and failure, drawing on archival documents and recent academic history of the early UN and its criminal justice efforts. Next it assesses the contemporary relevance of this history—specifically whether the commission represents the product of a unique historical moment or has pertinence today. The analysis then moves to a wider discussion of the relationship between domestic and international sources of criminal justice prosecutions for major crimes. To fast forward to the conclusion, this essay argues that many of the UNWCC's specific successes reflect the historical environment that produced it, but its core principles and approaches—especially the willingness to engage with domestic structures, the support and legitimation available to states engaging in their own prosecutions, and the general support for what would today be called 'complementarity'—represent powerful and under-used resources in contemporary systems of international criminal justice and accountability. Carsten Stahn goes so far as to propose that 'international criminal justice is still in search of a modern UNWCC 2.0',[4] which would surpass the limited impact and effectiveness of such modern organisations as the International Criminal Court (ICC). Indeed, evidence suggests that a 'UNWCC 2.0' could and should draw upon the lessons of the 'UNWCC 1.0'.

I. History of the Commission

The recent opening of the archives has sparked a great interest in the history of the UNWCC, its obscurity can be ascribed to a range of factors. In the United States which played a leading role in both the Nuremberg and Tokyo tribunals, an interagency conflict slowed the UNWCC's creation, limited its scope, and led to its premature closure. Chris Simpson[5] and Graham Cox[6] provide illuminating accounts of the opposition by conservative opponents of war crimes trials to the leadership of President Franklin D. Roosevelt and of his ambassador Herbert Pell. In fact, Cox argues that the Nuremberg tribunals might not have happened without the public pressure led by Pell following his dismissal. The Cold War-era political inconvenience of a trial structure that largely dealt with West German war crimes led to the UNWCC's marginalisation. In addition, the UNWCC's mostly secret work was overshadowed by the resources and publicity accorded to the trials at Nuremberg. Subsequently, the US priority of rebuilding Germany required the closure of the commission and its files, which became little more than a footnote in accounts of the development of international criminal justice.

[3] Richard Goldstone, *Foreword: The United Nations War Crimes Commission Symposium,* in 25 CRIMINAL LAW FORUM 9–15., (2014)
[4] Carsten Stahn, *Complementarity and Criminal Justice Ahead of their Time? The United Nations War Crimes Commission, Fact-Finding, and Evidence,* in 25 CRIMINAL LAW FORUM 224 (2013)
[5] Christopher Simpson, *Shutting Down the United Nations War Crimes Commission,* in 25 CRIMINAL LAW FORUM (2013)
[6] Graham Cox, *Seeking Justice for the Holocaust: Herbert C. Pell Versus the US State Department,* in 25 CRIMINAL LAW FORUM (2013)

Practical, as well as historical and ideological factors, also contributed to this comparative lack of attention and political amnesia. The commission's archives were sealed until 2014, with restrictions on access (including a requirement to obtain permission from the UN secretary-general, and a prohibition on reproduction) that were described by Robert Edwin Herzstein as 'a form of petty harassment'.[7] Academic, NGO, and museum-based campaigning resulted in 2011 in the UN's agreeing to partially de-restrict the UNWCC's minutes, whereupon the Prosecutor's Office of the ICC placed a good deal of this material online, helped by roughly parallel processes of digitisation in the archives of the Australian, British, and US governments. In 2014, the US Holocaust Memorial Museum obtained a full copy of the archive and made it available for on-site access. The 8,000 pre-trial dossiers sent to the commission by its member states are available,[8] but the full significance and contents of the 450,000-page archive is still being examined by researchers.

This article benefits directly from the explosive growth in interest, scholarship, and study of the UNWCC and related aspects of wartime and postwar criminal justice that has taken place in the past few years. Of especial significance are the contributions to the United Nations War Crimes Commission Symposium and the 2014 edition of the Criminal Law Forum[9] and to 'Historical Origins of International Criminal Law: Volumes 1 and 2',[10] and more especially work by Shanti Sattler and Dan Plesch.[11]

This essay goes beyond to examine the structural and organisational formation and functioning of the commission in order to assess its possible application as a model today. If the UNWCC encountered particular success or obstacles by adopting a certain policy or approach, such lessons might be valuable for contemporary international judicial pursuit.

A. Foundations

The UNWCC can trace its origins back to the early 1940s, as pressure grew among the Allies (particularly the governments-in-exile) to ensure some form of justice, accountability, and punishment for the actions of Nazi Germany in the war and occupation of Europe. Much of the initial backing for the commission came from a broad international coalition, but the support of the 'Big Three'—Washington, Moscow, and London—was crucial.

This support reflected the well-publicised, surprisingly well-documented, and clear declarations that increasingly committed these states to postwar criminal justice measures. In October 1941, for example, Franklin D. Roosevelt and Winston Churchill announced that they would seek 'retribution' for German crimes occurring 'above all behind the German fronts in Russia', with Churchill in particular noting that such retribution 'must henceforward take its place among the major purposes of the war'. Meanwhile in November of that year and the following January, the Soviet Union widely disseminated accounts of Nazi atrocities, including much greater

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[7] Robert Edwin Herzstein, *The Recently Opened United Nations War Crimes Archives: A Researcher's Comment*, in 52 AMERICAN ARCHIVIST 212 (1989)

[8] Maev Kennedy *UN War Crimes Archive 'Should Be Open to Public,', in* THE GUARDIAN, February 26 2012, http://www.theguardian.com/law/2012/feb/26/un-war-crimes-archive. Associated Press, *More than 2,200 Documents From World War II War Crimes Archive Are Available Online for the First Time*, in FOX NEWS ONLINE, August 3 2013, http://www.foxnews.com/world/2013/08/03/more-than-2200-documents-from-world-war-ii-war-crimes-archive-are-online-for/. Associated Press, *US Shoah Museum Gets War Crimes Archive*, in YNET NEWS, November 3 2013,http://www.ynetnews.com/articles/0,7340,L-4448298,00.html.

[9] 25 CRIMINAL LAW FORUM (2013)

[10] HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW (Bergsmo *et al.* eds. 2014)

[11] Dan Plesch and Shanti Sattler, *A New Paradigm of Customary International Law*, in 25 CRIMINAL LAW FORUM (2013)

detail than in the Anglo-American notes.[12] In January 1942, a broader group of Allied states announced their intention to pursue prosecutions for war criminals in their statement on 'Punishment for War Crimes' which, though not signed by several major powers, nonetheless crystallised the ideas and efforts that would later lead to the creation of the UNWCC. Rejecting 'acts of violence simply by acts of vengeance on the part of the general public', and 'in order to satisfy the sense of justice of the civilised world,' this statement pushed for 'international solidarity' in declaring Nazi acts as war crimes and seeking 'the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them'.[13]

The growing enthusiasm for accountability, though not universal (especially in the Anglo-American leadership), began to build. In July 1942, the British government endorsed the creation of a 'United Nations Commission on Atrocities', while Roosevelt, a month later, publicly announced in a White House briefing that

> The United Nations are going to win this war. When victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe and in Asia. It seems only fair that they should have this warning that the time will come when they shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts.[14]

Negotiations about the form that this warning would take was accompanied by significant civil society pressure stirred up by growing awareness of Nazi atrocities, which was preceded by government and resistance reporting.`[15] The simultaneous declaration by the Big Three in December 1942—after an extensive discussion of Nazi atrocities (particularly those targeting Jews)—concluded with the three states 're-affirm[ing] their solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press with the necessary practical measures to this end'. This declaration would eventually form the basis for the commission's later existence. The Moscow Declaration on Atrocities of October 1943 further reinforced the Allied commitment to returning Nazi perpetrators to the countries where they had committed atrocities so that they would be tried under their own laws. In addition, along with a list of accused war criminals, the Allies issued a warning to the Nazis that laid the foundations for the commission's establishment in late 1943:

> Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done.[16]

The overall pattern of these declarations—states elaborating on the atrocities of their enemies in warfare in shocking detail, and using them as a justification for even sterner action against them—is familiar. Indeed, it is often repeated with less-than-salutory results, including high-profile statements regarding atrocities that were later exposed as untrue, but nonetheless

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[12] His Majesty's Stationary Office (HMSO) (for the Soviet Embassy), November 7, 1941 and January 6, 1942). See also, HMSO for the Soviet Embassy, *Punishment for War Crimes* (1942), and UNWCC, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948).

[13] THE INTER-ALLIED INFORMATION COMMITTEE, PUNISHMENT FOR WAR CRIMES: THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES' PALACE LONDON, (1942).

[14] White House News Release, *Roosevelt's Statement on Punishment of War Crimes,* August 21 1942

[15] DAN PLESCH, AMERICA, HITLER, AND THE UNITED NATIONS, 103, 105 (2010)

[16] Washington, Government Printing Office, *Foreign Relations 1943* (1), 769

contributed to a decision on military action, such as the infamous 'babies thrown from incubators' story in the lead-up to the first Gulf War.[17] A number of elements, however, are unusual, particularly the focus on solidarity. Allied policymakers seem to have been keenly conscious of the need to stress their collective action in response to German atrocities, and to tie themselves to an international normative system. In addition, there is also a strong sense that leaders—for example, in the Roosevelt White House briefing quoted above—that Nazi officials were being 'put on notice'. While the threat of postwar prosecution may or may not have deterred Nazi officials and war criminals, it nonetheless established the clear and long-term intention to prosecute from early on in the war, which thereby diminished the sense of victors' justice hastily cobbled together as an improvisation by conquering armies. It also reduced the degree to which defendants could claim that they were unaware that what they were doing was criminal. In both cases, there were high-profile, self-escalating commitments to something more than direct national calls for justice. Rather than simply favouring retributive action, Allied action was linked to an international, universal normative framework.

Unlike contemporary perceptions of such international criminal justice projects as the ICC, the UNWCC was not an institution designed by Western European or Anglo-American lawyers, and foisted on the rest of the Allies. If anything, London and Washington and Moscow were more ambivalent than other states in pursuing this initiative. Much of the work and activity of the commission emerged from multilateral discussions and efforts between the governments of Axis-occupied states, with central Europe, China, and India playing key roles. The 'Big Three' for much of the war mooted summary executions or negotiated political solutions; but groups from the occupied countries (Belgium, Czechoslovakia, France, Greece, Holland, Luxembourg, Norway, Poland, and Yugoslavia) were all heavily represented. Among their delegations were a wide range of justice ministers, judges, and academics who were either highly regarded in their fields or would later go on to achieve prominence in the early United Nations. René Cassin (a legal scholar who would later win the Nobel Peace Prize for his work on the UN Declaration of Human Rights) represented France; Egon Schwelb (later deputy director of the UN Human Rights Division, known in diplomatic circles as 'Mr Human Rights') and President Edvard Beneš were part of the Czechoslovak delegation. Kerstin von Lingen describes how these assembled legal scholars and practitioners from across the occupied states began to coalesce as a 'truly international network', linked not only by common legal, political, and professional experience but also by 'an experience of political powerlessness … these exiled politicians and experts keenly felt the low position their agendas and authority to punish war criminals held among their British hosts'.[18] The exiled lawyers and politicians held a series of meetings and conferences in the early 1940s (beginning with the 'Cambridge Commission' and moving onto the 'London International Assembly'), which formulated and laid the basis for international criminal justice and accountability. By coordinating their technical, legal, and academic expertise, this network of internationalist lawyers was able to steer major powers towards a model of international prosecutions.

Not only did this concentration of legal expertise among exiled states help persuade the United Kingdom, United States, and Soviet Union that criminal prosecutions were desirable, but it also meant that the UNWCC started on a strong organisational footing. By the time that the commission became fully functional in early 1944, such legal scholars as Marcel de Baer and Bohuslav Ecer had already developed extensive proposals for how a shared Allied war crimes policy might be set up, what jurisdiction each country's court would have, how they would be established, and how evidence would be shared and collected.[19] Between this jump-start and the

[17] John MacArthur, *Remember Nayirah, Witness for Kuwait?* in THE NEW YORK TIMES, January 6, 1992
[18] Kerstin von Lingen, *Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development,* in 25 CRIMINAL LAW FORUM 74 (2013)
[19] von Lingen, *supra* note 18 at 64

significant role that many of the lawyers played in advocating for postwar international justice after the formation of the commission—de Baer, for example, was a key proponent of an 'international criminal court' to formalise the process of international criminal justice, while Ecer and Schwelb were active in the 'clarification of legal issues' and the promotion of individual responsibility for war crimes and crimes against humanity[20]—continental European governments-in-exile played a major role in founding, running, and developing the UNWCC and contemporary ideas of criminal justice.

To focus exclusively on the role of European states, however, would be to ignore the role that Asian countries played in the creation and functioning of the UNWCC and its subsidiary bodies. Observing the 'Proposal for the Creation of a United Nations Commission for the Investigation of War Crimes' in early 1942, Chinese representatives noted that China 'subscribe[d] to principles of the declaration [on German atrocities] and intend[ed] when the time comes to apply the same principles to the Japanese occupying authorities in China'.[21] Of the 'Big Four' powers, it was China that was the first to adhere to the seminal declaration of January 1942 on the "Punishment for War Crimes" by the exiled governments in London—Washington and London, in contrast, never seem to have fully joined.

China went on to become a founding and prominent member of the UNWCC, a position that it asserted partly because of its long-term conflict with Japan (predating other Allies), partly out of Roosevelt's support for China as an emerging 'great power', and partly out of China's own desire to assert 'international solidarity' and engage with the international system.[22] Owing to their specific experiences during the war, Chinese representatives proposed that the use of narcotics to subdue a population be a war crime, and helped lead the effort to create a crime of aggression or crimes against peace.[23] Indeed, the Chinese position was particularly forward looking at the time in pressing for individual responsibility—rather than that of states as a whole—in prosecuting crimes against peace. Wen-wei Lai quotes Wunsz King (the substitute for Wellington Koo, China's representative to the commission): 'unless the authors of German and Japanese wars of aggression were duly punished, the efforts to punish the war criminals would have no deterring effect'.[24] This concern with specifically charging the 'arch-criminals' was shared by many other commission members who were particularly concerned with the individual responsibility of Axis leaders. The Chinese role in developing the UNWCC and then applying it in its conflict with Japan has been the subject of a number of recent studies that confound the notion of international criminal law as a Western concoction.[25]

India, too, played a major role in creating the evolving system. Representatives of the Imperial government sat alongside their British and Dominion colleagues on the UNWCC in London and in China, and the innovations and differences of opinion shown by Indian representatives clearly demonstrate that they were not merely faithful representatives for British interests. It appears that an Indian official, Niharendu Dutt-Majumdar wrote the first main draft of a

[20] von Lingen, *supra* note 18 at 67-8
[21] UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS VOLUME 1: GENERAL; THE BRITISH COMMONWEALTH; THE FAR EAST, 45 (1942)
[22] Anja Bihler, *Late Republican China and the Development of International Criminal Law: China's Role in the United Nations War Crimes Commission in London and Chungking*, *in* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 513 (Bergsmo *et al.* eds. 2014)
[23] THE INTER-ALLIED INFORMATION COMMITTEE, PUNISHMENT FOR WAR CRIMES: THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES' PALACE LONDON 16 (1942)
[24] Quoted in Wen Wei Lai, *China, the Chinese Representative, and the Use of International Law to Counter Japanese Acts of Aggression: China's Standpoint on UNWCC Jurisdiction*, in 25 CRIMINAL LAW FORUM 121 (2013)
[25] Wen Wei Lai, *supra* note 24

proposal for joint military tribunals. This form of justice is best known today under the titles of concentration camps where trials were held: the British at Belsen and the Americans at Dachau. The commission, thwarted by both Whitehall (the Foreign Office) and Foggy Bottom (the State Department), was unable to get support for a permanent UN criminal court. The proposal for military tribunals under the authority of commanders, including Dwight Eisenhower in Europe and Douglas MacArthur in Southeast Asia, also was drafted by Dutt-Majumdar and appears to have been adopted and put into effect in a dozen or more tribunals. Indeed, this contribution was recently noted by the India's permanent representative to the United Nations, Asoke K Mukerji. At a panel discussion marking the release of the commission's documents:

> The idea of Military Tribunals to prosecute and penalize war crimes was mooted jointly in the Commission by the United States and India in August 1944, when the Commission was discussing the establishment of an International War Crimes Court [citing the UNWCC's report to ECOSOC on 'Information Concerning Human Rights']. Two major military tribunals were established at the initiative of the United States to prosecute war crimes, viz. the Nuremburg International Military Tribunal in November 1945, and the International Military Tribunal of the Far East, which conducted the Tokyo Trials, in April 1946.[26]

In addition to this rhetorical support, Mukerji also notes that India, in line with its income, was a substantial financial contributor to the commission's 'scale of assessments' budget. Out of a total of 1583 'units' of contribution, India contributed 80—the same as France, and more than Canada (60) or Australia and the Netherlands (30 each).

Asian involvement was not limited to the foundation and design of the UNWCC and its ideals but also took the form of extensive work within. China proposed and created a Sub-Commission of the UNWCC in Chunking for the Far East, which after a rocky start due to incapacity, indicted large numbers of Japanese citizens for crimes in China. Chinese and Indian judges were also active in tribunals across the Pacific and mainland China, while the Philippines—recently independent—tried its own cases, including the trial of Lt. General Shigenori Kuroda.[27]

For the most part, the debate on Asian involvement in the post-World War II trials has focused on the rejection of the crime of aggression as imperial hypocrisy by the Indian judge Radhabinod Pal at the Tokyo trial.[28] Yet from the earliest moments, today's ideas and practices of international criminal justice had significant input from the representatives of non-Western states. The leading role of China in developing the crime of aggression provides overriding empirical contradiction to the views of a single Indian judge at Tokyo, and has been, moreover, a matter of public record for the last seven decades. China's experiences with aggression were at least as severe as India's, but the Chinese nationalist government used the experience of World War II to draw a line against further aggression—in parallel with its successful efforts to overturn the unequal treaties governing many Western concessions in China.[29] This concept—heavily circumscribing aggression—would later find expression throughout the UN Charter.

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[26] In Email from Asoke Mukerji, Permanent Representative of India to the United Nations, to Dan Plesch, Centre for International Studies and Diplomacy, SOAS, University of London (Nov.14, 2014) (on file with Dan Plesch).

[27] RICHARD GOLDSTONE, ADAM SMITH, INTERNATIONAL JUDICIAL INSTITUTIONS: THE ARCHITECTURE OF INTERNATIONAL JUSTICE AT HOME AND ABROAD, 80 (2015)

[28] RADHABINOD PAL, INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSENTIENT JUDGMENT (1953)

[29] Rana Mitter, *British Diplomacy and the Changing Views of Chinese Governmental Capability Across the Sino-Japanese War, 1937-1945*, p35, in NEGOTIATING CHINA'S DESTINY IN WORLD WAR II, (van de Ven et al. eds., 2014)

Therefore, the UNWCC had a strong multilateral foundation. Many participants drew upon their own personal or national experiences of war and. Participation was also motivated by other factors. To be part of the UNWCC meant reinforcing and legitimating the actions of these countries after liberation, acting as a warning to perpetrators and offering a glimmer of hope to victims that justice would be done; and it meant access to the legal resources and infrastructure. It even appealed to basic concerns of national prestige, being a sign of confidence and maturity shown by beleaguered governments that would allow them to pursue their own policies and bolster their own positions. Together, these factors contributed to a multilateralism that went further tokenistic 'inclusion' of Allies beyond the major Western powers.

As an organisation, the UNWCC also benefited from a concentration of leading academics, lawyers, diplomats, and politicians, many of whom were either already notable in the human rights and international law fields, or would go on to have leading roles in the early postwar United Nations. Drawing upon this expertise and personal authority, it thus had a highly auspicious start, allowing it to function effectively and break new ground in international criminal justice.

B. Structure and Work

As a new organisation—part of a wave of innovation and ad-hoc effots during World War II—the UNWCC had to be created without much in the way of predecessors although it did draw on some of the intellectual output of previous war crimes prosecution attempts, such as the post-World War I 'Versailles list' of war crimes.[30] Like any wartime organization, much of its formation was determined by politics and available resources rather than any overall guiding principles. Nonetheless, the UNWCC's format and structure contributed to its success. As such, it makes sense to examine how the commission was set up and how it operated, particularly with an eye to identifying those parts of its structure that were particularly productive and beneficial.

The commission as a whole had three specific duties: to investigate and record the evidence of war crimes; to report to the governments concerned cases in which it appeared that adequate evidence existed to support a prosecution; and to make recommendations to member governments concerning questions of law and procedure as necessary for them to be able to fulfil their role of conducting trials.[31] These duties are illustrated in Figure 1.

[30] UNWCC, *Report of the Sub-Committee*. 4 (December 2 1943). UNWCC, INFORMATION CONCERNING HUMAN RIGHTS ARISING FROM TRIALS OF WAR CRIMINALS 146-180, n1 (1948)
[31] UNWCC, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR, 3 (1948)

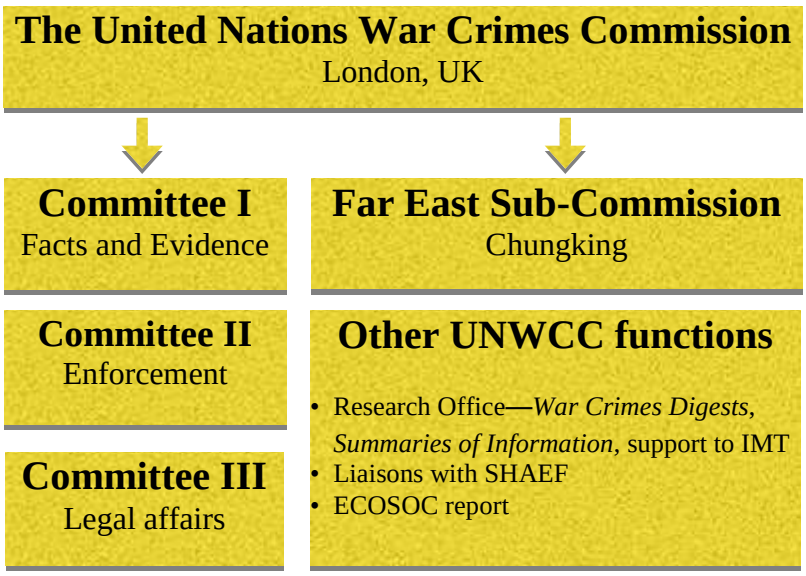

Figure 1: A Structural Overview of the UNWCC

Committee I of the commission was tasked with gathering and collecting evidence from member states, and evaluating each charge levelled against accused war criminals (numbering about 37,000 individuals in total). One of the first actions of Committee I was to propose that each member state should set up its own national office that would ensure liaison with the commission, coordinate investigations, collect evidence, and create new legal structures to handle war crimes. Member states set up national offices within their governments to link with the commission, coordinate investigations, collect evidence, and create new legal structures to handle war crimes where necessary.[32] As parts of the governments of the involved countries, they had a freedom to act and draw upon resources that the internationally-based commission could not; and since they often were made up of senior legal officials from governments-in-exile, they usually drew on pre-existent legal structures and ministries of justice (thus avoiding the commission's 're-inventing the wheel'.[33] Each member state submitted cases to the UNWCC against alleged or suspected war criminals whom they wished to be included among the lists of accused war criminals and material witnesses.

Despite coming from a wide range of countries, national situations, and legal systems, cases took on a remarkably standardised character, with categories of crime (based on the 'Versailles list', and specific named national legislation), contextual data (time, place, enemy units active in the area, and so on), and evidentiary approach (how perpetrators might be identified, and what testimony supported the case) being roughly comparable across the different member states. This 'harmonisation' of evidence-gathering was a key goal of Committee I; as early as December 1943, it had produced extensive documentation, sample charge-file templates, and instructions about how evidence should be gathered and weighed by the national offices,[34] and it continued to disseminate further guidelines to member states refining reporting procedure as the UNWCC began to become more active.[35] Between these, and more prosaic efforts such as disseminating extra blank

[32] UNWCC, *Minutes of Tenth Meeting Held On 22nd February 1944*, UNWCC, *First Report of Committee I (Facts and Evidence) as Adopted by the Commission*, C7 (1). A conference of all the national offices was held in London in May 1945. Also see UNWCC, *Minute No.60 Meeting Held On 10th May 1945, Minutes No. 66 Held On 20th June 1945, and Minutes and Documents of the United Nations War Crimes Commission National Offices Conference held at The Royal Courts of Justice*, London, 31 May–2 June 1945.
[33] UNWCC, see *supra* note 31, at 121.
[34] See, e.g., UNWCC, Transmission of particulars of War Crimes to the Secretariat of the United Nations War Crimes Commission, (December 1943)
[35] UNWCC, First Report of Committee I (Facts and Evidence): Preparation and presentation of cases of war crimes to the Commission, C7, 22, (February 18 1944)

copies of war crimes charge files to national offices,[36] Committee I was successful in harmonising the charge files produced by a large number of countries into a common format.

In its weekly meetings, Committee I analysed the charges produced by each state and determined whether citizens and soldiers from Axis powers should be listed as accused war criminals, suspects, witnesses, or (in other cases) there was insufficient proof or legal basis to charge them at all (instructing the National Offices to gather more evidence before they would approve their cases). Throughout, the UNWCC supported the national offices in conducting their investigations and also investigated some cases on its own by maintaining a small staff team that also liaised with governments through the national offices.[37]

The UNWCC was ultimately responsible for issuing prima facie decisions on the cases brought to it by the national offices that resulted from their investigation efforts (see Figure 2). Thus, while not carrying out evidence-gathering of its own, the commission played a major role in regulating the quality of charges submitted as well as providing an important international imprimatur on individual countries' trial processes. While member states could theoretically have enacted trials unilaterally (the Soviet Union, which had for a variety of reasons elected to remain outside the commission, conducted its own trials in liberated territories, for example), this framework allowed the National Offices to obtain legitimation and approval from their peers among other member states, senior legal scholars, and the nascent UN framework for their trials. Not only did this promote better quality trials, but it also provided greater domestic legitimacy for the process for other Allied states to have 'signed off on' a given case in this manner. These case determinations were then used to produce lists of war criminals, which were circulated and used to improve the Allies ability to locate and track down suspects in others custody.

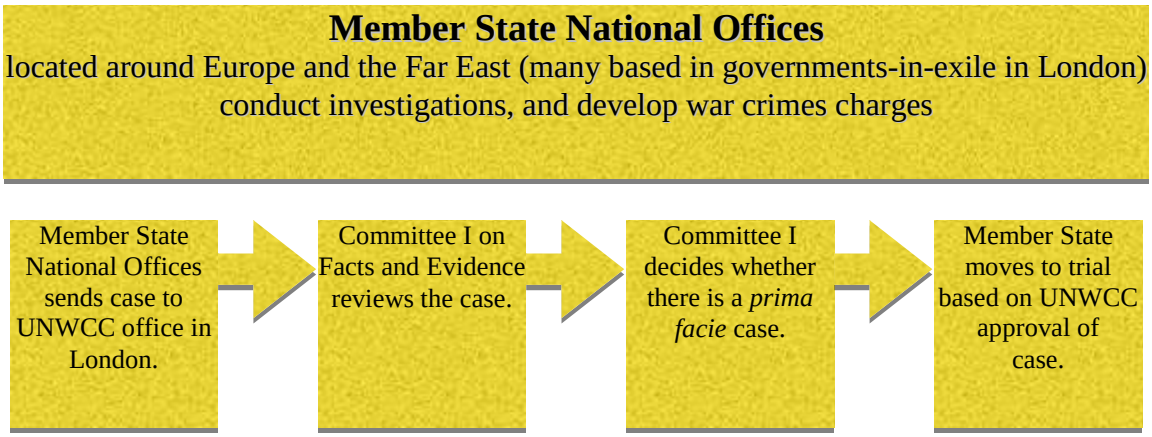

Figure 2: Core Process of UNWCC Investigation and Prosecution Operations

The fourth stage of the process, with member states moving onto the trial proceedings, is more of a national affair than an international one; and owing to the great range of jurisdictions, institutions, and processes, it is well beyond the scope of this article. In addition, data on this topic remain incomplete and much of this material remains sealed. More information on these trials can be found in the relatively well-known Law Reports of Trials of War Criminals and in the commission's own report to the Economic and Social Council (ECOSOC)[38.] Nonetheless, a few points are worth noting regarding their success and fairness. As noted throughout, that over two thousand cases were carried out under the auspices of the commission suggests that, as a system, it

[36] UNWCC, Correspondence between Belgian National Office and UNWCC Committee I, 27 April 1944,
[37] UNWCC, *Internal Memo*, April 18 1945.
[38] UNWCC, LAW REPORTS OF TRIALS OF WAR CRIMINALS VOLUMES I - XV (1947). UNWCC, INFORMATION CONCERNING HUMAN RIGHTS ARISING FROM TRIALS OF WAR CRIMINALS (1947).

worked. It offered support and legitimation to precarious domestic tribunal systems, which seems to have contributed to the emergence of an effective system of internationally supported prosecutions. The role of international scrutiny also seems to have contributed to their fairness. For example, a search through the minutes of Committee I shows that indictments were critically assessed regarding their legal soundness, whether with regard to the degree of responsibility, the evidence identifying the suspect, and the question of whether military necessity rendered an act a war-crime or not.[39] Nor did Committee I 'rubber stamp' every case; on top of the cases where they selectively withdrew or downgraded particular suspects' designations for lack of evidence, the History of the UNWCC shows that 454 cases were withdrawn by member states, adjourned, or not accepted outright.[40]

There is also evidence of international scrutiny of trials with features to ensure (or at least improve) their fairness. The UNWCC's report to ECOSOC on human rights discusses at length the human rights of accused war criminals, and how to resolve them where they conflict with those of victims.[41] Mark Ellis, executive director of the International Bar Association, in a study of the commission's approach to fair trial standards from what trial transcripts are available, observes that there were a number of irregularities and issues with UNWCC-supported trials that would meet with criticism by today's trial standards –and, indeed, were criticised at the time by defence counsels and by the commission. Nonetheless, he concludes by agreeing with the commission's own assessment that '"basic elements of a fair trial" for the accused were regularly stressed by the domestic systems'.[42] While UNWCC-supported cases certainly could have been fairer and more effectively conducted—and in contemporary legal practice we should aspire for better than 'good enough'—they were not 'kangaroo courts'. They demonstrated broad fair trial standards.

This process of case-tracking and case-review extended into the post-trial period as well. Where national prosecutions resulted, states were encouraged to send trial reports to be recorded by Committee I. This process was incomplete at the time of the UNWCC's hasty closure in 1948, with many countries being unable to complete and process their reports in time to be included in the commission's publications. Nevertheless, over 2,000 trials had been were recorded by this point. As well as examining individual cases, Committee I also provided a number of other functions that to support national offices, including conference of all national offices in May and June 1945,[43] which discussed and shared policy and best practice for the pursuit and trial of war criminals, and a scheme of support for countries who set up their own dedicated war crimes commissions.[44]

The efforts by the national offices and Committee I were complemented by the enforcement work of Committee II that was led by former US congressman Herbert Pell.[45] In short order in the spring of 1944, it developed mechanisms for a war crimes office in the territory of defeated enemies[46] that contributed to the creation of the Central Register of War Criminals and

[39] All of these objections to cases being approved—and more—can be found in one set of Committee I minutes alone. See UNWCC, *Summary Minutes of the Meeting of Committee I held on 9th May, 1946*, No. 60.
[40] UNWCC, see *supra* note 31, at 513.
[41] UNWCC, INFORMATION CONCERNING HUMAN RIGHTS ARISING FROM TRIALS OF WAR CRIMINALS passim; see in particular 103-109, 250-274. (1947)
[42] Mark Ellis, *Assessing the Impact of the United Nations War Crimes Commission on the Principle of Complementarity and Fair Trial Standards*, in 25 CRIMINAL LAW FORUM 207-222 (2013)
[43] UNWCC, *National Offices Conference held at the Royal Courts of Justice, London, May 31st to June 2nd 1945, Minutes and Documents* (1945)
[44] UNWCC, see *supra* note 31, at 123
[45] Cox, see *supra* note 6
[46] UNWCC, Minutes of the Twenty-First Meeting, 3 (June 6 1944) and the accompanying UNWCC, Establishment in Enemy Territory of War Crimes Offices: Draft Report by the Commission submitted by

Security Suspects (CROWCASS) under the command of General Dwight D. Eisenhower, the supreme commander of the Allied Expeditionary Force.[47] Other initiatives include a detailed proposal for mixed military tribunals under the major Allied commands that was later adopted[48] by many states, with strong Indian leadership in the drafting. In the specific case of the United Kingdom, the discussions within the UNWCC on how to bring accused war criminals to trial 'ultimately resulted' in the issuing of the Royal Warrant and the creation of the British War Crimes Executive in July 1945.[49]

Committee III received complex legal questions from the different participating countries in order to generate debate and ultimately arrive at decisions and recommendations for the practice of the national offices. In addition to the national investigations and trials, the UNWCC helped design and initiate the establishment of military tribunals to address situations involving particularly complex crimes. Crimes addressed by military tribunals included incidents that did not have specific geographic locations and crimes committed against Allied nationals in Germany and across parts of the Far East under various forms of colonial administration.[50] The military authorities were primarily from the United States and United Kingdom and were also responsible for aiding their respective nations in investigations and holding trials. The integration of military authorities was also due in part so that trials could be conducted "without waiting for the initiative of any one Government on the matter."[51] Collectively, Allied military authorities conducted a large number of trials around Europe and the Far East.

While these main committees and offices did their work, other UNWCC agencies, meetings, and offices also worked to bolster criminal justice efforts by the commission, coordinating its work both internally and with other agencies. The Research Office, for example, provided a forum and clearinghouse for the large quantities of documentary evidence that national offices and resistance members also were accumulating in their own archives. While many cases were based on affidavits taken by members of resistance movements or police forces after the war, many others were based on Nazi Germany's own records and announcements regarding its policies and actions.[52] When the Nazi-controlled press in a foreign country published an announcement of the execution of Jews, communists, or partisans that was intended to intimidate others, this data would often be noted and filed away by the Research Office. Other documents were also assembled, including detailed accounts of the wartime activities of prominent Nazi ideologues such as Ernst Rüdin,[53] and lists of the responsible officials of various German concentration camps, often produced while the war was ongoing.[54] Beginning in August 1944, the Research Office also began

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Committee II, C24 (May 30 1944); as well as UNWCC, Minutes of the Twenty-Second Meeting, 21st mtg. p. 3 (June 13 1944) and the accompanying UNWCC, Establishment in Enemy Territory of War Crimes Offices: Draft Report by the Commission submitted by Committee II, C24 (May 30 1944)

[47] UNWCC, *Minutes of the Thirty-Second Meeting* 2-7 (September 19 1944). Also see UNWCC, Document C 52(1), Recommendation in Favour of the Establishment by Supreme Military Commanders of Mixed Military Tribunals for the Trial of War Criminals (September 26 1944)

[48] UNWCC *Minutes of the Thirty-Second Meeting* 2-7 (September 19 1944). The commission approved the adoption of a proposal for a United Nations War Crimes Court (see the accompanying UNWCC Doc. C49, Doc. C50 and Doc. C58 Explanatory Memorandum).

[49] Treasury Solicitors Office for the Attorney General, *Memorandum 1*,2,4 (1945). UK National Archives TS26, 897, 27–33.

[50] UNWCC, LAW REPORTS OF TRIALS OF WAR CRIMINALS VOLUME 1 1-20 (1947).

[51] UNWCC, *Minutes of the Thirty-Third Meeting* 6 (September 26 1944).

[52] UNWCC, see *supra* note 31, at 165-166

[53] UNWCC, *Research Office Document Series No. 6: Professor Rüdin's Racial Institute*, (September 15 1945)

[54] UNWCC, *Index to the Documents of the Research Office of the United Nations War Crimes Commission*, 2-19 (November 17 1949)

to assemble 'Summaries of Information', which initially provided painstakingly sourced 'in their own words' accounts of official Nazi policies involving possible war crimes, before moving to information-sharing on particularly complex cases.[55] Other duties included supporting the Nuremberg Tribunals; the commission notes in the History of the UNWCC illustrates that documents assembled by the Research Office, particularly its 'Summaries of Information', played a role in focusing the Nuremberg tribunal's initial focus towards issues such as:

> deportations for labour and forced labour; the removal of foodstuffs; concentration camp and Gestapo atrocities; extermination of the Jews; crimes against prisoners of war; Germanisation of conquered territories; crimes against foreign workers; the looting of art treasures; medical experiments on prisoners and 'mercy-killing'.[56]

The wartime nature of these collections of documents had rendered them 'necessarily incomplete', and they were soon superseded by documents collected by Allied occupying armies. They nonetheless appear to have played a small but significant scoping role in supporting the better-known later trials.

The smaller scale of the Research Office also enabled it to urgently trace, source, and produce documents relating to pending trials at Nuremberg, as well as producing a regular 'War Crimes News Digest' that circulated details of ongoing developments in these and other trials. In this way, the Research Office aided the distribution and dissemination of information between different offices and different tribunal, prosecution, and military structures. By concentrating, gathering, and rendering easily digestible authoritative information regarding war crimes and Nazi policy, this comparatively minor arm of the commission smoothed and improved the functioning of the postwar international criminal justice project. Although replicated today by advances in telecommunications and the internet, its foundational work remains important.

Other institutions, groups, and processes within the UNWCC also helped in a number of ways to improve its functioning and support efforts to try war criminals and promote the nascent UN human rights infrastructure. In order to prevent accused Nazis from slipping out of Allied custody, the commission also developed extensive liaisons and ties to the Supreme Headquarters Allied Expeditionary Force (SHAEF) towards the end of the war.[57] Elsewhere, partly out of a desire for swift justice, the commission helped design and initiate the establishment of military tribunals to address situations involving particularly complex crimes. Primarily US and UK military authorities were also responsible for aiding their respective countries in investigations and holding trials. The integration of military authorities was also due in part so that trials could be conducted 'without waiting for the initiative of any one Government on the matter'.[58] As examined later, the commission as a whole also became involved in postwar discussions of human rights; at the prompting of ECOSOC and the UN's early Human Rights Division, the UNWCC prepared an in-depth report on 'Information Concerning Human Rights Arising from War Crimes Trials',[59] which highlighted essential issues for the UN to consider as it began to draft its human rights treaties and instruments. Taken together, the work and roles played by the commission—as a disseminator, conduit, and producer of information as well as a legal and case-review body—contributed significantly to international criminal justice efforts.

The commission's emphasis on bridging international and domestic systems was crucial. Especially before (but even during and after) the Nuremberg Trials, individual countries possessed

[55] UNWCC, *Research Office Summaries of Information 1 - 55* (September 1944 to December 1947)
[56] UNWCC, see *supra* note 31, at 166.
[57] UNWCC, see *supra* note 31, at 160.
[58] UNWCC, *Minutes of Thirty-Third Meeting* M33, 6 (September 26 1944).
[59] UNWCC, see *supra* note 41, at i - iii.

the resources and wherewithal to conduct trials of war criminals (and had strong political and emotional reasons to do so); and the UNWCC did not seek to supplant them. Instead, it provided important coordination, legitimation, and cooperation-promoting functions, working to harmonise different national approaches to the issue of war crimes prosecution while offering international support to member states' own efforts. In doing so, it arguably prefigured modern ideas of 'complementarity' present in the Rome Statute and elsewhere.[60]

C. Criticisms of the UNWCC

Achievements notwithstanding, the work, approach, and results of the UNWCC should be treated with some caveats. While forward-thinking and anticipating contemporary approaches to international criminal justice in many respects, it nonetheless is susceptible to a number of critiques.

Many of the trials were not conducted in line with modern-day standards or ideals. The widespread use of the death penalty in UNWCC trials provided one example as was the lack of an appeal option for many of those tried. While the severity of the crimes may have warranted the death penalty in the countries where they were prosecuted, and resources may have been lacking to offer extensive appeal options, these still represent difficult-to-accept outcomes for a UN-led, human-rights-based process. Other problems arose within the UNWCC case-handling system. In many instances, national offices submitted cases with incomplete dossiers or based their charges on evidence that they assured the commission was complete and stored in their own files. Committee I seems often to have taken these assurances on faith, legitimising the resulting cases. While countries may have developed a good rapport with Committee I by submitting reams of assiduously documented cases, and it often withheld full 'authorisation' until more evidence was produced. The fact that it accepted cases without fully scrutinising the evidence would weaken its authority. In some cases, the evidence assessed by the UNWCC has since been called into question. Robert Herzstein, for example, on an examination of the Yugoslav dossier used in charging of one Austrian—and later UN secretary-general, Kurt Waldheim—suggested that 'the case was weak, possibly even fraudulent',[61] arguing that the UNWCC's work was not immune to politically motivated perversions of justice. While Waldheim's proximity to and possible involvement in war crimes is corroborated by other sources,[62] which highlights the fact that UNWCC documents should not be taken as gospel truth.

Other criticisms should look beyond the UNWCC's individual case-handling to its broader role and function. The commission's remit was limited and could only support prosecutions of enemy personnel for offences committed against the United Nations during World War II. It had no role in respect of actions by personnel of its own members (and indeed, the Kochavi notes the particular enmity between the British and the Soviet Union, who pressed for more aggressive pursuit and prosecution of war criminals, and indeed did not join because of perceived British sluggishness, as a major failing of the UNWCC.[63] It also sought jurisdiction over crimes committed by the Germans against their own people, notably the Jews; but this unsuccessful pressure still contributed to the adoption at Nuremberg of crimes against humanity, a term used in formal debate in the UNWCC more than a year earlier in the spring of 1944. In addition, there is also a question of victors' justice because the UNWCC failed to prosecute Allied personnel for their crimes, and it was dependent on the total victory of the Allied states. That said, Plesch and Sattler note the

[60] Ellis, see *supra* note 42.
[61] Herzstein, see *supra* note 7, at 212
[62] Kate Connolly, *CIA Knew About Waldheim's Nazi Past, in* THE GUARDIAN, May 2 2001, http://www.theguardian.com/world/2001/may/02/worlddispatch.kateconnolly
[63] ARIEH KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT, 36 (1998)

conscious attempts to mitigate mob justice from the very beginning of the commission as a stated war aim from before St James' Declaration.[64]

These arguably are not fatal criticisms of the UNWCC's work. In fact, many are characterised by an insufficiently active commission that was unable to live up to its own standards owing, possibly, to the fact it was one of the least expensive international commissions according to Lord Wright.[65] Although certainly undesirable, politicisation of major tribunals is hardly a new phenomenon and do not necessarily detract from the overall value of the UNWCC's focus on complementarity and cooperative justice. This reality nonetheless should be kept in mind when trying to apply the lessons and approaches of the commission to contemporary practice.

D. The UNWCC in Action, Sexual Violence in Armed Conflict

The details of the national investigations and trials provide significant insight into the work of the UNWCC and the responsibility of its members in developing key aspects of public international criminal law. Indeed, the commission's accomplishments also involve its work on specific issues, many of which remain contentious today. This article focuses more on the institutional side of the commission's work, but some brief mention of the pertinent details of the commission's work and deliberations on some of these issues is worth pursuing as a specific illustration of how and why its structure and approach enhanced its ability to pursue them, or allowed it to explore and support prosecutions in areas that might otherwise have been overlooked. This is particularly noticeable when looking at its approach to the issue of rape and sexual violence in war.[66]

The UNWCC was unusual and well ahead of its time in the attention paid to indicting perpetrators of sexual violence and forced prostitution, with well over a hundred cases listed in its archives. While this still represents a tiny fraction of cases of sexual violence committed during the World War II, it is still striking that these crimes were taken seriously. Seven decades ago, UNWCC member states investigated and prosecuted these crimes, holding both direct and indirect perpetrators responsible for their crimes and offering some level of witness protection and sensitivity to witnesses participating in these crimes, is highly significant.

For centuries, acts of sexual violence were viewed as 'a detour, a deviation, or the acts of renegade soldiers … pegged to private wrongs and . . . [thus] not really the subject of international humanitarian law'.[67] Human Rights Watch noted—in response to a groundbreaking legal verdict prosecuting rape in the Rwandan genocide—that 'rape has long been mischaracterised and dismissed by military and political leaders as a private crime, the ignoble act of the occasional soldier. Worse still, it has been accepted precisely because it is so commonplace. Longstanding discriminatory attitudes have viewed crimes against women as incidental or less serious

[64] Dan Plesch, Shanti Sattler, *Before Nuremberg: Considering the Work of the United Nations War Crimes Commission of 1943–1948, in* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 469 (Bergsmo et al. eds. 2014)

[65] UNWCC, see *supra* note 31, at 134.

[66] This section is largely based on an article entitled 'The Relevance of the UNWCC Trials to the Prosecution of Sexual and Gender-Based Crimes Today' published in Criminal Law Forum, which one of the authors of this piece co-authored with Susana SáCouto and Chante Lasco of the War Crimes Research Office at American University Washington College of Law. Dan Plesch, Susana Sácouto, Chante Lasco, *The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today, in* 25 CRIMINAL LAW FORUM 364-8 (2014)

[67] Patricia Sellers, *Individual(s') Liability for Collective Sexual Violence, in* GENDER AND HUMAN RIGHTS, (Karen Knop ed., 2004) at 153, 190. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law, in* 46 1 MCGILL LAW JOURNAL 217-213 (2000)

violations'.[68] Indeed, such crimes were often perceived as 'incidental' or 'opportunistic' in relation to other 'core' crimes[69]—rape might be included in the list of charges committed as part of a broader atrocity such as the destruction of a village, but not taken seriously on its own. Even when recognised as criminal, sexual violence committed in the context of armed conflict or mass disruptions were often tacitly encouraged or tolerated, making it challenging for prosecutors to link the perpetrator with the crime. Not surprisingly, commentators have noted that while there have been significant improvements in the prosecution of crimes of sexual violence by contemporary tribunals, in the last two decades,[70] these cases continue to be plagued by prosecutorial omissions and errors as well as by a tendency on the part of the judges to require that the prosecution meet higher evidentiary standards in these cases than in other types of cases.[71] As Justice Richard Goldstone, the first chief prosecutor of the ICTY) noted, even recent international tribunals have sometimes been highly reticent about engaging with the issue of sexual and gender-based violence (SGBV) because they lacked the necessary precedents and case law to engage fully, instead sometimes prosecuting it as a form of torture and ill-treatment, or not addressing it at all.[72] Had the ICTY and other tribunals been able to draw upon the UNWCC's and its member states' work on the subject, he suggests that they would have 'benefited immeasurably'.

The approach that the commission took—building upon domestic jurisdictions' legal infrastructure and approach—not only helped to encourage indictment and prosecution of rapists, but it also helped to refine and add nuance to these proceedings. Three examples—all with particular relevance to contemporary debates—are found in the UNWCC's charge files and were bolstered by its structure and approach to the issue.

For example, the commission adopted a highly forward-thinking approach on was the issue of consent and coercion in rape. While forcible or violent rape is clearly an instance of rape, the commission went further in many cases, correctly identifying that sexual violence was taking place in a broader range of circumstances, including numerous examples in which external circumstances and pressures meant that consent could not be given. Commission-backed cases identified a number of instances in which victims of rape forced prostitution described the circumstances surrounding their coercion in terms of threats to family and relatives, exchanging of vital food supplies for sex, and deliberate intoxication with drugs and alcohol, as well as direct violence against the person, which clearly show that the commission did not adopt a conservative or narrow definition of the crime.[73] Indeed, just as Plesch, Sácouto, and Lasco found there was little controversy or contestation surrounding the commission's support for prosecuting rape and forced prostitution as a war crime[74] (much less than on other topics), so too did the Facts and Evidence Commission assign less controversy to approving intoxication-based rape charges than to other questions of intention, evidence, and crime.[75]

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[68] Human Rights Watch, *Human Rights Watch Applauds Rwanda Rape Verdict*, September 1 1998, http://www.hrw.org/press98/sept/rrape902.htm.

[69] Patricia Sellers and Kaoru Okuizumi, *International Prosecution of Sexual Assault*, *in* 7 1 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 45, 61-2 (1997): 45, 61–2

[70] Cate Steains, *Gender Issues*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 361-4 (Roy S.K Lee ed. 1999)

[71] Susana Sácouto and Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 2 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND LAW 337-59 (2009).

[72] Goldstone, see *supra* note 3, at 12-13.

[73] Dan Plesch, Susana Sácouto, Chante Lasco, *The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today*, *in* 25 CRIMINAL LAW FORUM 364-8 (2014)

[74] Plesch, Sácouto and Lasco, see *supra* note 73, at 352.

[75] As seen in Committee I's appraisal of Case 4553/Gr/It/37, in UNWCC, Summary Minutes of the Meeting of Committee I, No. 87 3 (January 30 1947) . A number of Greek charges were scrutinised and placed on

Similarly, attempted rape—rather than the completed act—was also charged routinely across a wide range of jurisdictions.[76] In these cases, just because the act had not been carried out—the victim escaped, for instance, or locals intervened—did not mean that the rape attempt was not a serious issue to the prosecuting country. That the UNWCC drew upon domestic law was key to this approach and allowed countries to offer a response to broader trends of sexual violence rather than just a handful of cases. US counsel for the prosecution at Nuremberg, Telford Taylor, was in favour of prosecuting attempted crimes but remarked in his address to the Fifth International Criminal Law Congress that 'international penal law with respect to this question [the doctrine of attempts, and the question of connection between crime and defendant] is most unsettled'.[77] As the report compiled by the UNWCC for ECOSOC on the human rights implications of war crimes trials noted, however, several states recognised this issue in their own legal systems, used existing penal codes, and dedicated war crimes legislation to address attempted acts of sexual violence. This use of domestic legal standards as well as pre-existing international war crimes codes also allowed national offices to indict accused war criminals for more specific—and often more severe—crimes, such as sexual violence against minors.[78] The commission's nature as a joint national-international body appears to have enabled and empowered it to more effectively pursue crimes of sexual violence by allowing it to enmesh itself with more developed and sophisticated national legislation on the topic.

The value of studying the commission's approach to the issue of sexual violence goes beyond a demonstration of the potential value of UNWCC domestic-international approach. The jurisprudence and political significance emerging from UNWCC-supported cases may also be relevant to contemporary policy debates. Indeed, the active role of states in pursuing crimes of sexual violence in the 1940s provides a more reinforced foundation for pursuing such crimes today than they may realise. Indeed, four permanent members of the UN Security Council—China, France, the United Kingdom, and the United States—were members of the UNWCC. They, and Russia (then the Soviet Union), were also party to the Hague Conventions, which were relied upon by many states to prosecute rape and forced prostitution. Similarly, a number of states that are members of the European Union—including Belgium, France, Greece, Italy, Poland, and the United Kingdom—endorsed rape and forced prostitution as war crimes in the 1940s. To the extent that the issue of SGBV committed in the context of armed conflict or mass violence continues to be the subject of debate in UN and European Union forums, the valuable work carried out in the 1940s could be potentially of great legal significance.

E. Closing the UNWCC

As with many post-conflict criminal justice initiatives, the UNWCC was not without its detractors and lukewarm supporters. While many continental European countries were firm backers, factions in the US and UK governments had been much more reticent and would only grow more so after the war's end.

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hold pending further evidence, explanation of motive and crime, and legal argument; the rape-by-intoxication case is not one of them.

[76] e.g., UNWCC, *French Charges against German War Criminals,* Registered No: 2280/Fr/G/983, Case No. 1180 (January 31 1946), *Greek Charges against Bulgarian War Criminals*, Registered No: 7656/Gr/B/192, Case No. 267-46 (February 16 1948), *Yugoslav Charges against German War Criminals*, Registered No: 2985/Y/G/115, Case No. R/N/115 (April 17 1946)

[77] UNWCC, see *supra* note 31, at 216.

[78] e.g., UNWCC, *Belgian Charges against German War Criminals,* Registered No: 1805/B/G/159, Case No. 150 (November 14 1945), UNWCC, *Greek Charges against Italian War Criminals,* Registered No: 6945/Gr/It/84, Case No. 109/45 (November 14 1947), UNWCC, *Yugoslav Charges against German War Criminals,* Registered No: 4021/Y/G/200, Case No. R/M/200 (November 14 1947).

Divisions in the United States pose a particularly distinct example. Herbert Pell, a former congressman and US ambassador to Portugal and Hungary, was a fervent advocate of the commission's work; his service in Hungry gave him the rare, for an American experience of seeing fascism first-hand; he was a vocal opponent of racial discrimination in the United States, and his similar background to Roosevelt's gave him political access. While he enjoyed some measure of support from Henry Morgenthau's Treasury Department and civil society groups, he faced consistent obstruction from the State Department, which viewed the commission as a legally over-reaching and politically irrelevant extension of US power. The State Department, through its influence on funding allotments, eventually managed to have Pell withdrawn from the commission.[79] While this did not end US participation, and though Pell's activism even after removal strongly committed the US to some form of postwar criminal justice, it certainly restricted the impact at times.

In addition, the end of World War II and the onset of the Cold War played a major role in shaping US policy away from supporting the UNWCC. When Truman assumed the presidency following Roosevelt's death, the Allied liberation of Nazi death camps and what Simpson describes as the 'wrenching proof of the Nazis' systematic criminality' meant that anti-Nazi feeling was high among the Allies. Moreover, Truman he was also inclined to accept the recommendations of State Department officials to reduce the expenditure of occupying Germany and bolster West Germany against the perceived growing Soviet threat. Both goals were incompatible with American involvement in the commission.[80] Simpson's historical account of closing the commission documents how State Department officials recognised that the unpopularity of being openly seen to desire the UNWCC's closure would be significant both among smaller Allied countries and with the American public, and instead coordinated with the British to close the commission and withdraw funding. The reason for this, he argues, was

> hostility toward what might be called today legal "activism" on the part of the Commission on the recognition of human rights. There is also a tacit acknowledgement that aggressive, post-war prosecution of wartime Nazi quislings and collaborators posed political problems for Anglo-American strategy in Continental Europe and the Far East as the Cold War deepened.[81]

Despite strongly worded objections and aggressively stepped up prisoner transfer requests by countries including France, Poland, and Czechoslovakia, these Anglo-American campaigns led to closing the UNWCC by spring 1948. Broader strategic concerns trumped concerns of criminal justice and accountability.

Just because the commission was shut down, however, does not mean that it ceased its work or its relevance. Much of its work was preparatory and encouraged, for example, better evidence handling, circulating and pooling information and legal acumen between member states, and providing legitimacy and international sanction to trials that met its standards (rather than conducting trials itself, and many prisoners were already in the custody of the countries who sought to prosecute them). Rather than leading to a cessation of trial activity once the commission closed its doors, domestic processes set in motion continued to result in prosecutions of Nazi war criminals. Since these—by definition—occurred after the end of the UNWCC's reporting period, there are no definite figures, and many countries' archives from this period remain sealed. Yet there are strong suggestions in the commission's archives that these trials were widespread. The archives include correspondence from September 1949 between the former members of the Dutch National Office and J.J. Litawski, then at the UN's Human Rights Division in London, detailing dozens more

[79] Cox, see *supra* note 6.
[80] Simpson, see *supra* note 5, at 137.
[81] Simpson, see *supra* note 5, at 40.

cases that were still being completed.[82] Subsequent judgments in the Netherlands would include a number of high-profile cases, including the 'Breda four'—a group of Nazi SS personnel responsible for the deportation of Dutch Jews to the death camps, (including Willy Lages and Ferdinand Aus Der Funten) in 1950. The UNWCC played a major role in initiating this trial with the charge file—including extensive witness statements and other evidence—being prepared by the Dutch National Office for the commission in June 1944.[83] While the notion of international organisations' primary role as 'capacity building' is somewhat of a cliché, this case would seem a clear example of the UNWCC approach of providing a forum in which cases could be prepared, offering legal assistance and support, and legitimising cases that satisfied an internationally recognised standard. This approach clearly had a positive impact on postwar criminal justice even after the closure of the organisation.

In addition, and as mentioned above, the UNWCC also was closely involved in bridging early UN activities in human rights and international law. The UNWCC conducted the only comparative analysis of the different national practices to take place during this time in a report to ECOSOC in 1948.[84] Until recently, virtually no research on the work of the many national offices had been conducted, or the influence that this work had on the early UN (especially given the degree to which its personnel went on to prominent ranks in major international institutions).[85] The UNWCC continue to have relevance even after it closed its doors, albeit much less than it could have if its work had not been interrupted in mid-stream..

II. The Contemporary Relevance of the UNWCC

What relevance do the UNWCC's emergence, activities, closure, and its particularly notable attributes have for contemporary international relations?

First, assessing the commission can contribute significantly to our understanding of the history of international criminal justice, international organisations, and the Allied war effort. The archives—only recently opened to public access—contain invaluable material and content. As Hale and Cline note, the UNWCC represents an important 'missing link' in developing such concepts as joint criminal enterprise and responsibility, which provided an important context for Nuremberg and subsequent trials.[86] Reydams and Wouters highlight the political innovations and drafts for 'a draft Convention for the Establishment of a United Nations War Crimes Court, a draft Convention for the Surrender of War Criminals, and a recommendation for the Establishment by Supreme Military Commanders of Mixed Military Tribunals'.[87] While these concepts may be familiar today, they were precedents when the commission was active, and so an appreciation of their scope in forming today's system of international criminal justice is helpful in situating development across the twentieth century.

Even individual charge files, trial transcripts, and minutes can provide valuable insights into World War II and the legal response to it. For example, Norwegian trial reports contain

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[82] Letter from Joyce Sweeney, Secretary to Dr. M.W. Mouton, to Dr. J.J. Litawski, Consultant on War Crimes Trials, United Nations Division of Human Rights, (September 2 1949) (on file in Reel 61 of the UNWCC archive).
[83] UNWCC, Dutch Charges against German War Criminals, Registered No: 173/Nl/G/19, Case No. 7(July 28 1944)
[84] UNWCC, see *supra* note 41, at 125–45 and Appendix.
[85] UNWCC, see *supra* note 31, at 499-505.
[86] Kip Hale and Donna Cline, *Holding Collectives Accountable: The UNWCC's Undervalued Role in Developing Collective Responsibility, Yesterday and Today,* in 25 CRIMINAL LAW FORUM (2013)
[87] Luc Reydams, Jan Wouters, *The Politics of Establishing International Criminal Tribunals* 5 (Leuven Centre for Global Governance Studies Working Paper No. 77, 2007)

disturbing and detailed accounts of torture and 'enhanced interrogation' carried out on members of the resistance, and include legal commentary on the incidence of various practices, why they constituted torture, and the Nazi command structure that ordered them.[88] Other documents provide valuable (often first-hand, from members of resistance groups or eyewitnesses) primary documentation of atrocities, conditions within concentration camps, or details of individuals detained in them.

Second, the relevance of the UNWCC is more than historical. As an organisation, this ambitious project covered a considerable scope that helped to structure extensive war crimes prosecutions worldwide. The commission's success stands out compared to much of today's practice in three ways: as a concept, its cost, and its speed. We have already noted that much of this success was a product of the time and circumstances, but its work also suggest a number of potential lessons for contemporary attempts to prosecute major crimes, through the ICC and elsewhere.

The UNWCC reflected the initiative of victim states to provide a global system of complementary justice to reinforce and legitimate the actions of these countries after liberation and to warn perpetrators and offer a hope of justice to victims. In addition to this ambitious first experiment with international criminal justice, a number of precedents stand out. Rape was prosecuted routinely, and legal responsibility was attributed to those with collective or command responsibility and low-level functions. A uniform system of facts and evidence collection was developed and implemented. Torture, including waterboarding, was prosecuted in a considerable number of cases. Prosecutions took place in the states where they occurred and were pursued with urgency and economy. The commission's minutes show multilateral debates and decisions about such contemporary headlines as collective responsibility, the mandate of an international criminal court, and the crime of aggression, and represent a highly effective example of a wide range of states of different regime types and wartime experiences cooperating and collaborating to bring about some measure of criminal justice.

More basic measurements of effectiveness—including caseloads, budgets, and speed—also suggests the commission's success. In the mere two-and-a-half years between the end of World War II and its closure in March 1948, the UNWCC oversaw nearly two thousand cases, a figure that dwarfs the caseload handled by subsequent international machinery. Figure 3 graphically illustrates that the number of trials supported by the UNWCC vastly exceeds all other international criminal justice efforts put together.

[88] UNWCC, *Norwegian Trial Report No. 7 (The Trial of 1. Johan ARNDT; 2. Peter LAUER; 3. Ernst WEIMANN; and 4. Walter KUPER)*, (August 1948)

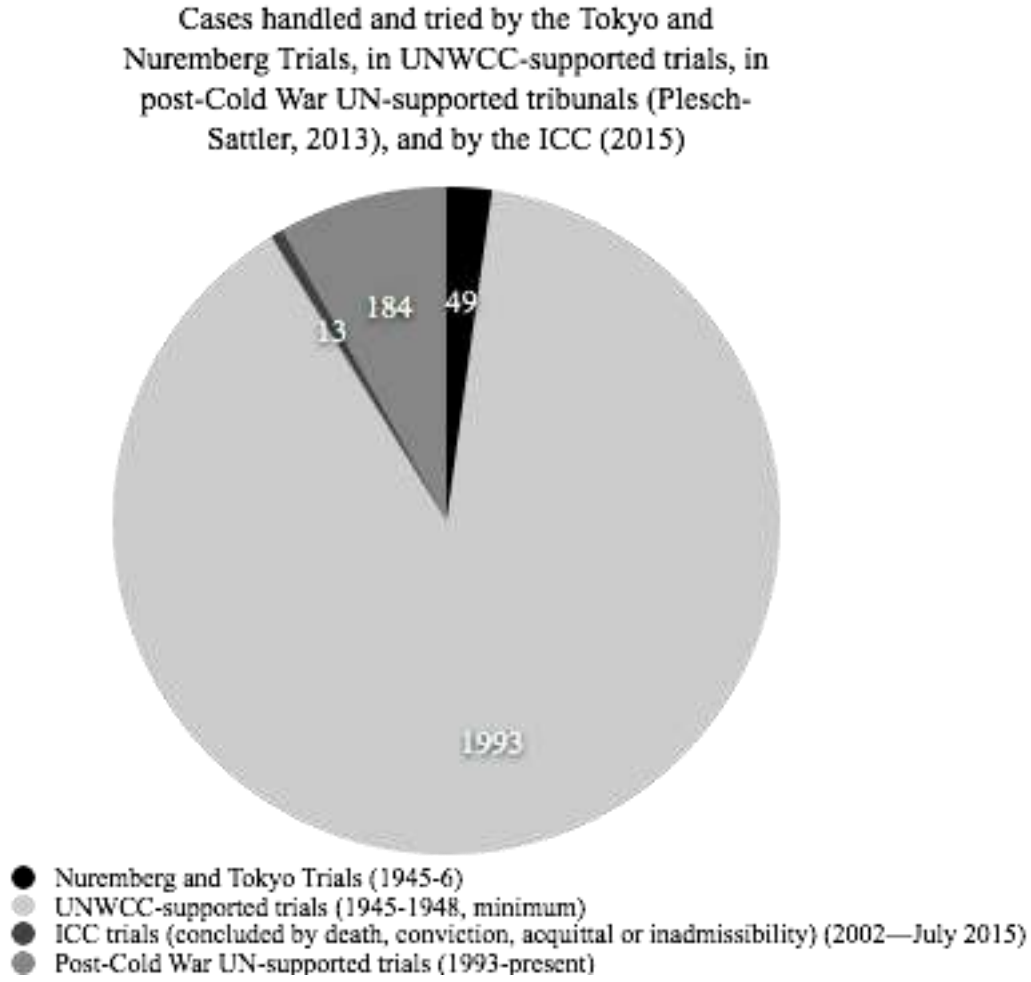

Figure 3: War Crimes Cases Tried through Various International Bodies

The scale and ambition of the UNWCC's work suggest that large-scale international criminal justice efforts were feasible, could deal with large numbers of low-level perpetrators, and do so in a timely fashion. These facts offer a valuable counter-example to the large-scale, highly expensive, and slow prosecutions of high-level perpetrators of atrocities that characterise major trials since the end of the Cold War. Perhaps the most egregious counter-example is the Extraordinary Chambers in the Courts of Cambodia (ECCC), which tried high-level perpetrators of the Cambodian genocide, has cost over $200 million, and resulted in only three convictions.[89]

The UNWCC, by contrast, was comparatively inexpensive. Lord Wright frequently stated that the UNWCC was the least expensive international commission known in history—a fact in the 1940s, which remains even truer today. The UNWCC's annual expenditures were: 10 October 1943– 31 March 1944 (£730), 1 April 1944–31 March 1945 (£4,238), 1 April 1945–31 March 1946 (£12,462), 1 April 1946–31 March 1947 (£15,137), and 1 April 1947–31 March 1948 (£15,388).[90] In current pounds or dollars, this represents around £1.7 million, or US$2.6 million,[91] clearly a small fraction of the usual operating budget of many international organisations. By contrast, Stuart Ford, the former assistant prosecutor at the ECCC, estimates that UN member states will have spent approximately US$6.3 billion on the ICC, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the ECCC, and the Special Court for Sierra Leone by the end of 2015;

[89] http://time.com/6997/cambodias-khmer-rouge-trials-are-a-shocking-failure/
[90] UNWCC, see *supra* note 31, at 134.
[91] Plesch and Sattler, see *supra* note 11, at 32.

and he remarks that 'it is well understood by scholars and practitioners that trials at international criminal courts are expensive, at least compared to the average domestic criminal prosecution'.[92]

In many ways, the direct financial comparison is unfair in that the UNWCC was not a trial structure but rather a mechanism by which domestic trial structures could be coordinated, given further authority, draw upon expert legal advice and support in their early planning, and exchange information about the disposition of prisoners and evidence. The true cost of the postwar criminal justice project would have to be calculated across the various jurisdictions and countries where the commission was active; moreover, rather than trying to handle thousands of cases and defendants on its own, it could distribute this burden across a wide range of other jurisdictions and legal systems. Nonetheless, the juxtaposition is striking because it demonstrates what could be done by taking advantage of existing systems and providing them with the support and legal coordination that they were lacking in order to avoid duplication and unnecessary expense.

Domestic prosecutions for serious crimes can still be expensive in their own right. The recent prosecution of Désiré Munyaneza, a Rwandan génocidaire living in Canada, was judged to be 'cumbersome and costly … costing an estimated $1.6 million',[93] and took place in a stable country with a well-developed legal system. However, it suggests that an international system of support for domestic trials does have promise. International resources could bolster and supplement domestic efforts rather than replacing them with expensive international tribunals. Many of the expenses for the Munyaneza trial were related to international cooperation and coordination—for example, flying witnesses and investigators to and from Rwanda, and conducting parts of the trial in Belgium and France.

An additional component to be emulated today would be the speed of the trials that resulted from the UNWCC. The need for the implementation of speedy justice was one of the arguments used to draw the United States and United Kingdom into the commission, and UK Foreign Secretary Anthony Eden in particular was a great supporter of immediate postwar trial and punishment of war crimes suspects, because he feared that prolonged trials would risk vigilante justice, thereby delaying the restoration of peace in Europe and the Far East.[94] The official history likewise stated that 'it was widely felt that justice should not be delayed'[95] as 'delay will mean escape of the guilty'.[96]

By 1948 when the UNWCC was closed, almost 2,000 cases had been reported to the commission after thousands more investigations conducted out by national offices.[97] Building on this preparatory work, most UNWCC-supported trials were rapid. Many lasted between four and five days; trials of major criminals such as Amon Goeth (commandant of Plaszow Camp) and Rudolf Höss (commandant of Auschwitz) lasted a little longer,[98] but even more complex trials did not take a great deal of time (the Belsen Trials, for example, lasted for 54 days).

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[92] Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 SAINT LOUIS UNIVERSITY LAW JOURNAL 956-7 (2011)

[93] News Desk, *Désiré Munyaneza case: Quebec's Court of Appeal upholds conviction for his role in Rwandan genocide*, *in* MONTREAL GAZETTE, May 7 2014, http://montrealgazette.com/news/local-news/desire-munyaneza-case-quebecs-court-of-appeal-upholds-conviction-for-his-role-in-rwandan-genocide

[94] Plesch and Sattler, see *supra* note 11, at 31.

[95] UNWCC, see *supra* note 31, at 4.

[96] UNWCC, see *supra* note 31, at 109.

[97] UNWCC, see *supra* note 31, at 484.

[98] UNWCC, see *supra* note 50, at 1-21.

This stands in stark contrast to many trials for war crimes and crimes against humanity today. In several cases, defendants have died while on trial. Slobodan Milosevic died after four years of his trial; delays in commencing the 'Red Terror' trials of the Ethiopian Derg government led to deaths of 43 defendants in prison over the ten years of the trial[99]; while the stop-start genocide trial of Guatemalan ex-dictator Efrain Rios-Montt seems endangered by his increasing frailty.[100] In each case, the drawn-out nature of the trial risks demoralising victimised communities by keeping experiences of persecution fresh in their memories, prevents closure, and—where the defendant dies on trial—can rob them of the symbolic value of a 'guilty' verdict, something that was arguably avoided with the UNWCC's set of cases.

To some extent, fast trials are something to which all post-conflict trial structures are likely to aspire, and the factors that lead to delayed and drawn-out trials are likely to be more dependent on the particular circumstances under which they are set up (such as supporters of the accused retaining political power, damaged legal infrastructure, or destruction of evidence). In addition, very fast trials can prevent proper consideration of evidence, an adequate chance for the defendant to represent their case, or a proper appeal. This issue was discussed in the UNWCC, where the French representative M. Gros acknowledged that '[a]lthough the notion of swift justice is found in manuals of military law, 'justice' is something that does not admit of qualifying adjectives'.[101] In some cases when defendants were tried by supreme courts, there was no appeal and thus hasty executions—Goeth, for example, was executed eight days after he was found guilty—which would be unacceptable for many contemporary human rights or legal commentators.

Nonetheless, the work of the commission does provide an example of fast, relatively fair trials being carried out on a massive scale. It also offers a way for an international information-gathering and approval-granting mechanism like the UNWCC to give governments-in-exile multilateral legal support in building cases even while armed conflict is raging.

III. The Unique Product of a Historical Moment?

So far, we have analysed the UNWCC as a potential model for contemporary legal and political action. Could the UNWCC be revived today, as an international system for the promotion of domestic trials for war crimes, genocide, and crimes against humanity? Arguably, the answer is 'no', at least in anything resembling its shape in the 1940s because the commission's launch and successes were based on the unusual circumstances on which it operated, circumstances that are not evident in many contemporary armed conflicts. While all cases are sui generis, the UNWCC one nonetheless is well worth exploring in more detail than it has to date to glean useful lessons for current international legal efforts to impede mass atrocities.

World War II represented a starkly divided global ware between two clearly and openly defined sides. While the Axis powers may have had some support on the fringes in Allied societies, and the major powers may have disagreed as to how to resolve the postwar situation, all of the major Allies were actively fighting the Axis. There were no large powerful countries that backed Nazi Germany or Imperial Japan and might have been willing to openly block prosecutions of their personnel. Hence, opposition to the idea of postwar international criminal justice was limited.

Axis war crimes, especially Nazi extermination camps, were so heinous as to vitiate arguments that postwar trials solely represented victor's justice. Various Allied militaries commited

[99] EDWARD KISSI, REVOLUTION AND GENOCIDE IN ETHIOPIA AND CAMBODIA 103 (2006).
[100] Associated Press, *Guatemala Ex-Dictator Rios Montt's Retrial Suspended, in* THE NEW YORK TIMES, January 5 2015, http://www.nytimes.com/aponline/2015/01/05/world/americas/ap-lt-guatemala-rios-montt.html?_r=0
[101] Plesch and Sattler, see *supra* note 11, at 28-9, n39

acts that—had they been brought before a prosecutor after the war—might have led to war crimes convictions. Prominent examples include the widespread mutilation of Japanese war dead[102] by American soldiers and the strategic bombing of Axis cities (including the nuclear bombing of Hiroshima and Nagasaki). Not all of the thousands of UNWCC charge files dealt with death camps and mass extermination, however, as many addressed sexual violence, looting, and mistreatment of prisoners of war and civilians that characterised both sides. Nonetheless, the overall disparity in perceptions of Axis and Allied wartime conduct meant that the commission could comfortably describe Axis conduct as going beyond 'war in itself always [being] a wicked and evil thing', and instead being 'peculiar in the history of the world … an incredible multiplication of cruelties and atrocities'[103] that had to be prosecuted, and in doing, so, reflect popular opinion, which had been bolstered by media campaigns to highlight Nazi atrocities.[104] While debates about victor's justice may endure and have merit, this disparity at least gave the UNWCC moral impetus.

The doctrine of unconditional surrender—adopted first by the United States and United Kingdom at the 1943 Casablanca Conference and consolidated (especially with respect to trials) by the October 1943 Moscow Declaration—also assisted in ensuring that the UNWCC would be able to do its work. A negotiated surrender would undoubtedly included immunity from prosecution for Nazi war criminals involved in brokering the surrender, or otherwise block military personnel from facing trial. Indeed, as Kerstin von Lingen points out, this was exactly what Albert Kesselring attempted to do in secret discussions with the American Office of Strategic Services.[105] In fact, and as she notes, his colleague SS-Obergruppenführer Karl Wolff largely managed to avoid prosecution for his role in arranging the surrender of German forces in Italy. By focusing on total victory rather than a negotiated settlement, Allied wartime strategy led to significant successes in ensuring that German military personnel could be brought to trial after the war. While the early closure of the commission and US attempts to downplay German war crimes and criminal trials in favour of Cold War politics might be seen as a belated form of negotiated surrender, the policy of unconditional surrender nonetheless helped the UNWCC's work greatly.

The groups and organisations in London that set up the UNWCC also represented a historically distinct situation. Governments-in-exile from across Europe had fled Nazi invasion and decamped to London, where they continued to function with (in many cases) full cabinets and continuity of staff.[106] Owing to this continuity, and the conduct of the Nazi occupation or puppet governments that tended to succeed them, these governments-in-exile tended to enjoy significant legitimacy among the other Allied governments as the recognised representatives of their states. Not only did this make it easier for them to function as part of the commission and maintain legal functioning while in exile, but it also allowed many states to develop and pass their own war crimes statutes during the war, it also provided additional (and not after-the-fact) legal bases for postwar prosecutions. In the Netherlands, for example, the Extraordinary Penal Law Decree 61 of 1943 was the basis for the subsequent postwar policy of prosecutions.

In addition and as noted above, the UNWCC benefited from individual personnel and the weight and status that they brought to it from across the Allied world. Whether in institutional champions such as Herbert Pell, prominent legal scholars such as Wellington Koo, or human rights advocates such as René Cassin and Egon Schwelb, many key moments in the emergence, survival,

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[102] James J. Weingartner, *Trophies of War: U.S. Troops and the Mutilation of Japanese War Dead, 1941-1945*, in 61 1 PACIFIC HISTORICAL REVIEW (1992)
[103] UNWCC, see *supra* note 31 at 1.
[104] PLESCH, see *supra* note 15, at 108 113.
[105] KERSTIN VON LINGEN, ALLEN DULLES, THE OSS, AND NAZI WAR CRIMINALS: THE DYNAMICS OF SELECTIVE PROSECUTION 62 (2013)
[106] Helen Lawrence Scanlon, *European Governments in Exile* (Carnegie Endowment for International Peace, Memoranda Series no.3 1943)

and functioning of the commission can be traced back to individuals, key meetings, or groups and networks. While the world is not lacking today for legal scholars, academics, and sympathetic politicians, the circumstances that brought together groups like the London International Assembly or Cambridge Commission do not pertain.

Finally, the UNWCC was part of a broader movement and wave of internationalist sentiment among the Allies. As two of the authors have argued elsewhere,[107] Franklin Roosevelt and other wartime Allied leaders used the banner of the 'United Nations' to rally extensive popular support for the war, organise and coordinate Allied governments, and plan and develop postwar organisations ranging from reconstruction and relief to agriculture, education, and development. Organisations like the United Nations Information Organisation provided a strong sense of internationalism and common feeling across the populations of Allied states, linking together different governments-in-exile, politicians, and populations together and bolstering this sense of the value of multilateral cooperation. As a fairly secretive organisation (concerned particularly with the possibility of reprisals against prisoners-of-war for declarations that it would prosecute German officials),[108] the ability of the commission to ride this wave of internationalism and expectation surrounding the new United Nations was limited, but it nonetheless was part of an optimistic approach to establishing international organisations to sustain postwar peace and prosperity.

It is impossible to prove the counterfactual that the UNWCC would not have been as effective in different circumstances: if the Western Allies had pushed for a negotiated surrender of the Axis, if governments-in-exile (and their associated groups of legal scholars and experts) had not escaped occupied Europe, or if less attention had been paid to promoting the strongly internationalist agenda of the nascent 'United Nations'. Nonetheless, the major role that these variables played in enabling and bolstering the commission's work suggests that the UNWCC was a product of its time.

In many modern conflicts, these same factors are not present, or are complicated by other issues and political phenomena. The example of the ongoing morass in Syria illustrates the problem of any direct comparison between the UNWCC and attempts to prosecute members of the Bashar al-Assad government or other belligerents in the civil war that thus far have led to over 250,000 deaths and the displacement of half of the pre-war population.

The Syrian government is backed by major powers opposed to international criminal trials on grounds of crimes against humanity; in May 2014, for example, Russia and China vetoed a draft Security Council resolution to refer Syria to the ICC.[109] And both Moscow and Beijing have often offered political support in the council to the Assad government just as other members of the P5 have used their influence and veto to protect or defend the armed opposition. The complex political situation surrounding Syria, and its larger geopolitical implications, are different from the comparative unanimity to defeat the Axis powers that the UNWCC enjoyed. In addition, while it began as an institution with fairly wide support, British and American politicians and diplomats stopped supporting the commission when politically inconvenient, resulting in its early closure, which implies that a similar institution today might also be compromised from its inception.

Likewise, while Assad's government is implicated in widespread atrocities and human rights abuses, it is harder to identify them as a qualitatively more brutal than the opposition (in the

[107] Such as PLESCH, see *supra* note 15.
[108] Such concerns were expressed throughout the Meeting Minutes of the organisation; see, e.g., UNWCC, *Minutes of the Forty-Fifth Meeting*, 2-3 (January 24 1945).
[109] Ian Black, *Russia and China veto UN move to refer Syria to international criminal court*, in THE GUARDIAN, May 22 2014, http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court

same manner as Nazi occupation forces committed atrocities in occupied Europe to a greater extent than the Allies did so in bombing and occupation campaigns). Reports by the Office of the UN High Commissioner for Human Rights (OHCHR) identify widespread violence, torture, and ethnic persecution carried out by groups fighting against the Assad government, including the Free Syrian Army, Jabhat al-Nusra, and, most recently, the Islamic State of Iraq and Al-Sham, whose actions in territory occupied by them have been noted as particularly brutal.[110] In addition, the UN also has noted numerous attacks in which the perpetrator was unclear. Without trying to diffuse responsibility for the Syrian government in war crimes and crimes against humanity, the nature of this war would make it difficult to prosecute only one side as the worse violators of human rights, as was practiced in the UNWCC.

Another difference would be the infeasibility of a 'total victory' in Syria that resembled that Allied defeat of the Axis. The regional, cross-border nature of the conflict, its predominantly irregular/guerilla fighting-focused character, the splintered nature of many of the opposition factions, and the way other violence in neighbouring countries have endured would seem to paint a rapid, complete victory by any of the sides as unlikely. At the same time, a negotiated settlement is also likely to face serious obstacles. For instance, a report by the International Crisis Group highlighted the lack of appetite for a negotiation that did not include Assad's ouster as an initial concession, and 'the repression, tortures, massacres and massive looting and destruction of property throughout the country [generating] a vast reservoir of individuals with nothing to lose and thus willing to fight to the end'.[111] Opposition demands for Assad to step down would likely find little traction with the Assad government, particularly if they resulted in prosecutions—as for the Allies, immunity deals would have been unpalatable. In short, it is tricky to identify how the Syrian conflict might be resolved or where a UNWCC-like mechanism could have an effect; and even if such a resolution emerged, how it might take place in such a way as to permit large-scale prosecutions for war crimes and crimes against humanity.

At the same time, different organisations and institutions have offered a range of potential solutions, with varying degrees of effectiveness—in 2012, for instance,William Hague, the UK foreign secretary, announced plans to send UK experts to document regime crimes.[112] Another option would be an ad hoc or lower tribunal working closely with international bodies to deal with 'ordinary war crimes' in line with a UN stabilisation mission, and could address crimes by both sides much as the ICTY has done—but these would move away from the essential UNWCC model.

The question of government legitimacy is also a serious complication for any potential Syrian tribunal. Unlike in World War II in which legitimate governments were displaced by a foreign invader, there is little agreement about who in Syrian politics represents the legitimate 'Syrian leadership'. Even leaving aside the question of what role the Assad government—which Washington and other capitals have described as no longer representing the Syrian people[113]—might play, the 'Syrian opposition' represents a complex mix of opposition and rebel groups representing liberal, nationalist, ethnic, and religious groups with only tenuous links among them; and this confusion has been exacerbated by the emergence of the Islamic State (ISIS) among them. Developments in the conflict have seen different groups come and go depending on the policies

[110] OHCHR, Report of the independent international commission of inquiry on the Syrian Arab Republic UN Doc. A/HRC/27/60 (2014).
[111] International Crisis Group, S*yria's Metastasising Conflicts* 25-6 (International Crisis Group Middle East Report no.143, June 27 2013)
[112] William Hague, *Britain to launch new initiative against Syrian war crimes, in* THE TELEGRAPH, February 12 2012 http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9076872/Britain-to-launch-new-initiative-against-Syrian-war-crimes.html
[113] Jill Dougherty, *Obama recognizes Syrian opposition coalition, in* CNN NEWS, December 12 2012, http://edition.cnn.com/2012/12/11/world/us-syria-opposition/index.html

taken by the Syrian Opposition Council as a whole,[114] which mean that nothing like the same sense of continuity and legitimate government-in-exile status exists for Syria that was present in London during World War II.

Finally, the UNWCC was a new organisation that emerged amid popular enthusiasm and great power support for internationalism as a force to combat the Axis powers and end criminal impunity, which is completely alien for international criminal pursuit today. The ICC has seen growing criticism among former supporters (particularly among African states), while the United Nations as a whole lacks the same sense of excitement and optimism that accompanied its creation in the 1940s. Taken together, a revival of the UNWCC framework would lack the 'freshness', impetus, and political support that the 1940s commission enjoyed as part of the nascent United Nations championed by the 'Big Four' and joining the Allies together in the fight against fascism.

Thus, a whole-cloth establishment of the UNWCC would be implausible today. However, the commission's legacy is not merely as a historical curiosity. Its principles and operations retain salience. Indeed, they form an important, albeit under-utilised and under-appreciated, foundation for the Rome Statute and International Criminal Court. Moreover, the UNWCC's experience highlights the importance of looking beyond high-profile, headline-grabbing trials and armed conflicts in order to take more seriously lower-profile legal processes worldwide. Although the ongoing conflict in Syria would be a problem for a UNWCC-style institution, there are other post-conflict situations that would be a better fit for such a mechanism capable of supplying technical and legal assistance, international validation, and broader support to domestic criminal processes to prosecute the perpetrators of war crimes, genocide, or crimes against humanity.

IV. Complementarity and the UNWCC

One of the UNWCC's precedents with the most traction for contemporary debates in international criminal law results from its experience with 'complementarity'. This significant principle in modern international law, especially with regard to the International Criminal Court, was prefigured by the commission's work, as Mark Ellis's scrutiny of its founding documents and approaches makes clear.[115] Much has been written on this topic since the Rome Statute ICC entered into force, including from a variety of different perspectives (ranging from critical forward-looking appraisals from early in the ICC's existence;[116] wide-ranging overviews of the principle and its theoretical and practical implications;[117] and appraisals of the practical implications for tribunals.[118] Rather than repeating ground covered elsewhere, this article briefly examines complementarity as it exists before teasing out it overlaps with the UNWCC's ideas and approaches of the UNWCC. The aim is to assess whether a resurrected commission-like body could assist in the implementation of this concept.

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[114] Middle East and Africa Desk, *Their own men: Islamist rebels sever ties with the political opposition, in* THE ECONOMIST, September 28 2013, http://www.economist.com/news/middle-east-and-africa/21586879-islamist-rebels-sever-ties-political-opposition-their-own-men , Reuters, *Opposition Syrian National Coalition agrees to attend Geneva 2 peace talks, in* DEUTSCHE WELLE ONLINE, January 18 2014, http://www.dw.com/en/opposition-syrian-national-coalition-agrees-to-attend-geneva-2-peace-talks/a-17371913

[115] MARK ELLIS, SOVEREIGNTY AND JUSTICE: BALANCING THE PRINCIPLE OF COMPLEMENTARITY BETWEEN INTERNATIONAL AND DOMESTIC WAR CRIMES TRIBUNALS 13 (2014)

[116] Louise Arbour and Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach, in* 1 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 13-19 (1999)

[117] THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn and Mohamed M. El Zeidy, eds, 2011).

[118] ELLIS, see supra note 115.

The ICC is, from the Preamble of its statute onwards, intended to be 'complementary to national criminal jurisdictions'.[119] It is not intended to replace national courts but rather to supplement them, acting as a 'second line of defence' for the pursuit of criminal justice. Its role is more clearly defined in Article 17, which addresses what cases are admissible. In brief, it notes that cases that are currently being investigated or prosecuted by a state with jurisdiction over it are not the ICC's concern unless the state in question is 'unwilling or unable genuinely to carry out the investigation or prosecution'. When examining unwillingness, the article identifies the following circumstances under which the ICC should declare a state unwilling to carry out prosecutions:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

In the case of the inability to conduct prosecutions, the Rome Statute is briefer, directing the court to consider 'whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.' In short, the ICC is a court of last resort that exists to prosecute cases that would not be prosecuted or prosecuted fairly under national jurisdictions.

We dispense with discussions of willingness to prosecute, which have arguably been more high-profile in many debates surrounding the ICC, but pose a poor match to the work carried out by the UNWCC. The case of President Al Bashir of Sudan represents a salutary example. Following the referral to the ICC by the UN Security Council in 2005 (and a period of pre-trial arrest warrants and investigation), the prosecutor requested that Sudan arrest and surrender Al Bashir, and that ICC member states do so as well if presented with an opportunity.[120] For a range of reasons—usually focusing on the impact on the peace process and the suitability of the ICC's approach—the Sudanese government did not hand over its president, and other African countries allowed him to visit without arresting him.[121] Similar problems exist for Syria, where there have been calls for ICC action without any chance that Assad will find his way into the ICC's jurisdiction, to say nothing of the political obstacles that would then face such a prosecution. These are a poor fit to the approach suggested by the UNWCC, which required states (albeit sometimes governments in exile) to cooperate and voluntarily work as part of the commission.

While the existence of an international body with an interest in assisting prosecutions might help to encourage willingness for trials and shift domestic political cultures away from impunity, if a state is unwilling to cooperate with international criminal justice or try a sitting leader, there is little to learn from the UNWCC's experience. Enforcement issues, non-cooperation, and unwillingness to participate would have torpedoed the efforts of Committee I, for example, which typically dealt with governments who engaged in the process—by governments-in-exile and while the war was ongoing. The commission did not have to deal with non-compliant states.

[119] Rome Statute of the International Criminal Court, preamble, U.N. Doc. A/CONF.183/9 (1998).
[120] Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, in 34 6 FORDHAM INTERNATIONAL LAW JOURNAL 1603 (2011)
[121] Barnes, see *supra* note 120 at 1607-1613.

What about states that are unable to prosecute major cases, rather than being unwilling—that is, countries that are unable to prosecute because of disruptions to their legal systems (common in the wake of major war crimes, crimes against humanity, or genocide? Tom Fawthrop and Helen Jarvis note that under the Khmer Rouge, for example, 'legally trained personnel from the pre-1975 period, only seven remained' alive or in the country.[122] They propose that such cases be handed thought a broader international framework, presumably not damaged by the same conflict that had such a devastating impact on national courts. A number of writers, however, have suggested that questions of complementarity should go beyond a simple binary 'are states able/not able to prosecute major war criminals' and be a more cooperative/constructive approach. The range of approaches can be seen from the writers in Stahn and El Zeidy's edited volume, The International Criminal Court and Complementarity. Silvana Arbia and Giovanni Bassy draw upon their own experience working in the ICC and Burke-White's conception of 'passive' versus 'proactive' complementarity.[123] The ICC, could engage in efforts to assist and encourage trials, suggesting that the Registry of the Court in particular could assist with such issues as strengthening and coordinating lists of legal representation for those involved, coordinating international and bilateral schemes of witness protection to protect witnesses, and sharing the benefits of its 'state-of-the-art' court management processes (including translating, archiving, distributing documents among a range of other possible functions.[124] Burke-White elaborates these concepts but remarks that the ICC 'has not formally taken [a range of trial capacity-encouragement measures], [that] its policy with respect to positive complementarity is muddled at best, and its track-record for encouraging national prosecutions is decidedly mixed'.[125] Carsten Stahn explores similar conceptions of 'positive complementarity' and stresses its potentially more holistic nature and wide range of forms along with its capacity to lead to fairer, more effective, and more legitimate trials.[126]

The notions of 'constructive' or 'positive' or 'holistic' complementarity should be familiar from the discussion of the UNWCC, as should the specific recommendations: a holistic range of bureaucratic and support-based activities for courts active in war-torn countries, together with a degree of legitimation from participating in an international process. While the UNWCC did not offer the same sort of direct trial support as is sometimes considered by advocates of positive complementarity, its structure increased the capacity of states to carry out prosecutions by offering them international legal backing for their initial charges and pushing them to improve their charges to the point that this backing could be given. The commission provided a forum for discussing legal issues and questions, and a multilateral system for recording and documenting atrocities with the aim of eventually leading to trial.

Common to several of the above accounts of positive or assistance-based complementarity is that it is not implemented, examined, or realised as effectively as it could be. Indeed, the ICC's Bureau of Stocktaking explicitly places the court outside the provision of 'capacity building,

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[122] TOM FAWTHROP, HELEN JARVIS, GETTING AWAY WITH GENOCIDE?: ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL p41 (2005)

[123] Silvana Arbia and Giovanni Bassy, *Proactive complementarity: a Registrar's perspective and plans*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 52-67 (Carsten Stahn and Mohamed M. El Zeidy eds, 2011)

[124] Arbia and Bassy, see *supra* note 123 at 52-67.

[125] William W. Burke-White, *Reframing positive complementarity: Reflections on the first decade and insights from the US federal criminal justice system*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 342 (Carsten Stahn and Mohamed M. El Zeidy eds, 2011)

[126] Carsten Stahn, *Taking Complementarity Seriously: On the sense and sensibility of 'classical', 'positive', and 'negative' complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 262-270 (Carsten Stahn and Mohamed M. El Zeidy eds, 2011)

financial support, and technical assistance', suggesting instead that this would be an activity for member states to carry out on a voluntary basis.[127]

Nonetheless, modern-day prosecutions illustrate a wide range of cases in which international assistance could or has been used to encourage international trials. Ellis cites several places where such assistance could be helpful: Kenyan enthusiasm to prosecute war crimes (combined with its still-fragile domestic legal system and reticence surrounding the ICC); Ugandan prosecutions of the Lord's Resistance Army (where some training has been provided, but still needed increased tailoring to specific domestic conditions); and mobile courts prosecuting sexual violence in armed conflict in the Democratic Republic of Congo.[128] Similar projects have seen a measure of success. For example, a United Nations Development Program (UNDP) evaluation found that supporting mobile courts was an effective way of promoting accountability and justice for widespread crimes such as sexual violence, with the roving and dispersed nature of circuit courts helping to further reduce the sense of justice as something only available in civic centres.[129]

Technical and coordination-based problems were identified as key, but overall this effort was seen as one that had a significant positive effects from a complementarity-based perspective. It helped to develop legal skills on major crimes among national jurist populations, and successfully prosecuted international crimes at a domestic level in environments that—due to their political insecurity, lack of infrastructure, and remote location—might otherwise be seen as legally unpromising.[130] The potential for complementarity-based systems was observed across many African states in a monograph edited by Max du Plessis and Jolyon Ford, who identified that the conflict between support for the ideals of the ICC (regarding prosecution of international crimes) and scepticism for its practice and Western-dominated nature might be resolved by encouraging international criminal justice principles to become embedded in domestic legal contexts and trial processes. It was essential to offer technical support towards this goal and involve regional bodies such as the African Union.[131] Non-African domestic trials have taken place for incidents of major crimes in areas as disparate as Kravica in Bosnia-Herzegovina to the Ixil municipalities in Guatemala, which have drawn upon the resources of international organisations—for instance, legal precedents established by preceding courts,[132] or internationally-supported truth commissions that documented and provided legal analysis of genocide in the pre-trial environment.[133]

In each case, these proceedings have proceeded in an ad hoc fashion. Commissions and tribunals have been set up for specific cases, or specific projects have been financed. But there has been little overall coordination from the wider community of international criminal justice specialists or from the ICC. Would the addition of a more centralised, permanent system along the lines of the UNWCC be of use?

Several factors suggest an affirmative reply. The wide spread of cases in which there is some enthusiasm for prosecution but fragile judiciaries make cases difficult (or lead to poorly

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[127] ELLIS, see *supra* note 115 at 242.
[128] ELLIS, see *supra* note 115 at 262-270.
[129] UNDP, EVALUATION OF UNDP'S SUPPORT TO MOBILE COURTS IN SIERRA LEONE, THE DEMOCRATIC REPUBLIC OF CONGO, AND SOMALIA 7, 13, 19 (2014)
[130] UNDP, see *supra* note 129 at 22-3.
[131] Max du Plessis and Jolyon Ford. *Recommendations*, in UNABLE OR UNWILLING? CASE STUDIES ON DOMESTIC IMPLEMENTATION OF THE ICC STATUTE IN SELECTED AFRICAN COUNTRIES 123-5 (Max du Plessis and Jolyon Ford eds 2007)
[132] Alfredo Strippoli. *National Courts and Genocide - The Kravica Case at the Court of Bosnia and Herzegovina*, 7 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 595 (2009).
[133] Jan Perlin, *The Guatemalan Historical Clarification Commission Finds Genocide*, in 6 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 389-414 (1999)

conducted and unfair trials) suggests that a need for technical assistance. The UNDP review of technical support for mobile courts commented repeatedly about the possibilities and positive results that international coordination among relevant UN and NGO agencies could bring. Regularising and broadening the basis for cooperation thus could reap positive benefits. In addition, framing international support in terms of cooperative 'assistance' rather than routinely referring cases to The Hague would be a better fit for any enthusiasm states had towards the ideals of international criminal justice as it would be seen less intrusive. This is not automatically a good thing—du Plessis and Ford note that it would be important to ensure that any the product of an international assistance system would not 'dilute or subvert universal values'.[134] It is easy to imagine a situation in which a complementary system of international legal assistance would be caught between failing to do its job and assisting (and thus legitimating) a trial process that violated human rights.

The UNWCC provided support to assist countries in prosecuting Axis war criminals, but only part was technical because case review and legitimation played a greater role. While it may be difficult for countries today to accept putting prosecutions for major cases up before an international body for review as they did with the UNWCC. Such a move, even if voluntary, would appear to relinquish sovereignty and might return unwelcome results, but linking such legitimation with broader justice/humanitarian and human rights concerns to necessary technical assistance might help make the relinquishment more palatable. Another problem would be cohesion—a modern UNWCC-like entity would not be sustained by the intensive interstate bonds among the Allies of the 1940s, which derived not only from a shared commitment to justice and human rights but also from joint participation in a military conflict. Modern complementarity mechanisms would have to address the challenge of building mutual confidence and trust. One potential tactic could derive from the technical, legal nature of legitimation—specifically the emphasis on a diverse group of experts providing advice instead of intergovernmental deliberations and judgment. Another possible approach could encourage regional rather than global reviews at a regional. While rivalries and mistrust exist within a region, the shared identity among members of such groups could assist in fostering confidence and trust as a prelude to greater cooperation.

In short, there exists still a demand for an organisation or process that resembles that performed by the UNWCC; and in fact, in some cases the functions are being fulfilled, albeit in an ad hoc fashion, Nonetheless, significant questions remain about how a new organisation would work, specifically about cohesion, sovereignty, and precise nature of work. Despite uncertainty, the proposals for a permanent UNWCC-like body that would provide assistance and support to 'unable but willing' countries in their prosecutions for mass atrocity crimes. Probing the UNWCC's activities and discussions can, as Kip Cline and Donna Hale note, provide valuable insights into an impressive previous attempt to address these problems.[135]

V. Toward a 'UNWCC 2.0'?

While we have noted the risks of being too sanguine about the direct application of UNWCC-era practices and approaches to the present, nonetheless the previous analysis suggests that the notion of an international complementarity-based system that aims to coordinate and offer support to domestic legal processes is potentially viable and valuable.

What would such a system look like? While we have focused more on historical lessons rather than actionable projects, a number of specific policies and approaches suggest themselves.

[134] du Plessis and Jolyon Ford, see *supra* note 131, at 123-5.
[135] Hale and Cline, see *supra* note 86 at 28.

Three in particular merit a sketch of how the UNWCC's experience approach might be realised in contemporary international institutions or practices.

The first approach revolves around dedicated legal support and technical assistance. The idea of an international organisation (or sub-organisation) focusing on complementarity and the provision of technical assistance to countries engaging in national prosecutions is not new but deserve emphasis in light of the preceding analysis. Mark Ellis, the head of the International Bar Association (IBA) and former advisor on war crimes prosecutions in The Hague and Yugoslavia, lays out his plan for an 'International Technical Assistance Office' that would be responsible for the specific provision of services like those of the commission. Ellis's proposed organisation would aim to satisfy twelve key goals. While space does not permit coverage of all in detail, a number relate closely to the work of the UNWCC.

To reinforce the provision of 'fair, impartial, and effective trials', for example, he argues for a committee of legal experts including judges, prosecutors, and academics from across the world who possess experience of handling major cases involving war crimes. These would be capable of providing legal briefs and other advice on the foundation and running of major trials, and also on substantive legal and procedural issues that arise during trials.[136] As a group of independent legal experts, they would be able to present themselves as offering neutral, unbiased, and effective advice; as an international body, their input would also be valuable in legitimating and accrediting the new trial system and its results, 'giv[ing] the new court access to the very best in establishing a newly promulgated domestic court'.[137] Ellis cites examples of this sort of 'group of experts'—drawn from groups such as the IBA—providing constructive advice on an ad hoc basis in Iraq and Serbia.

His recommendation to systematise this capacity could in fact draw upon the concrete experience of the UNWCC's Committees I and III, which successfully carried out similar work in legitimating trial structures, supporting tribunals, and providing expertise to resolve substantive legal questions. While the UNWCC did not carry out systematic detailed trial observations—instead relying on transcripts that were (occasionally) sent back to it by member states, and individual observations made by its members—it assessed the results of trials that it supported and produced valuable transnational studies of best practice such as the ECOSOC report on human rights issues arising from war crimes trials. That this worked (albeit in a narrower form) might be a spur to Ellis's suggestion that the proposed International Technical Assistance Office (ITAO) play a major role in trial monitoring.[138] Other potential roles—such as training for judges, assistance in witness and victim support, and assessment of post-trial sentencing—do not have similar precedents in the commission's history but could be viewed as expansions of the sort of work that it accomplished successfully during its brief existence.

How effective would this ITAO be? Obviously, Ellis an incomplete sketch and not a complete schematic for an international organisation, but he nonetheless outlines several key elements that reflect the commission's success. By portraying itself as a technical organisation tasked with offering specialised assistance to already-existing domestic legal institutions and systems, it escapes many of the problems that international justice can face regarding duplication of effort and compliance. There exists extensive best practice and expertise, dispersed across the globe, that could significantly assist trials carried out domestically, and that would help legitimise and refine proceedings. Such measures would also assist countries in focusing on areas of particular concern and feasible (but internationally satisfactory) legal approaches. It could deal with low-level perpetrators more easily than international courts owing to the much greater extent of such

[136] ELLIS, see *supra* note 115 at 250-254.
[137] ELLIS, see *supra* note 115 at 250.
[138] ELLIS, see *supra* note 115 at 256.

prosecutions, which might overwhelm international capacity but be more feasible for a state's own legal system to handle—especially if international assistance is provided. The work of the UNWCC provides clear examples of each of these tasks being accomplished. Notwithstanding flaws, this work provides from which to take inspiration if not follow as a model. Finally, Ellis notes elsewhere that such an organisation would have a potential 'niche' because it would fulfil the ICC's need for positive complementarity but without directly competing for the attention and resources of the Office of the Prosecutor, Assembly of State Parties, or other parts of the court.[139]

At the same time, there are also a number of caveats associated with the proposal that would have to be resolved. From the experience of the UNWCC, several are not so much internal structural issues as ones of external context. While Ellis lays out a system of experts, lawyers, and practitioners working across the world to provide technical assistance (aided by current and future communications technologies), the UNWCC's history has suggested that a much more dramatic inception was a definite advantage. Some of the world's leading legal luminaries were thrown together in exile in London, and their respective governments strongly backed their calls for action and proposed organisational innovations. Despite some initial reticence, these calls were eventually echoed by major Allied leaders such as Stalin, Roosevelt, and Churchill. Together, these organisational developments promoted a sense of urgency and a fertile ground for legal and institutional innovation that would not inherently be recaptured by the ITAO, no matter how convincing the solutions it offers may be. An effort to maintain the highest standards of recruitment and visibility would nonetheless be valuable assets.

Likewise, the UNWCC and the Nuremberg and Tokyo tribunals were part of an initial wave of enthusiasm for the United Nations—a globalised sense of camaraderie that, despite its patchiness and mutual mistrust, did manage to encompass a vast swathe of the non-Axis world, bringing together a diverse range of countries, ideologies, and regional groups in their opposition to Nazism and Japanese fascism. The same would not be true for a spiritual successor like the ITAO. The international landscape is already populated with attempts to develop international criminal law systems, many with tarnished images that are met with suspicion by major and minor powers; any International Technical Assistance Office would have to simultaneously justify its own existence (and expense), portray itself as separate and distinct enough from the ICC to distance itself from any ill-feeling towards the latter, and still be able to work within the international system without duplicating efforts. Ellis addresses several of these problems in his proposal—for example, he explicitly makes the ITAO distinct from the ICC, with a suggestion that it might be able to have a positive impact in situations such as Sudan where the ICC has lost credibility.[140] However, these sorts of issues would have to be addressed by the ITAO in justifying its existence and forestalling 'new international organisation fatigue'.

It perhaps seems a little unfair to criticise such a proposal on grounds that essentially amount to it not being sufficiently 'exciting' or swept up and buoyed along in generalised wartime moral outrage in the same way that the UNWCC was. There is no shortage of major atrocities and criminality whose trial and prosecution would benefit from an organisation like the ITAO, and the experience of the UNWCC suggests that it could be effective in encouraging trials. What such experience also underlines, however, is that the content of such an organisation's work is not the only factor—both its place in the international system and external and internal normative impetus are both essential consideration.

The second possible and desirable approach would involve a collective research office, information-sharing, and evidence-gathering. While the UNWCC's main work took place through

[139] Mark Ellis, *The ICC and Complementarity: Support for National Courts and the Rule of Law*, in LAW AND JUSTICE: A STRATEGY PERSPECTIVE 193 (Sam Muller and Stavros Zouridis eds, 2012)
[140] ELLIS, see *supra* note 115 at 245.

its three committees, which—along with the Nuremberg trials—were underpinned by the work of the Research Office, which gathered data and coordinated the dissemination of carefully referenced factual evidence regarding war crimes, that could then be used by Member States to prosecute Axis war criminals. Just as CROWCASS and other bodies helped coordinate the transfer of accused prisoners, the Research Office assisted in the sharing and disseminating information, particularly in complicated cases where criminal acts crossed borders.

Could a similar body provide a similar benefit today? In fact, in many current cases, 'thicker' networks of international agencies and communications already fulfil some functions. Bodies like the Human Rights Council (and a whole host of UN entities) already document and record violations of human rights, including those that amount to war crimes, while NGOs and media bodies compile and distribute their own research and dossiers of evidence surrounding war crimes, such as the 2014 'Caesar' dossier depicting photos of torture victims in Assad's Syria.[141] What precisely would a newly constituted UN Research Office add to these existing networks especially when modern communications technologies reduces the pressure for a centralised entity tasked with documenting and disseminating evidence of potentially prosecutable acts? There is less requirement for a UNWCC-type Research Office to assemble documentary evidence of major human rights abuses and send weekly summaries around the world when there already exist dozens of major human rights organisations—both within and outside the United Nations structure—that have well-developed reporting mechanisms and dissemination networks, both online and offline, that provide much of these functions.

Nonetheless, there arguably is still room for greater, more formalised cooperation and information-sharing in the field of international criminal justice about major atrocities; and the UNWCC's work provides an example of what it might look like. Such an entity might also help to reduce the degree to which reports and information become politicised and rendered questionable. While the Syrian 'Caesar' dossier has not been seriously questioned, some have pointed to the ways in which its use, analysis, and purpose have been heavily politicised, thus rendering it questionable. Dan Murphy points out a number of them: It is funded by a political enemy of Assad, which has sponsored rebels fighting against it who have themselves been criticised as being involved in war crimes. It over-sells the amount of analysis that it contains. Previous dossiers justifying aggressive intervention on Middle Eastern issues—including the Hill and Knowlton 'babies thrown from incubators' report in Iraq and the 'Curveball' report on biological weapons—encouraged the 2003 US and UK intervention in Iraq, but both turned out to be largely fabricated.[142] While the UN is by no means an uncontroversial setting, the distance could be valuable from such a hypothetical UNWCC-like Research Office. Together with its ability to cross-reference incoming reports with other data and assemble stronger, more widely grounded evidence, such a unit might provide valuable international sanction and legitimation to future trials that could build upon them, provide internationally supported dossiers of information, and represent a productive way that international resources could improve trial capacity.

A third option for the 'UNWCC 2.0' would be to look to the sheer scale and scope of prosecutions and indictments of war criminals by the 'UNWCC 1.0', and take it as a challenge—and a 'model'—for a more extensive, less 'exceptional' approach to war crimes prosecutions today. One option would be to establish a form of tribunal to deal with 'ordinary' war crimes, below the level of the ICC, which could be adapted to local situations. Such tribunals with UN mandates

[141] Ian Black, *Syrian regime document trove shows evidence of 'industrial scale' killing of detainees*, in THE GUARDIAN, January 21 2014, http://www.theguardian.com/world/2014/jan/20/evidence-industrial-scale-killing-syria-war-crimes

[142] Chelsea Sheasley, *Alleged Syrian detainee torture photos called a 'smoking gun'*, in THE CHRISTIAN SCIENCE MONITOR, January 21 2014, http://www.csmonitor.com/World/Security-Watch/terrorism-security/2014/0121/Alleged-Syrian-detainee-torture-photos-called-a-smoking-gun-video

might be attached to UN peace operations, utilising international standards but in accordance with local cost structures and procedures. In the case of Syria, the UN enclaves on Cyprus might provide a regional base for such legal operations. Indeed, we can see examples of these sort of structures emerging in the national prosecutions of 'cases involving intermediate and lower rank accused [in] competent national jurisdictions' in the case of the ICTR and Rwandan national courts.[143] Such an approach offers a potentially productive way of approaching the issue of complementarity and addressing wider ranges of perpetrators in more 'ordinary' legal settings,[144] albeit one that has so far been used over-cautiously with very high standards.[145] It is often thorny to determine how to blend complex conflict termination processes, widely varying national situations, and the requirements of formal justice, but the UNWCC's approach—providing a set of broadly agreed standards and arguments—might provide a useful model in standardising and disseminating the ad hoc achievements of the ICTR to other locales. In any case, such an approach—with its ability to support and promote the trials of more 'ordinary' intermediate and low-level perpetrators—might help redress the current focus almost entirely on the higher level perpetrators.

V. Conclusion

Andrew Hurrell laments the 'relentless presentism' of social science[146]—narrowing one's intellectual and practical scope to take inspiration and lessons only from the most recent experiences. At best such myopia limits the range of innovation, policy-making, and breadth of our understanding of contemporary issues, and at worst leads to repeating mistakes. As Plesch and Weiss have noted,[147] this is a particular risk with the history of the United Nations, whose roots have gone remarkably under-studied. Even if the wartime origins of the UN and its efforts towards human rights and international criminal justice have only a modest potential direct application today, they remain relevant in shining light on pertinent precedents for addressing contemporary problems, for identifying institutional trajectories with insights about feasible institutional. We argue, in particular, that UNWCC history has value not only in combating presentism but also elucidating the origins of modern international criminal justice. As a result, we conclude with three notes of optimism.

First, there is a room for cautious optimism. The UNWCC's records and work provide a plethora of important historical lessons that can inform contemporary action and policymaking. The charge files, trial transcripts and summaries, legal debates, and contents of the UNWCC Law Reports provide a rich range of lessons, precedents, and legal discussions that can inform modern attempts to hold accountable the perpetrators of mass atrocities to legal account. In addition, the political debates within and surrounding the commission's work in the minutes of its meetings and the History of the UNWCC contain valuable insights not only into the history of World War II and the foundations of the United Nations but also into key questions of international institution design and operational practice. Academic neglect exacerbated until recently by sealed archives means that the heretofore unexplored potential application of the UNWCC may soon change.

Many of the problems confronted by the commission are still present. Allied states (often in exile) rose to the legal challenges of the time with a spirit of genuine multilateral cooperation and

[143] William Schabas, Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda, 13 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE 34 (200).
[144] Office of the Prosecutor, *Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial*, UNICTR 56-8, 11 February 2015.
[145] Schabas, see *supra* 143, at 58-9.
[146] Andrew Hurrell, *Foreword to the Third Edition*, of HEDLEY BULL, THE ANARCHICAL SOCIETY xiii (2002)
[147] Dan Plesch and Thomas G. Weiss, *1945's Lesson: "Good-enough" Global Governance Ain't Good Enough*, 21 2 GLOBAL GOVERNANCE 21,197-204 (2015)

political innovation under extremely dire circumstances—in wartime London under attack, in occupied Europe at the height of the Holocaust, and in the conflict-ravaged political landscape of postwar Poland. Even the four major powers who remain today outside the International Criminal Court—China, India, Russia, and the United States—played leading roles in launching a global system of international criminal justice, whereas Britain—now an advocate of international criminal justice—played a role in sabotaging the UNWCC's work. Our optimism is because crucial members of the original United Nations once vigorously cooperated on orchestrating an international scheme of accountability for major crimes, and might one day do so again.

Second, such a study highlights a productive way forward for a system international criminal law that has, historically, tended to be patterned after a highly limited set of criminal trials at Nuremberg and Tokyo—large-scale, expensive, drawn-out trials of leaders conducted by international (overwhelmingly Western) lawyers and officials. The UNWCC's system—which both post-dated and pre-dated the International Military Tribunals—offers a different approach, one characterised by building on, supporting, and coordinating already-existing institutions and groups in order to promote justice at the national, domestic, or even local levels through existing judicial systems. This finds its modern equivalent in notions of complementarity in the ICC—the notion that it is not a court of first resort, but a last one. Rather than seeing fully internationalised trials as the be-all and end-all of international criminal justice at the opposite end of the spectrum from fully domestic trials, the UNWCC's work suggests the value of blending the two to take advantage of existing domestic structures while bringing to bear international legitimation and technical assistance to ensure full and fair trials. This blending could also help to 'domesticate' legal processes and thereby increase their traction. We should recall that the UNWCC was multilateral and diverse in its constituents; and it benefited from its ability to be 'steered' towards areas of particular concern among its participants, such as attempted crimes of sexual violence for several European countries (particularly Greece and Yugoslavia), or aggression for China. While there is value in an internationally harmonised, consistent system of criminal justice for major atrocities, this more responsive approach is also crucial.

Third, we can identify specific ways in which the legacy of the UNWCC can be carried forward with a variety of possible modern-day applications patterned on historical antecedents—whether in the form of the 'ITAO', the revival of the 'clearing house of documentation and coordination' concept for the modern information age, or other specific approaches taken by the commission. These possibilities have their own strengths and weaknesses, but they suggest the value in looking to past best practice to realise international criminal justice in the twenty-first century.

As mentioned at the outset, Carsten Stahn indicates that 'international criminal justice is still in search of a 'UNWCC 2.0.', noting the irony that modern-day academic debates and legal practice are only beginning to return to where the intense burst of innovation in legal practice and organisation brought policy-makers and jurists in the 1940s. We would go further: modern policy-makers would be served well by actively drawing upon this historical legacy to refine fledgling current international criminal legal structures. Complementarity and the development of systems of hybrid international/domestic criminal justice for mass atrocity crimes represents a potentially productive and under-investigated field of study as well as inspiration for contemporary action.