WILLIAM SCHABAS*, CARSTEN STAHN**, JOSEPH POWDERLY***,
DAN PLESCH**** and SHANTI SATTLER****

THE UNITED NATIONS WAR CRIMES COMMISSION AND THE ORIGINS OF INTERNATIONAL CRIMINAL JUSTICE

I INTRODUCTION

Twenty-five years ago, this journal was founded “out of a conviction that a new scholarly journal is needed to capture the changes that are transforming the criminal law as we have known it”.¹ The founders expressed the hope that the “*Forum* will have achieved its purpose if future scholars, looking back through these pages, can trace the emergence of a global community of criminal law scholars working together to respond to their changing world and striving to create a better one.”² This symposium pays tribute to this idea. We are pleased to open this 25th anniversary volume with a special treat for our readers who share an interest in the origins and foundations of international criminal justice.

There are many “hidden histories” in international criminal justice. The record and practice of the United Nations War Crimes Commission (UNWCC) is one of the “best kept secrets” in the field. The early work of the London International Assembly and the Commission have not received the attention that they deserve in existing treaties and textbooks. Scholarship and historical writings are typically focused on the legacy of the Nuremberg or the Tokyo trials or contemporary courts and tribunals. This symposium pro-

* Editor-in-Chief, Criminal Law Forum.

** Executive Editor, Criminal Law Forum.

*** Managing Editor, Criminal Law Forum.

**** Guest Editor.

¹ V. M. Del Buono and P. H. Robinson, ‘Foreword’ (1989) 1 Criminal Law Forum 1.

² *Ibid.*

vides a fresh perspective on the origins of international criminal justice, by re-visiting the history and function of the UNWCC and its contribution to the development of core areas of criminal justice (crimes, modes of liability and institutional foundations).

In past decades, it has been difficult to gain access to a complete record of the archives of the Commission. Research had to rely on the published official history of the Commission³ or access to files at UN Headquarters in New York or in national archives. This *status quo* is gradually changing, with the availability of a larger amount of documents and files on the Legal Tools database of the International Criminal Court,⁴ and calls for greater access to copies in national archives. The emerging documentation is a rich source for inquiry. It provides novel insights into power relations during and after World War II, historical choices and approaches towards accountability, the emergence of modern categories of crimes (aggression, genocide, crimes against humanity, war crimes), modes of liability and international procedures, as well as the development of international criminal justice as a whole.

Many of the articles in this issue are based on publicly available sources and selected archival research. A fuller picture will only emerge through comprehensive study of UNWCC records and files and closer scrutiny of domestic trials, held as a follow-up of UNWCC action. But this does not detract from the value of this symposium. This symposium represents one of the first scholarly attempts to provide a modern account of the history, record and legacy of the Commission.

The contributions assembled here go back to a research initiative of the UN War Crimes Project, led by scholars from the School of Oriental and African Studies (SOAS) of the University of London, Dan Plesch and Shanti Sattler, and presentations given at the Conference marking the 70th anniversary of the Commission held in London on 10–11 September 2013,⁵ organized by the SOAS Centre for International Studies and Diplomacy and the International Bar Association, with the support of the Oak Foundation and the Carnegie Corporation of New York, in cooperation with the Wiener Library, the American University Washington College of Law War

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

⁴ See ICC, Legal Tools Database, United Nations War Crimes Commission, available at http://www.legal-tools.org/en/go-to-database/ltfolder/0_28425/#results.

⁵ For a survey, see <http://www.cisd.soas.ac.uk/event/reinforcing-international-human-rights-standards-lessons-from-the-united-nations-war-crimes-commission,66877383>.

Crimes Research Office and the American Bar Association Center for Human Rights and the City University of New York Graduate Centre/SOAS Centre for International Studies and Diplomacy project on Wartime History for the Future UN. The International Bar Association provided essential support for this publication. Dan Plesch and Shanti Sattler kindly acted as guest editors of the volume.

The symposium sheds light on a number of core aspects of the Commission's work. It is focused on three themes: the (i) history and foundations of the Commission, including the role of individual Commission members, (ii) central institutional and systemic dimensions (e.g. the contribution of the Commission to the development of modern norms, institutions and procedures), and (iii) its role in the development of theories of responsibility and individual crimes.

II HISTORY AND FOUNDATIONS OF THE UNWCC

The work of the Commission is set in context by Justice Richard Goldstone and the opening contribution by Plesch and Sattler. Goldstone stresses the contemporary relevance of the Commission. He argues, in particular, that "the definitions of war crimes" in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda "might well have been more explicit with regard to gender-related crime", had the drafters taken into account the work of the UNWCC. Plesch and Sattler discuss the historical context of the Commission and its general contribution to key areas of international law (aggression, superior orders, environmental degradation). They highlight important blind spots, such as the crucial role of the Commission in the adjudication of mid-level perpetrators, which remains a challenge for contemporary justice mechanisms.

Several contributions provide fresh perspectives on the geo-politics, working methods and closure of the Commission. Kerstin von Lingen examines the link of the UNWCC to its predecessors, and in particular, the contributions of representatives of exiled governments of smaller European countries (e.g., Bohuslav Ečer, Egon Schwelb). She shows that lawyers from smaller countries were instrumental in (i) promoting the idea that atrocity crimes should be addressed through legal procedures and (ii) in developing new legal concepts for adjudication. Graham Cox analyses the US position towards the UNWCC, and in particular the role of Herbert Pell, who served as US Representative on the Commission (1943–1945). He explains

Pell's key role in framing Allied policy on war crimes and crimes against humanity. Wen-Wei Lai discusses the Chinese position towards the UNWCC. He shows that the establishment of the Commission, and its regional sub-commission provided an important moment for China to become engaged in the development of international law. He also points out Chinese criticisms of the UNWCC, including its limited temporal jurisdiction over war crimes committed in Japanese–Chinese hostilities since the 1930s.

The historical part concludes with a contribution by Christopher Simpson that complements von Lingen's and Cox's arguments. Simpson examines the split in the US government over post-war relations with Europe and initiatives by the US and the UK to close the Commission as of 1946. He claims that pleas for closure were in part motivated by reservations of Great Powers about legal activism on the part of the UNWCC and the interpretation of its mandate by representatives of smaller governments.

III INSTITUTIONAL AND SYSTEMIC DIMENSIONS

The second part of the symposium addresses institutional and systemic dimensions of the work of the UNWCC, including its contributions to the development of the contemporary system of international justice. It illustrates to what extent the work of the Commission foreshadows modern debates in international justice (*i.e.*, the creation of a permanent international criminal jurisdiction, the interaction between international and domestic justice mechanisms, the definition of crimes and the application of procedural standards).

Harry Rhea relates the work of the UNWCC to its historical predecessor after World War I, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The 1919 Commission, meeting as part of the Paris Peace Conference, identified applicable categories of crimes. It also recommended the establishment of a multinational military tribunal established by states. Rhea examines the influence of these recommendations on the work of the UNWCC (*i.e.* list of crimes, creation of international jurisdiction) and the establishment of the Nuremberg Tribunal.

William Schabas provides new insights on the origins of international justice through analysis of the proposals of the London International Assembly and the UNWCC on the establishment of an International Criminal Court. Schabas argues that these proposals

contained novel thinking on core aspects of permanent international criminal jurisdiction (*i.e.* prosecutorial authority, complementarity, financing) that were ignored by the Great Powers in the framing of the London Agreement of 8 August 1945. He shows that many of the tensions arising in 1944 and 1945 (e.g., control over the court, controversies between ‘big powers’ and smaller and less powerful states) re-emerged in negotiations on the establishment of the International Criminal Court in the 1990s.

Mark Ellis draws a connection to contemporary themes of international justice, namely the principle of complementarity and fair trial standards. He argues that the early work of the UNWCC between 1943 and 1945 provides important groundwork for the current design and interpretation of the principle of complementarity, as applied in the context of the International Criminal Court. He claims that the ultimate success of the UNWCC should not be assessed by the quantity of cases but the fairness of trials for defendants.

Carsten Stahn examines the practice of the Commission (1943–1948) with a particular emphasis on facts, evidence and interaction with domestic authorities. Stahn argues that the UNWCC marked an early counter-model to the idea of military justice that prevailed in many World War II accountability initiatives, and an alternative to the centralized and situation-specific enforcement model under the umbrella of UN peace maintenance. He illustrates the nexus between debates inside the UNWCC and contemporary dilemmas of international justice (e.g., independent investigative authority, exercise of *proprio motu* powers, the labelling and origin of core crimes and evidentiary standards in proceedings).

IV TREATMENT OF RESPONSIBILITY AND CRIMES

The last part of the symposium is devoted to the treatment of responsibility and the development of particular types of crimes. It connects debates on collective violence and atrocity crimes in the UNWCC to modern approaches and jurisprudence.

Kip Hale and Donna Cline address the tension between individual and collective responsibility in the adjudication of crimes. They discuss the tensions in the Commission over the treatment of collective responsibility, including the debates over accountability for membership in a criminal organization and collective responsibility as a mode of liability. They argue that the work of the Commission influenced contemporary approaches towards modes of liability,

including the emergence of the controversial concept of Joint Criminal Enterprise in the jurisprudence of the ICTY (e.g., *Tadić*) and other UN tribunals.

The following contributions focus on the treatment of specific categories of crime. Wolfgang Form addresses approaches of the UNWCC towards the prosecution of torture. He argues that many domestic jurisdictions pursued different, if not contradictory, approaches towards torture. He traces discussions of the Commission on torture as a war crime and as a crime against humanity. Lutz Oette links historical debates on torture and ill-treatment to contemporary practices and challenges. He argues that the practice of the UNWCC made an important contribution to the clarification of the history and treatment of torture, including the nature and scale of ill-treatment during World War II, medical experiments, practices of enforced disappearance and controversial methods of interrogation (e.g., waterboarding).

The symposium concludes with an article by Dan Plesch, Susana SáCouto and Chante Lasco that analyzes the relevance of the work of the UNWCC to the prosecution of sexual and gender-based violence. Crimes of rape and enforced prostitution were included in the list of offences scrutinized by the Commission. The authors examine the practice of the Commission in relation to cases involving sexual violence, including approaches towards consent, coercion as an element of forced prostitution and theories of responsibility. They argue that the work of the Commission and its reception in domestic prosecutions after World War II provide a strong precedent for the prosecution of sexual and gender-based crimes as international crimes and potential guidance for contemporary trials.

V NOT A CONCLUSION

The picture which emerges from this symposium is still not entirely complete. The UNWCC forms part of the legacy of international criminal justice. But many issues remain under-researched. Others are unexplored. Topics that might deserve further attention include the relationship of the UNWCC to the Nuremberg and Tokyo trials, its approaches towards specific categories of crime (e.g., aggression, crimes against humanity, specific war crimes), the role of National Offices, the record of domestic cases or the role of the Commission in inter-state cooperation. The list could be continued.

It is our hope that the journey does not end here. There is a need for deeper inquiry and more systematic publication of law reports of all the trials of the World War II era as international criminal law is “coming of age”. This symposium is meant to serve as a starting point for engagement with the origins of international criminal justice and its emerging legacy. We look forward to further contributions on these themes in future issues.