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UNITED NATIONS WAR CRIMES COMMISSION
SYMPOSIUM

I FOREWORD

The publication of this 25th anniversary Criminal Law Forum symposium on the United Nations War Crimes Commission (UNWCC or Commission) and its work is a significant event in the development of scholarship related to international criminal law and the historical record of World War Two. At the outset I would like to congratulate Dan Plesch and Shanti Sattler on their initiative in establishing the War Crimes Project of the Centre for International Studies and Diplomacy at SOAS and furthering the study of the UNWCC, which they correctly describe as representing a new and positive paradigm in customary international criminal law.¹ Dan started this work in researching one of the chapters in his fascinating book *America, Hitler and the UN*.² He is now heading and providing the intellectual leadership as the head of the Centre. The Centre has made publicly accessible a little known treasure trove regarding the development of international criminal justice in the years that immediately preceded the Nuremberg Trials of the major Nazi leaders. This journal presents the next and broader phase of illuminating the history and contemporary relevance of the Commission.

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¹ D. Plesch and S. Sattler, 'Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943–1948' (2013) 15 *International Community Law Review* 203, 223.

² D. Plesch, *America, Hitler and the UN: How the Allies Won World War II and Forged Peace* (I.B.Tauris & Co Ltd. 2011).

The recovered history of the minutes and deliberations of the UNWCC reads like a story of fiction rather than fact – the inner workings of a largely forgotten international criminal justice initiative in which seventeen nations worked together in London on the investigation of over 30,000 international criminal cases. Those cases were tried before the domestic courts of those nations. Those countries included not only the United States and the major European nations, but also China and India (let it be noted, some time before it became an independent nation). What is so striking is the agreement by seventeen nations to set up a central authority to investigate and make recommendations on the domestic prosecution of war crimes. I doubt whether there would be the political will today to act in that way.

The UNWCC was constituted at the Foreign Office in London on 20 October 1943. In consequence of the efforts of the Commission, over 1,000 trials were held between 1945 and 1948. 2,700 accused persons faced trial. The official history of the UNWCC published in 1948³ points out that the wisest route would have been to create a single great war crimes prosecution agency. However, national sovereignty prevented that from happening. Each country created a national office to investigate crimes falling within its sphere. It was those national offices that the Commission assisted. The national offices submitted cases to the Commission in order for it to decide if a *prima facie* case could be established. If a *prima facie* determination was made, the names of the accused persons were added to a 'List' in which eventually 36,800 names appeared. The majority of the trials were held before military courts. National courts, in most cases, had to be granted additional international law jurisdiction.

The work of the Commission's legal committee provides an important resource on the development and substance of international criminal law, as well as other documents found in the archive. The Commission received reports of most of the trials held in the domestic courts of its member nations. These were published in London between 1947 and 1949.⁴ It is important to point out that those reports have been consulted as a source of international humanitarian law but only with regard to the application of the law by domestic courts and tribunals. They were consulted, for example,

³ *History of the United Nations War Crimes Commission and the Developments of the Laws of War* (His Majesty's Stationary Office, 1948).

⁴ *The Law Reports of Trials of War Criminals, Selected and Prepared by the UNWCC*, London (1949).

by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* decision where the doctrine of Joint Criminal Enterprise was first explicated.⁵

This issue of individual responsibility for mass crimes inevitably arises in war situations and so it did in the former Yugoslavia where policies of ethnic cleansing were carried out. In *Tadić*, the Appeals Chamber of the ICTY described the situation as follows:

Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.⁶

A criticism leveled at the *Tadić* decision on Joint Criminal Enterprise is that some decisions of the national courts, including those resulting from the work of the UNWCC, that were relied upon by the Appeals Chambers were from common law and others from civil law systems.⁷ However, access to the recently recovered records of the UNWCC discloses that some of the most important decisions were the consequence of recommendations made by the Commission to its member nations. One reads in the minutes of 16 May 1945 that Professor Andre Gros, a leading French international lawyer and diplomat, proposed that the UNWCC make the following recommendations to member governments:

- (a) To seek out the leading criminals responsible for the organization of criminal enterprises including systematic terrorism, planned looting and the general policy of atrocities against the peoples of the occupied States, in order to punish all the organisers of such crimes;
- (b) To commit for trial, either jointly or individually all those whose members of those criminal gangs, have taken part in any way in

⁵ See *Prosecutor v. Tadić*, (Appeals Judgement) IT-94-1-A (15 July 1999).

⁶ *Ibid.*, para. 191.

⁷ See, for example, M. Sassoli and L. M. Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadić* Case' (2000) 82 *International Review of the Red Cross* 733.

the carrying out of crimes committed collectively by groups, formations or units.⁸

The representative of the United States stated at the 69th meeting of the Commission that his government had adopted a policy substantially in accordance with the Commission's recommendation.⁹ It is accepted today that the work of the Commission informed the drafters of the London Agreement that governed the Nuremberg Trials.

The UNWCC should be considered a major source of customary international law. The issues that were canvassed by international law experts from seventeen countries who served on the Commission and their deliberations covered the whole gamut of the norms of humanitarian law. As they state in their article:

The UNWCC offers a rare body of legal material developed by states working together in official multilateral fashion to address and develop elements of international law. The record available that details UNWCC member states debating major issues of international law and then supporting national tribunals involving thousands of suspected war criminals, verifies the intricacy of this process and the legal worth of the work in support of customary international law.¹⁰

The UNWCC, in a remarkable way, anticipates the rationale of the system of complementarity on which the International Criminal Court (ICC) operates. The Rome Statute recognizes that the ICC is a court of last and not first resort. War criminals should preferably be prosecuted in domestic courts having jurisdiction. It is only when those courts are unwilling or unable to prosecute war crimes that the ICC comes into the picture. The starting point of this approach appears to be the 1943 Declaration of Moscow. It was recorded that Churchill, Roosevelt and Stalin agreed that the "major" war criminals should be dealt with "as the Allied Powers should decide". "Minor" criminals should be sent back to their own countries to be tried by the laws of those countries. This was an early realization that no international tribunal would have the capacity or resources to try more than a small fraction of the war criminals and that the bulk of prosecutions would have to be held in domestic courts.

⁸ UNWCC 61st Mtg. at 3-4 (16 May 1945).

⁹ UNWCC 69th Mtg. at 4-7 (July 11, 1945).

¹⁰ D. Plesch and S. Sattler, (n 1) 211-212.

The Commission debated and made decisions about many areas of humanitarian law. I turn to the work of the Commission with regard to gender-related crimes. The Commission gave careful attention to those egregious crimes. Crimes of sexual violence were successfully prosecuted in UNWCC-supported national tribunals in both Europe and Asia. In supporting those prosecutions, the Commission relied on the inclusion of rape in the list of war crimes that accompanied the Treaty of Versailles in 1919. It also referred to Article 46 of the 1907 Hague Regulations, which provides that “[f]amily honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected”. Rape was successfully prosecuted as a war crime in UNWCC-supported trials.¹¹ Had the work of the UNWCC been taken into account by the drafters of the Security Council statutes for the ICTY and the International Criminal Tribunal for Rwanda, the definitions of war crimes might well have been more explicit with regard to gender-related crimes. In any event, as the first Chief Prosecutor of the ICTY, I would have benefited immeasurably from access to this rich material.

The fact was that the statutes for the two *ad hoc* tribunals did not refer to rape as a war crime save in the definition of crimes against humanity.¹² The early work of the ICTY did not produce evidence that would have justified indictments for crimes against humanity. In particular, there was an absence of sufficient evidence of the criminal conduct having been directed at “a civilian population”. The crimes we were prosecuting related to more discrete war crimes committed in situations such as in the death camps that the Bosnian Serb army had established in the regions of Bosnia and Herzegovina. In one of the early judicial proceedings of the ICTY, one of the two women judges of the ICTY, Elizabeth Odio Benito, suggested from the bench that we should consider charging rape as a crime against humanity.¹³ This was a demonstration of her frustration at the failure, in the face of strong evidence, to charge rape as a war crime even in the absence of proof of the commission of crimes against humanity. There was really no legal basis to justify that suggestion. In some cases we resorted to charging rape as a form of torture and in others as

¹¹ *Ibid.*, 220. See also the contribution by D. Plesch, S. Sácouto and C Lasco in this volume.

¹² See generally RJ Goldstone, ‘Prosecuting Rape as a War Crime’ (2002) 34 *Case Western Reserve Journal of International Law* 277, 285.

¹³ See *Prosecutor v. Nikolić* (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-94-2-R61 (20 October 1995) paras. 5–23.

inhumane treatment. Had we been able to access the ample records of the UNWCC, our approach would have unquestionably been influenced by the careful analyses that emerged from its deliberations and decisions.

The Commission also discussed and reached agreement on important aspects of crimes against humanity. In particular, they determined that those international crimes need not be connected to warfare. Here the minutes and documents disclose that there was a heated difference of opinion between the first chairman of the UNWCC, Sir Cecil Hurst and his government and between the first designated US member of the Commission, Ambassador Herbert Pell, and his government. Both of them supported the prosecution of German crimes against German Jews, Roma and homosexuals. Both governments were strongly opposed to this. Pell took his case to the *New York Times*. As is usually the case, governments win these battles and Hurst was forced to resign and Pell's appointment was withdrawn.

I could not help but reflect on the politics of the ICTY and ICTR. Political issues are common to the functioning of all war crimes courts and tribunals. Indeed, without the politics these institutions would neither exist nor prosper. Governments hate being thwarted and judges and prosecutors demand the perception and fact of independence. Too frequently there is a clash of interests. Without the political will of the Permanent Members of the Security Council, there would have been no international criminal courts. Fortunately, once established, they developed a will and independence of their own. I recall one difficult exchange I had with the then Secretary-General of the United Nations, Boutros-Ghali. At a one-on-one meeting in his office, he complained that during the first six months of my term as Chief Prosecutor of the ICTY, I had spent too much time traveling away from my office. I explained that the travel was essential to set up the mechanisms that would be conducive for the Tribunal to obtain crucial government support without which the Tribunal would be effectively disabled from operating. I also had to attend meetings in Washington DC in order to reach agreement with the US Government on the provision of security information that turned out to be so valuable to the Office of the Prosecutor. The Secretary-General informed me that he did not consider those activities to be a part of my duties and that I was to stop my travels. I disagreed strongly and informed the Secretary-General that I was not prepared to accept those instructions. I referred to the independence

guaranteed to the Chief Prosecutor by the Security Council Statute establishing the ICTY. It provides that the Prosecutor shall not take instructions from any government or any other person. I pointed out that that included the Secretary-General. His annoyed response was to the effect that he did not know how to deal with a UN official who was entitled to ignore his instructions. Later, I had a similar tiff with Boutros-Ghali when I issued the first indictment against Radovan Karadžić and Ratko Mladić. That indictment was issued during the war and he informed me that had I consulted him he would have told me not to issue it. In fact, that indictment enabled the Serbs and Bosniaks to meet at Dayton Ohio towards the end of 1995 and put an end to the war. I am confident that the documents of the UNWCC contain many interesting political issues that occupied the time and energy of its members. I would urge that those issues also be analyzed and discussed. That there will be lessons to be learned I have no doubt.

It is also important to consider events currently unfolding around the world today in the context of the work of the UNWCC (particularly the conflict in Syria). The work of the Commission would suggest the need to start turning the wheels of international justice even while the conflict rages on, and to focus on the crimes of low and mid-level perpetrators in addition to the top leaders and those most responsible. The Commission also devoted extensive discussion to the legacy of the Kellogg-Briand Pact of 1928 that supported punishment for the committing of crimes of aggression.

I hope that I have said sufficient to demonstrate the importance of this research and its ongoing relevance in the coming years. This journal symposium is an important step for historians and all those involved in humanitarian law, whether as practitioners or academics. The research into the archives of the UNWCC is important and must continue.