The United Nations War Crimes Commission: A Model for Complementarity today?

Dan Plesch and Leah Owen[1]

On 21 August 1942, President Franklin Delano Roosevelt issued a public statement on war crimes. In it, he warned the Axis powers that the United States would

> make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe and 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.[2]

Amidst growing public awareness of the scale of Nazi war crimes in occupied territory particularly the mass murder and persecution of Jews—there was growing political support for the idea that some form of formal justice or accountability measure must be implemented, and that this should occur in a domestic setting.

Roosevelt was by no means the only leader to publicly commit himself to postwar criminal justice (even if, as Kochavi suggests, this was more of a political ploy than a policy intent[3]). Winston Churchill declared shortly after, that Nazi war criminals would "have to stand up before tribunals in every land where their atrocities have been committed in order that an indelible warning may be given to future ages and that successive generations of men may say 'so perish all who do the like again'"[4]. In January 1942, a group of Allied States had signed a statement on "Punishment for War Crimes" that, in place of mere "acts of [vigilante] vengeance" and "in order to satisfy the sense of justice of the civilized world," called for "the punishment, through the channel of organised justice, of those guilty of or

1 This essay builds on a briefing paper by Dan Plesch, Leah Owen, Hanns Kendel, and Richard Wright; we are very grateful to Hanns Kendel and Richard Wright for their comments and suggestions in this essay.

2 *US State Department Bulletin*, August 22, 1942, 710.

3 Arieh Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 2000), 33.

4 Ibid.

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responsible for these crimes, whether they have ordered them, perpetrated them or participated in them"[5]. This was reaffirmed by the Allied Moscow Declaration on Atrocities in October 1943, which—in addition to a list of war crimes the Nazis were accused of—put the Axis powers on notice that "most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done"[6].

Conventional wisdom holds that these sentiments found their eventual expression in the International Military Tribunals at Nuremberg and Tokyo. This is true, but an incomplete picture, and an incomplete realization of the values Roosevelt and others expressed. The Nuremberg, Subsequent Nuremberg, and Tokyo trials indicted 237 defendants in total, almost all major war criminals (political, business, and military leaders). With a few exceptions (such as during the *Einsatzgruppen* trial[7]), these represented a small fraction of the social infrastructure of war crimes, and of those personally involved in enacting campaigns of genocide, systematic terrorism, sexual violence, mistreatment of prisoners, and a range of other crimes.

This article will explore the other major institution of wartime and postwar international criminal justice—the United Nations War Crimes Commission (UNWCC). Between 1943 and 1948, the seventeen members of the UNWCC authorized 8,178 cases, involving over 36,000 accused, leading to at least 2,000 war crimes trials prosecuted in domestic courts. UNWCC members submitted indictments for "peer review" by other Allied states in a formal multilateral organization with diplomatic status staffed by their eminent jurists; if approved, they went on to enact prosecutions in their own courts. The accused ranged in rank from generals to private soldiers, in courts from China to Norway.

This chapter will provide a brief overview of the history of this organization and its operation. It draws upon the rapid growth of UNWCC scholarship (in particular the UNWCC Symposium and resultant special issue of the Criminal Law Forum[8], Bergsmo et al.'s "Historical Origins of Inter-

5 The Inter-Allied Information Committee, *Punishment for War Crimes: The Inter-Allied Declaration Signed at St. James' Palace London*, (1942).

6 Washington, Government Printing Office, *Foreign Relations 1943* (1), 769.

7 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals: Volume IV* (London: His Majesty's Stationery Office, 1948), 509–586.

8 *Criminal Law Forum* 25.1–2 (2014), 1–381.

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national Criminal Law: Volumes 1 and 2"[9], and Plesch's history of the UNWCC[10]). Having done so, we will then discuss the importance of the UNWCC's legacy and relevance today, especially in the light of the modern notion of "positive complementarity" and the "domestication" of international law. The Nuremberg Trials are highly influential on modern international criminal justice—indeed, Samantha Power has described how even the architecture and visual aesthetics of the International Criminal Tribunal for the Former Yugoslavia (ICTY) "seemed deliberately chosen to harken back to the UN tribunal's functional parent"[11]. What lessons could be learned from this other side of postwar international justice—is, as Carsten Stahn suggests, international justice in need of a "UNWCC 2.0"[12]?

The History of the UNWCC

As alluded to above, the UNWCC emerged from a growing awareness of the extent and scale of Axis war crimes, and a desire to seek some form of judicial reckoning and accountability for participants at every level. While the Nuremberg trials were largely a product of the major powers, they were often more hesitant about participating in the UNWCC's early stages —it was Asian and European states who played the major role, with governments-in-exile putting a high priority on seeking accountability for the atrocities their information-gathering networks sent evidence of back to them. Kerstin von Lingen notes that this "truly international network" emerged partly out of "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"[13]. To address this, a range of eminent European legal scholars (such as Egon

9 Morten Bergsmo, Wui Ling Cheah, and Ping Yi, *Historical Origins of International Criminal Law: Volume 1–2* (Oslo: Torkel Opsahl Academic EPublisher, 2014).

10 Dan Plesch, *Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes* (Washington: Georgetown University Press, 2016).

11 Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Harper Perennial, 2002), 484.

12 Carsten Stahn, "Complementarity and Criminal Justice Ahead of their Time? The United Nations War Crimes Commission, Fact-Finding, and Evidence," *Criminal Law Forum* 25.2 (2013), 224.

13 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," *Criminal Law Forum* 25.1 (2013), 74.

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Schwelb, later deputy director of the UN Human Rights Division, René Cassin, who received the Nobel Peace Prize for his work on the UN Declaration of Human Rights, and later Czechoslovak President Edvard Beneš) began to meet in the early 1940s, pooling institutional, legal, technical, and academic expertise in a series of conferences that laid much of the groundwork for the Commission. From an early stage, this concentration of legal expertise and the direct experience of conflict by European member states, shaped the organization as an institution particularly concerned with individual criminal responsibility for perpetrators across all levels, and one that would enact a joint Allied war crimes policy with well-defined national jurisdictions and evidence-sharing[14]. After some initial discussion, the UNWCC also decided to adopt a two-pronged approach to definitions of war crimes, opting to use the "Versailles list" of (which had been agreed by both the member states, as well as Germany and Japan)[15], as well as domestic penal codes. That these predated the Second World War helped resist *nullem crimen* defenses, the notion that war crimes could not be prosecuted if they had not been recognized as war crimes at the time. By the time it had begun to assess its first indictments in March 1944, the UNWCC had thus already developed a sophisticated set of organizational procedures,

This process of discussion and groundwork laying culminated in the establishment and official recognition of the UNWCC on 20 October 1943. Represented among its members were Australia, Belgium, Canada, the Republic of China, Czechoslovakia, Denmark, Ethiopia, France, Greece, India (as its own state), Luxembourg, the Netherlands, New Zealand, Norway, Poland, and Yugoslavia (both Royalist and, later, Socialist). The USSR had opted to pursue domestic war crimes separately, as attested elsewhere in this volume[16]; while there were some limited attempts at cooperation between the two processes, this was highlighted as a "greatly felt" loss by its members[17].

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14 Ibid., 64, 67–68.

15 UNWCC, *Report of the Sub-Committee* (December 2, 1943), 4. UNWCC, *Information Concerning Human Rights Arising From Trials of War Criminals* (New York: United Nations Economic and Social Council, 1948), 146–180, n1.

16 Marina Yu. Sorokina, "On the Way to Nuremberg: the Soviet Commission for the Investigation of Nazi War Crimes," Beth Griech-Polelle [ed.], *The Nuremberg War Crimes Trial and its Consequences Today* (Baden-Baden: Nomos Verlag, 2009), 21.

17 United Nations War Crimes Commission, *National Offices Conference held at the Royal Courts of Justice, London, May 31st to June 2nd, 1945 – Minutes and Documents*, 35.

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In addition to the role of continental European members, the Asian members of the Commission—China and India—also played leading roles in shaping the emerging organization. A founding and prominent member of the UNWCC, Chinese representatives had pointed out as early as January 1942 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"[18]; it had, after all, been involved in the Second Sino-Japanese War since 1937, and so in some ways had been involved in the conflict longer than the UNWCC's European members (a similar argument to that made by Ethiopia, surrounding its invasion and occupation by Italy in 1935[19]). This, together with Roosevelt's support for China as an emergent "great power" and its own desire to become more active in the international system[20], led to it playing a key role in the Commission, particularly on issues such as the use of narcotics to subdue a population, and individual responsibility for the crime of aggression and crimes against peace[21]. After the foundation of the UNWCC, China established the Sub-Commission of the UNWCC in Chunking for the Far East on which member states were also represented, which was responsible for listing and organizing cases against over 3,000 Japanese defendants[22]. India, present on the Commission as an autonomous member even before its national independence, played a major role in developing the legal and organisational basis on which the Commission conducted many subsequent trials. Niharendu Dutt-Majumdar, the Indian representative, developed and drafted the notion of joint mili-

18 United States Department of State, *Foreign relations of the United States diplomatic papers Volume 1: General; the British Commonwealth; the Far East* (Washington: United States Government Printing Office, 1942), 45.

19 Ethiopian Government Press and Information Office, *La Civilisation de l'Italie Fasciste en Ethiopie Vol. I & II* (Addis-Ababa: Berhanea Selam Printing Press, 1948).

20 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," Bergsmo et al. [eds.], *Historical Origins of International Criminal Law*, 513.

21 The Inter-Allied Information Committee, *Punishment for War Crimes: The Inter-Allied Declaration Signed at St. James' Palace London* 16 (1942); 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," *Criminal Law Forum* 25.1 (2013), 121.

22 UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HM Stationery Office, 1948), 514.

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tary tribunals used by the British at Belsen and the Americans at Dachau[23], as well as successfully advocating for Ethiopian cases to be discussed by the UNWCC[24]. India also contributed significantly to the Commission's operation; out of a total of 1583 "units" of contribution to the budget, India contributed 80—the same as France, and more than Canada (60) or Australia and the Netherlands (30 each). Finally, while not a UNWCC member—operating largely under the auspices of the USA—the newly independent Philippines also handled a number of East Asian UNWCC cases, including the trial of Lt. General Shigenori Kuroda[25].

From the beginning, the UNWCC had three specific duties—to investigate and record evidence of war crimes provided by member states; to determine whether such evidence amounted to a *prima facie* case that the state could prosecute; and to make recommendations to member governments concerning questions of law and procedure, to support trials[26]. It carried out these duties through the activities of three Committees, and a variety of supporting agencies and programs.

Committee I – "Facts and Evidence"—was tasked with gathering and collecting evidence from member states, and evaluating each charge leveled against accused war criminals (numbering about 36,000 individuals in total, in 8,178 indictments). While one of its first actions was to coordinate the establishment of national offices to handle war crimes investigations at a domestic level[27], drawing on pre-existent legal structures and ministries of justice to avoid "re-inventing the wheel"[28], its main function was its program of regular review. Each member state submitted cases to the UNWCC against alleged war criminals, whereupon – in weekly meetings –

23 UNWCC, *Minutes of thirty-fourth Meeting held on October 3rd 1944,* October 3, 1944, comment of Marcel de Baer, 5. UNWCC, *Proposal for a United Nations Military Tribunal (Mr. Dutt's Proposal as Amended by a Drafting Committee)*, Doc. No. II/26, August 1, 1944; and *Proposal for United Nations Military Tribunals*, Doc. No. II/26/1, August 16, 1944.

24 UNWCC, *Minutes of Meeting of Commission Held on Wednesday, September 24, 1947 at 3.00pm,* September 24, 1947, 6.

25 Richard Goldstone and Adam Smith, *International Judicial Institutions: The architecture of international justice at home and abroad* (London: Routledge, 2015), 80.

26 UNWCC, *History,* 3.

27 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). 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.

28 UNWCC, *History*, 1948, 121.

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the Committee analyzed the charges before it, determining whether there was a *prima facie* case that those listed should be categorized as accused war criminals, suspects, witnesses, or (in other cases) if there was insufficient proof or legal basis to charge them at all (instructing the National Offices to gather more evidence in such instances). In doing so, it critically assessed cases 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[29]. Committee I certainly did not "rubber stamp cases"—454 cases were withdrawn by member states, adjourned, or outright not accepted even after the Committee requested more information[30]

Thus, while not carrying out its own evidence gathering, the UNWCC extensively regulated the quality of charges submitted to it, and provided an important international imprimatur to individual countries' trial processes. Member states did not, in theory, have to take part (the USSR, for example, had for a variety of reasons elected to remain outside the UNWCC, and conducted its own trials), but participation in this process offered legitimation and approval from their peers in other member states and the nascent international framework of the United Nations. 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 liaised with governments through the national offices[31]. As well as promoting better quality trials, it also offered greater domestic legitimacy for the process for other Allied states to have "signed off on" a given case in this manner.

Once indictments had been made, Committee I also conducted limited scrutiny of trials 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 conflicted with those of victims.[32] Mark Ellis observes that while there were several issues with UNWCC-supported trials that would meet with criticism by today's trial standards (and indeed, met with criticism at the time), the "'basic elements of a fair trial' for the accused were regularly stressed

29 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.

30 UNWCC, *History,* 1948, 513.

31 UNWCC, *Internal Memo*, April 18, 1945.

32 UNWCC, *Information Concerning Human Rights*, 1948, 103–109, 250–274.

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by the domestic systems"[33]. The UNWCC did not support "kangaroo courts", and worked to prevent these where possible, through case review, a 1945 conference to discuss and share policy and best practice[34], and a scheme of support for countries who set up their own dedicated war crimes commissions.[35]

The work of Committee II – "Enforcement"—became largely folded in with CROWCASS, discussed in detail later. Rather than dealing with cases individually, it focused more on the creation of mechanisms for war crimes prosecution, whether offices in the territory of defeated enemies[36], proposals for joint military tribunals[37], and even a serious consideration of the establishment of an "international criminal court" to address atrocity crimes – in the 1940s[38]. The first two of these, as well as the CROWCASS program, were successful, while the notion of an ICC would remain unfulfilled until the 1990s.

The main responsibility of Committee III – "Legal Affairs"—was to discuss "large questions of principle", and, more prosaically, to avoid bringing the UNWCC to a standstill while it had to refer legal problems to an external body. After all, as the *History* notes, it was a body of eminent jurists itself, and was thus capable of addressing these questions in its own right[39]. After some initial disagreement regarding its constitution, it was established in February 1944 with jurists from a wide variety of countries represented among its ranks. Immediately after its establishment, it was highly busy—the *History of the UNWCC* describes it as "constantly being called on to examine and advise on a number of questions of substantive law when dealing with particular charges brought before it by National

33 Mark Ellis, "Assessing the Impact of the United Nations War Crimes Commission on the Principle of Complementarity and Fair Trial Standards," *Criminal Law Forum* 25.2 (2014), 207–222.

34 United Nations War Crimes Commission, *National Offices Conference held at the Royal Courts of Justice, London, May 31st to June 2nd, 1945 – Minutes and Documents*, 35.

35 UNWCC, *History*, 1948, 123.

36 UNWCC, *Minutes of Twenty First Meeting*, (June 6, 1944), 3, and the accompanying UNWCC Doc. C24, as well as UNWCC *Minutes of Twenty Third Meeting* (June 13, 1944), 3, and the accompanying UNWCC Doc. C30.

37 UNWCC, *Minutes of 32nd Meeting*, (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.).

38 William Schabas, "The United Nations War Crimes Commission's Proposal For An International Criminal Court," *Criminal Law Forum* 25.1. (2014).

39 UNWCC, *History*, 1948, 125.

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Offices … rang[ing] from the defense of 'military necessity' to the implication of 'usurpation of sovereignty'"[40]. Other activities included developing more specific notions of war crimes, crimes against peace, and crimes against humanity[41]. Herbert Pell, the US representative, moved a resolution in March 1944 that provided an early definition of crimes against humanity as "crimes committed against stateless persons or against any persons because of their race or religion; such crimes are judiciable by the United Nations or their agencies as war crimes"[42]—this notably introduced the idea that domestic persecution, such as the Holocaust of the German Jews, could be addressed in an international major crimes framework, something that had been questionable before this, but seems to have informed later discussions of genocide, crimes against humanity, and human rights.

Also notable in Committee III's work is what was *not* debated in great deal, but rather seen as unremarkable. Water torture and part drowning—an issue of intense relevance today—was charged[43] and prosecuted (especially in UNWCC-supported American cases in the Pacific Theater[44]). The indictment of suspects for sexual violence was also routine—rape and forced prostitution went unremarked as the fourth and sixth crimes on the thirty-two-strong "Versailles list" of crimes listed by the UNWCC, rape featuring in all three draft lists of offences[45]. 151 charges involving sexual violence were approved by Committee I. That Committee III did not see fit to discuss its thinking on sexual violence means we must infer exactly why this ready indictment of support for sexual and gender-based violence prosecutions was the case, but the presence of rape on the "Versailles list", and the use of domestic legal frameworks (which, though inadequate by modern standards, were nonetheless a lot better than overlooking war rape as a distasteful but "natural" phenomenon) seem to have helped. Indeed, once

40 Ibid., 124–127.
41 Ibid., 169–184.
42 UNWCC, *Resolution moved by Mr. Pell on 16th March 1944*.
43 UNWCC, *Norwegian Charges against German War Criminals (Klötzer et al.)*, Registered No. 3193/N/G/55, Case No. 55, May 23, 1946.
44 See, for example, *United States of America vs. Isamu Ishihara*, Before the Military Commission by the Commanding General, United States Army Forces, China Theatre, among many others. Ishihara was a civilian interpreter, a fact that also helps illustrate the degree to which UNWCC-supported trial processes were concerned with fulsome prosecutions of even low-level perpetrators involved in war crimes.
45 UNWCC, *Notes of Unofficial Meeting held at 2:30 p.m. on the 26th October*, (October 26, 1943), n5.

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indictments developed into prosecutions, some (but not all) included a number of highly progressive elements, including focusing on lack of consent over the use of physical force, coercion as an element of forced prostitution, joint criminal responsibility and command responsibility for sexual violence, and respectful treatment of witnesses[46].

Thus—whether through specific design or simply because it was seen as an obvious development of existing standards—Committee III and the UNWCC more broadly developed sophisticated and progressive legal responses to a range of issues. Much of this thinking fed into early international criminal law and human rights theory, through the UNWCC's 1948 report to the UN's Economic and Social Council (ECOSOC)[47].

In addition to addressing case-specific and legal questions, the UNWCC also played an important role as an informational clearinghouse for member states, coordinating both its internal work, and its cooperation with other agencies.

The Research Office, for example, collated affidavits taken by resistance movements with primary documentation of war crimes (often, the Office built indictments on Nazi proclamations about the execution of Jews, communists, or partisans designed to intimidate others, condemning them with their own words)[48], and compiled dossiers on specific Nazi leaders[49] or the staff of specific camps[50]. Beginning in August 1944, it began compiling regular "Summaries of Information", providing backgrounds for particularly complex cases and "in their own words" accounts of Nazi policies involving possible war crimes[51]. These would then form an important part of the early planning of the Nuremberg trials; before the capitulation of Germany (and the resultant flood of documentation captured by the Allied armies), they provided an "indication of the objectives on which research might profitably be directed in the examination of the documents that were being brought to light in Germany", including "deportations for labor and forced labour … concentration camp and Gestapo atrocities; exter-

46 Dan Plesch, Susana Sácouto, and Chante Lasco, "The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today," *Criminal Law Forum* 25.1 (2014).

47 UNWCC, *Information Concerning Human Rights*, 1948.

48 UNWCC, *History* (1948), 165–166.

49 E.g. UNWCC, *Research Office Document Series No. 6: Professor Rüdin's Racial Institute*, (September 15, 1945).

50 UNWCC, *Index to the Documents of the Research Office of the United Nations War Crimes Commission*, (November 17, 1949), 2–19.

51 UNWCC, *Research Office Summaries of Information 1-55 (September 1944 to December 1947)*.

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mination of the Jews; crimes against prisoners of war; Germanisation of conquered territories; crimes against foreign workers [and] medical experiments on prisoners"[52]. Even once the Nuremberg trials had begun, the Research Office fielded urgent document tracing requests and requests for information made by the Tribunal, and ensuring that much documentation of war crimes produced at Nuremberg that had no direct bearing on the trial was conveyed to relevant national authorities that were able to prosecute these crimes[53].

In addition to this, the UNWCC was also closely involved in tracking and coordinating the disposition of war criminals who were wanted by the Allied nations, as well as those in custody. To prevent accused Nazis from slipping out of Allied custody, the Commission developed extensive liaisons and ties to the Supreme Headquarters Allied Expeditionary Force (SHAEF) towards the end of the war[54]. One such institution was the Central Register of War Criminals and Security Suspects—CROWCASS. Recognizing the sheer scale of the problem, and the difficulties involved in handling suspects who might be in custody in one jurisdiction but wanted in another—CROWCASS published "wanted lists" of mid-high-ranking Nazi officials and those named in indictments, as well as lists of those currently in custody and witnesses, expediting and coordinating the transfer of suspects between nations so that they could face trial. This was highly effective; as Christopher Simpson notes, "although it was in operation for only three years [it] proved to be a singularly effective tool for locating tens of thousands of suspects", and was "probably the most extensive database on … persons being sought for crimes against humanity … ever created"[55]. It was instrumental in locating, charging, and convicting perpetrators involved in atrocities at Buchenwald, Mauthausen, and Dachau. CROWCASS was a flawed institution. The sheer scale of its activities often meant that accused war criminals did still slip through the cracks, as with Oskar Groening, the so-called "accountant of Auschwitz"[56]. In what was likely an early recognition of US covert programs like Operation Paperclip, Marian

52 UNWCC, *History*, 1948, 166.
53 Ibid., 166–168.
54 Ibid., 160.
55 Christopher Simpson, *Blowback: America's Recruitment of Nazis and Its Effects on the Cold War* (New York: Open Road Media, 2014), 66.
56 Owen Bowcott and Kate Connolly, How Nazi guard Oskar Gröning escaped justice in 1947 for crimes at Auschwitz, *The Guardian*, July 16 2015, https://www.theguardian.com/world/2015/jul/16/how-nazi-guard-oskar-groning-escaped-justice-in-1947-for-crimes-at-auschwitz (accessed September 9, 2018).

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Muszkat, the Polish delegate to the Commission, complained to the UNWCC that the USA was flouting CROWCASS' standards of investigation, apprehension, and extradition by seeking out Germans with "knowledge in the field of complicated war techniques" (largely rocketry and advanced engineering) "not for trial, but for other purposes"[57]. In some cases, as Simpson relates, CROWCASS lists and processes were even directly used to identify ex-Nazis likely to be useful in the Cold War, rather than prosecute them[58]. Despite these flaws, however, the effort to prosecute war criminals was highly dependent on CROWCASS as a centralized registry, and the 85,000 wanted reports and 130,000 detention reports it had published by the time it ceased operating.

Despite these successes, the UNWCC, as with many post-conflict criminal justice initiatives, was not without its detractors. 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.

Even before the end of the war, for example, the US State Department had repeatedly obstructed the participation of Herbert Pell, a former congressman and US ambassador who had fervently advocated for the Commission. The Department saw the UNWCC as an overreach of US power and politically irrelevant. Through its influence on funding allocation, it eventually managed to have Pell withdrawn from the UNWCC[59]. While this did not end US participation – Pell's activism and subsequent outcry strongly committed the US to some form of postwar criminal justice – it limited support for the UNWCC in Washington. The beginning of the Cold War also complicated this – as discussed above, many accused Germans were seen as more useful as anti-Soviet assets than incarcerated for war crimes. On top of this, the newly inaugurated President Truman had been advised to reduce the costs of occupying Germany and bolster West Germany against its communist neighbors, both goals incompatible with ongoing support to the Commission[60]. Simpson describes how there was a sense of "hostility toward what might be called today legal 'activism' on the part of the Commission on the recognition of human rights [and] a

57 UNWCC, *Letter from Marian Muszkat, Polish Delegate to the UNWCC, to Lord Wright, Chairman of the UNWCC*, December 9, 1947, 4–6.

58 Simpson, *Blowback*, 67.

59 Graham Cox, "Seeking Justice for the Holocaust: Herbert C. Pell Versus the US State Department," *Criminal Law Forum* 25.1 (2014).

60 Christopher Simpson, "Shutting down the United Nations War Crimes Commission," *Criminal Law Forum* 25.1 (2014), 38.

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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"[61]. Papers from the British Foreign Office on the "winding-up of the UNWCC" (written in 1947, the year before this took place) clearly show the disdain many British diplomats felt for the Commission, criticizing its jurists as "legalistic and pedantic"[62], its indictments as "frequently embarrassing and a nuisance to us", and its legal discussions (implicitly on issues such as crimes against humanity, and the way it was beginning to work with the UN to consolidate the precedents set up during the Nuremberg trials[63]) as dealing with matters "really not strictly their concern"[64].

This hostility expressed itself in a number of forms, including withdrawals of and obstructions to funding, unilateral withdrawal from the system of extradition and deadlines on indictments, and the sealing and disposal of archives. Despite strongly worded objections and aggressively stepped up prisoner transfer requests by countries including France, Poland, and Czechoslovakia[65], these Anglo-American campaigns led to the closure of the UNWCC by March 1948.

Given the UNWCC's extensive support for domestic trial processes, its focus on research and preparation rather than "in-house" trials, and the high levels of enthusiasm among many of its staff, many of its activities continued beyond its closure. Correspondence from September 1949 between former members of the Dutch National Office and J.J. Litawski, formerly a high-ranking member of the Commission and then a member of the UN's Human Rights Division, detailed dozens more Dutch UNWCC-

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61 Ibid., 40.

62 Foreign Office, *Winding Up of the United Nations War Crimes Commission*, May 3, 1947. Part of document held in The National Archives of the UK, *Winding-up of the United Nations War Crimes Commission*. Code 73 File 58, Archival Reference FO 371/66570.

63 Foreign Office, *Cooperation of the UNWCC with the Human Rights Division, the United Nations*, Colonel G.A. Ledingham, January 30, 1947. Part of document held in The National Archives of the UK, *Winding-up of the United Nations War Crimes Commission*. Code 73 File 58, Archival Reference FO 371/66570.

64 F.F. Garner, *Future of the UNWCC*, January 9,1947. Part of document held in The National Archives of the UK, *Winding-up of the United Nations War Crimes Commission*. Code 73 File 58, Archival Reference FO 371/66570.

65 Christopher Simpson, *The Splendid Blond Beast: Money, Law, and Genocide in the Twentieth Century* (New York: Grove Press, 1993), 274–277.

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supported cases that were only then coming to completion[66]. Since these came after the UNWCC's reporting period, we cannot know how many such cases there were across the member states, but these do attest to the lingering positive impact of its early "capacity-building" measures. In addition, just before its closure, the UNWCC assembled a number of documents for the early United Nations bridging human rights and international law, including the history cited throughout this chapter, and its report on human rights and international law submitted to ECOSOC in 1948[67]. Thus, despite its closure, the UNWCC continued to contribute to criminal justice.

The Policy Significance of the UNWCC today: Complementarity and Institutional Model

The UNWCC, we have seen, represented a different approach to international criminal justice to the International Military Tribunals—one that is not merely of historical interest, but has potential policy relevance today. This section will discuss some of the ways this relevance might manifest, with a particular focus on the degree to which the UNWCC's example can contribute to modern discussions surrounding, proposals for, and requirements of positive complementarity. After a discussion of what positive complementarity entails, and a survey of how it has been implemented across a range of international organizations, we will consider some of the ways that a UNWCC-like approach might be able to bolster these efforts.

The UNWCC primarily played a facilitatory role in wartime and postwar international criminal justice. Rather than try to launch its own international trial structures for all cases reported into it, it instead aimed to improve the functioning of existing legal systems across Allied states, in line with Roosevelt's goal of making sure that Nazi war criminals would "stand in courts of law in the very countries which they are now oppressing and answer for their acts". It did this by pooling (largely informational and expertise-based, rather than financial) resources and best practice, coordinating trial and prisoner-handling efforts, and by providing scrutiny and review of cases, to minimize the risk of summary or unfair justice. These is-

66 *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).

67 UNWCC, *Information Concerning Human Rights*, 1948, 125–145 and Appendix.

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sues were particularly key for the governments-in-exile, who had fled the occupation of their countries and lacked the judicial infrastructure, personnel, and large-scale information-gathering ability they would usually need to carry out even the preparatory stages of trials.

To use anachronistic modern terminology, the UNWCC's facilitatory role thus closely resembled modern-day notions of legal capacity-building and "positive complementarity". This is a concept that emerges from Article 17 of the Rome Statute of the International Criminal Court, which—among other provisos—restricts the ICC to only investigate cases where states are "unwilling or unable genuinely to carry out the investigation or prosecution"[68]. Especially in the latter case, Article 17 directs the Court to consider the degree to which, "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"[69]. While nominally an eligibility criterion (and a resource-saving device—by making the ICC into a court of last resort, it reduces the burden on it having to hear cases), this notion of complementarity has developed significantly, evolving into a "classical" (or "negative") approach and a more "positive" notion, by which the ICC (and potentially other bodies) are empowered and encouraged to combat unwillingness and inability through a variety of measures[70]. While the extension and desirability of this more "pro-active" approach have been questioned by some[71], a wide range of theorists have highlighted it as a desirable and effective approach for the ICC to take in promoting accountability for major crimes[72]. Indeed, the notion of "positive complementarity" has been ex-

68 ICC, *Rome Statute of the International Criminal Court,* Article 17(1)(a).

69 Ibid., Article 17(3).

70 Carsten Stahn, "Taking Complementarity Seriously: On the sense and sensibility of 'classical', 'positive', and 'negative' complementarity," Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011), 260–281.

71 See, for example, Marlies Glasius, "A problem, not a solution: Complementarity in the Central African Republic and Democratic Republic of the Congo;" Paul F. Seils, Making complementarity work: Maximizing the limited role of the Prosecutor, both in Stahn and El Zeidy (eds.), *The International Criminal Court*.

72 Michael A. Newton, "The quest for constructive complementarity; Michael Burke-White, Reframing positive complementarity: Reflections on the first decade and insights from the US federal criminal justice system;" Christopher K. Hall," Positive complementarity in action;" Morten Bergsmo, Olympia Bekou, and Annika Jones, "Complementarity and the construction of national ability;" all in Stahn and El Zeidy (eds.), *The International Criminal Court*.

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tended to cover a wider spectrum of phenomena where international legal institutions provide assistance to improve the capacity of domestic ones, to shift the caseload from the international to the domestic level. The ICTY's work in case-transfer to domestic jurisdictions highlighted as a particularly successful example[73], as has the prosecution-ordering and supervisory roles of the Inter-American Court[74].

This is not merely a theoretical recommendation, but is widely recognized throughout a wide range of international organizations' strategies, stated goals, and action plans, both in overarching and general terms, and in the specific strategic action plans of individual bodies.

Perhaps predictably, this is clear in the ICC's own work. In its twenty years of operation, the ICC has only completed a very small number of cases, issuing 8 convictions and 2 acquittals in 6 cases; while a wide range of factors contribute to this, issues like low capacity for trials, difficulty in encouraging willingness among states to participate are key issues, leading to positive complementarity being seen as an important complement to trials of major criminals. In its three-yearly "Strategic Plans of the Office of the Prosecutor", the ICC has (in at least four reports in a row) emphasized the importance of positive complementarity and capacity building as a core component of the Office of the Prosecutor[75]. These stress the importance of assisting national and regional judiciaries in organizing domestic trials

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73 David Tolbert and Aleksandar Kontic, "The International Criminal Tribunal for the former Yugoslavia ('ICTY') and the transfer of cases and materials to national judicial authorities: Lessons in complementarity;" Fidelma Donlon, "Positive complementarity in practice: ICTY Rule 11bis and the use of the tribunal's evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber;" both in Stahn and El Zeidy (eds.): *The International Criminal Court*.

74 Alexandra Huneeus, "Pushing States to Prosecute Atrocity: The Inter-American Court and Positive Complementarity," Heinz Klug (ed.), *The New Legal Realism: Studying Law Globally*, Volume 2 (Cambridge: Cambridge University Press, 2016), 228.

75 ICC Office of the Prosecutor, *Report on Prosecutorial Strategy*, (ICC, 2006), 5, https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (accessed on 9 September 2018); ICC Office of the Prosecutor, *Prosecutorial Strategy*, (ICC, 2010), 5, https://https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (accessed on 9 September 2018); ICC Office of the Prosecutor, *Strategic plan June 2012–2015*, (ICC, 2013), 13, https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf (accessed on 9 September 2018); ICC Office of the Prosecutor, *Strategic plan | 2016–2018*, (ICC, 2015), 22, 44–45 https://www.icc-cpi.int/iccdocs/otp/en-otp_strategic_plan_2016-2018.pdf (accessed September 9, 2018).

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before cases reach the ICC, both as a positive goal in its own right, and as a way of making the Court's already stretched resources go further by enabling cases to be heard at domestic levels. The ICC has even mooted the possibility of "enhancing coordination of activities and developing a common understanding of how to conduct [investigations and prosecutions where perpetrators or victims have crossed state borders]" in cooperation with bodies such as Interpol, perhaps via a "common platform for improved interaction between the relevant members of the law enforcement community"[76]. Explained in general terms, this is closely reminiscent of UNWCC institutions such as CROWCASS, that provide worked and workable examples of what such cooperation might look like.

At the same time, this has seen limited implementation—in the most recent Strategic Plan, the ICC's Bureau of Stocktaking explicitly places the court outside the provision of "capacity building, financial support, and technical assistance", suggesting instead that this would be an activity for member states to carry out on a voluntary basis[77]. Even where it does endorse positive complementarity as a concept, its implementation of it is, to quote Nidal Nabil Jurdi, "patchy", "ignoring or overlooking—at best" the principle, and rushing to take on cases that could and should have been handled domestically[78], a critique that has also been raised by the European Parliamentary Research Service[79].

Other regional courts and institutions have also incorporated the notion of capacity building, cooperation, and coordination as key components of an effective system of domestic and international accountability for major crimes, with varying levels of success.

In its 2017–2021 Strategic Action Plan, the Inter-American System for Human Rights commits itself—under its broader Strategic Objective 4 (addressing the universalization of its implementation by links with "other international, regional, and sub-regional human rights agencies and mechan-

76 ICC, 2013, 29.

77 ICC, 2015, 22.

78 Nidal Nabil Jurdi, "The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya," *Leiden Journal of International Law* 30 (2017), 219.

79 Ionel Zamfir, *International Criminal Court: Achievements and challenges: 20 years after the adoption of the Rome Statute* (European Parliamentary Research Service, 2018), 10, http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI(2018)625127_EN.pdf (accessed September 9, 2018).

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isms"[80]) to a wide range of programs aimed at sharing information and best practice (P13), coordinating criminal justice efforts (P14), and promoting technical cooperation on human rights institutions (P11)[81]. Indeed, the Inter-American Court (a subsidiary of the IAS) routinely directs domestic courts to investigate and prosecute acts amounting to crimes against humanity, and issues follow-up supervision, reporting, and recommendation regimes[82]. While beset by problems, including low compliance and a slow progress rate leading to evidence loss and the deaths of witnesses, perpetrators, and victims to old age[83], it nonetheless has a number of significant achievements. Huneeus describes how it has provided support to over fifty cases across South America, received greater buy-in from local actors than it seems likely that international intervention would have achieved, and developed a significant body of case law and practice, including a greater emphasis on truth-telling, symbolic reparations, and other forms of accountability procedures.

The European Commission also emphasizes positive complementarity as a key part of its approach to international criminal justice promotion. As part of its 2013 Staff Working Document on Advancing the Principle of Complementarity – the *Toolkit for Bridging the Gap Between International & National Justice*—the Commission suggests that successful international criminal justice "must be ensured by taking measures at the national level and by enhancing international cooperation". As part of this, it provides a brief summary of some of the most effective forms of immediate and longer-term assistance for supporting countries with damaged judicial infrastructure and a desire to prosecute atrocity crimes[84], as well as a range of legal and infrastructural measures, such as support for travelling courts and archival measures[85]. At the same time, this has seen limited practical realization; while the EU remains a significant donor to legal development, the toolkit itself has largely been realized through "operational … internal guidelines" to its staff, and recommendations of "operational en-

80 Inter-American Commission on Human Rights, *Strategic Plan 2017–2021*, 2017, 48, http://www.oas.org/en/iachr/mandate/StrategicPlan2017/docs/StrategicPlan2017-2021.pdf (accessed September 9, 2018).
81 Inter-American Commission on Human Rights, 2017, 49.
82 Huneeus, 2016, 228.
83 Ibid., 236.
84 European Commission, *Joint Staff Working Document on advancing the principle of complementarity – Toolkit for bridging the gap between international and national justice*, 2013, 12, http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206783%202013%20INIT (accessed September 9, 2018), 12.
85 Ibid., 20–21.

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try points" for other programs, rather than concerted institutional change in its own right[86].

Positive complementarity is, therefore, a significant recent development in international criminal law and its supporting institutions—building from a centralized international court system, as seen at Nuremberg, to a model where such courts are a measure of last resort, and seek to reduce demand for them by developing the capability of individual states and domestic judicial systems. At the same time, it could see deeper and more effective implementation—many of the calls for positive complementarity described above take the form of proposed models for future work, while positive complementarity efforts today are often either geographically limited (as with the IACHR), more planned than implemented (as with the EU), or patchy and poorly implemented (as with the ICC). What can the UNWCC's model contribute to improving the implementation of this principle? At the risk of elaborating additional plans and ideas to a field currently more lacking in implementation, the UNWCC's history represents a series of practical examples of positive complementarity in action that could inform and embolden current practice. We identify three areas where this could help.

Technical Assistance

One of the clearest forms of support offered by the UNWCC would be its role in providing technical assistance and coordination for the indictment, and later prosecution, of war criminals. Individual states may have been responsible for the actual prosecution of those involved in major crimes, but by providing bureaucratic, administrative, and informational support for member states, the UNWCC made this process more effective, especially in cases where jurisdictions overlapped. While modern, and currently proposed, positive complementarity regimes do respond to similar needs, the Commission's work provides a number of innovations and worked examples of such assistance that could contribute to modern practice.

One of the most basic contributions that the Commission made to wartime and postwar international criminal justice would be its administrative and centralizing role. By providing a unifying set of standards and

86 Coalition for the International Criminal Court, *EU a key player in ICC system*, February 3, 2015, http://www.coalitionfortheicc.org/news/20150203/eu-key-player-icc-system (accessed September 9, 2018).

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forms by which war crimes could be reported and categorized, as well as a forum in which individual states could share and disseminate best practice to other members, the UNWCC provided a basic-yet-effective system which could continue to prove relevant today.

Examining the minutes of meetings and correspondence between the Commission and its National Offices, even minor developments such as standardized reporting forms, lists and categorization of crimes, and lists of information gathered, seem to have been highly useful to the Commission's work, by ensuring a harmonized system of best practice across its member states.

Each of the Commission's over eight thousand charge files contained (at least in theory—some Offices were better at providing indictments than others) the same distinct categories of information, including a standardized scheme for identifying perpetrators, temporal and geographical data to locate crimes, specific war crimes committed, summary of the evidence in support of a given indictment, and even basic case-appraisal data such as the degree to which the accused was acting in an official capacity, the probable defense, and the completeness of the case[87]. By providing an easy-to-use guide for member states as to the collection of data, encouraging them to standardize their reporting procedures when they strayed away from this[88], and even providing extra specimen forms for member states who had run out[89], the UNWCC could ensure that its members hewed to a basic standard of case/indictment completeness, encouraging fairer and more effective trials. This applied whether they were well-resourced great powers not subject to invasion (such as the United States) or governments-in-exile reliant on embattled resistance networks smuggling information out of occupied countries under pain of death (such as France and Poland).

87 Many features of which are present in the Specimen Form drafted at the start of the UNWCC's operation in 1943. See UNWCC, *Notes of Unofficial Preliminary Meeting held at 2:30pm, on the 26th October, 1943, at the Royal Courts of Justice*, London; and UNWCC, *Transmission of particulars of War Crimes to the Secretariat of the United Nations War Crimes Commission* (December 1943).

88 See, for example, UNWCC Sub-Committee on Facts and Evidence, *Note by the Secretary General on the first batch of cases transmitted by the French National Committee*, February 8, 1944.

89 UNWCC, *Correspondence between Belgian National Office and UNWCC Committee I*, April 27, 1944.

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Figure 1. A sample Charge File, of the sort used by every member state. Subsequent pages include detailed descriptions of ghetto liquidations, lists of perpetrators from high-ranking generals to individual line soldiers, summaries of witness statements (and, in other cases, hand-drawn maps of death camps), and discussions of how complete the case was and perpetrators' likely defenses.

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UNITED NATIONS WAR CRIMES COMMISSION

POLISH CHARGES AGAINST GERMAN WAR CRIMINALS

CHARGE No. 20 *

Name of accused, his rank and unit, or official position. (*Not to be translated.*)	See continuing page 1
Date and place of commission of alleged crime.	From the beginning of 1942 up to the end of 1943 in the following localities : a/ Bełżec, in the district of Lublin; b/ Majdanek near Lublin, district of Lublin, c/ Sobibór near Włodawa, district of Lublin, d/ Kosów Podlaski, district of Warsaw, e/ Chełmno, near Koło, in the "Reichsgau Wartheland" f/ Oświęcim /in German "Auschwitz"/, "Gau Oberschlesien"
Number and description of crime in war crimes list. References to relevant provisions of national law.	I Murder and massacres-systematic terrorism III Torture of civilians VIII Internment of civilians under inhuman conditions XIII Pillage Criminal Code /1932/ art.225, 230/2, 235/1 a,b, 246 and 248,257. War Crimes Responsibility Decree /1943/ art.2,3,4 and 10

SHORT STATEMENT OF FACTS.

In connection with the liquidation of the Jewish ghettos throughout Poland during the period 1942-1943 and in order to facilitate and speed up the mass-killing of Jews several special camps for the extermination of Jews were established by the Germans in Poland in which more than one and a half milion Polish Jews were murdered as well as a large number of foreign Jews were exterminated by means of mechanised methods i.e. electric current and gas.

Dr.J.Litawski
Officer in charge.

TRANSMITTED BY Polish War Crimes Office

* Insert serial number under which the case is registered in the files of the National Office of the accusing State.

(26752) Wt.P.156G 1120 500 1/44 A.S.F.W.Ltd. Cp.685
(26924) Wt.P.1817 P.1139 5,000 3/44 " "

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This technical and administrative standardization was not limited to fixed reporting formulae, either. The UNWCC continued to refine its reporting procedures, organizing gatherings such as the 1945 National Offices Conference, where—towards the end of the war—the member states of the UNWCC gathered to "meet, compare notes and discuss the whole position, with the object of pooling information and improving their methods, thus inducing a feeling of solidarity and co-operation and common purpose which should be invaluable in the work which still lay ahead"[90]. The three-day conference included what would now be recognized as extensive "dissemination of best practice"—amidst broader discussions of how best to handle the flood of war crimes cases in liberated Europe (especially regarding the storage and handling of witness statements, and the disposition of cases where a single perpetrator had carried out crimes in multiple jurisdictions), states shared details of how they carried out their work. One report by Lt. Col. J.V. Hodgson, the American representative, provided a detailed (down to the colors of pins used to indicate different types of data source) overview of the information flow that the US Judges Advocate General and military used to gather information and notify relevant bodies about information related to war crimes, to create a system that was "flexible, capable of expansion … enabled one to find the document required", and could operate in hostile conditions including ones without access to electricity, without specially trained operators[91]. While recognizing that the scale of this system made it difficult to graft it onto already existing practices elsewhere, Hodgson and the representatives of the National Offices used the Conference to work out systems of information dissemination between the various offices, SHAEF, and the Commission itself. These efforts, together with institutions such as CROWCASS, provided a centralized system of bureaucratic and technical assistance to its member states, increasing their ability to pursue war criminals, especially in large, complex cases where suspects needed to be transferred to other jurisdictions.

What use is this today? In some cases, modern information technology and bureaucratic methods reduce the need for such approaches. Centralized digital databases and widespread access to computers mean it is no longer necessary for national governments to request an international agency to print off more copies of a vital form for them, and complex filing systems like those proposed by Hodgson are similarly unnecessary—

90 United Nations War Crimes Commission, *National Offices Conference*, 1945, 3.
91 Ibid., 13–15.

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there is no need to have a dramatic network of pins when geotagging software exists. Nonetheless, the notion of a bureaucratically robust, centralized and standardized set of guidelines for war crimes reporting is surprisingly important (and underused) in modern international criminal law.

A UN Development Program evaluation of mobile courts in Sierra Leone, the Democratic Republic of Congo, and Somalia, 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 centers, but also noted significant logistical difficulties with visiting and working in remote areas[92]. Attention to developing a more rugged and robust system of reporting and categorizing major crimes remains a problem, therefore, even into the twenty-first century.

Similarly, in its 2009 manual of "developed practices", the ICTY noted that "the structure and wording of an indictment can be affected by the complexity of the case which can require inclusion of a large amount of information"—a failure to properly handle this could lead to "serious consequences" for the case's success. To address this, the ICTY developed a program of "organization and standardization in the form and content of indictments"[93], which were much more capable of surviving legal challenges and led to fewer disrupted or failed trials. While, as Patrick L. Robinson, former ICTY president noted, the manual deliberately discussed "developed" rather than "best" practices—noting that "there are no grounds to claim that the practices developed by the Tribunal are better than those of any other court or legal system", and offering a "warts and all disclosure" of its approaches, this nonetheless seems to echo the successes of the UNWCC.

Finally, the notion of international institutions as sources of bureaucratic and administrative coordination for national trials is one that has found currency among international institutions in the ICC. Silvana Arbia and Giovanni Bassy—the former Registrar of the ICC, and its Special Adviser on External Relations and Cooperation respectively—outline a wide range

92 UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, the Democratic Republic of Congo, and Somalia* (2014), 3–15, http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/evaluation-of-undp-s-support-to-mobile-courts-in-drc--sierra-leo.html (accessed September 9, 2018).

93 ICTY, *ICTY Manual on Developed Practices* (Turin: UNICRI, 2009), 38, http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (accessed September 9, 2018).

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of ways in which the ICC's own administrative components could contribute to a system of "proactive complementarity", examining "how to coordinate [national legal and judicial systems] so that their work is coherent and effective"[94]. These include providing training and support in national information handling and court management programs[95], as well as support for complex cases wherein participants in trials (in this case, witnesses rather than defendants) need to be transferred[96]. Arbia and Bassy note that the administrative resources of the ICC have been under-used in these cases—these are areas of potential improvement—and the UNWCC's history provides some indication of what such a system might look like.

Such technical assistance-based approaches would not merely be effective, but the UNWCC suggests they could also be cost-efficient—as Lord Wright noted, the UNWCC was the least expensive international commission known in history, a success that remains clear 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)[97]. Its total budget, approximately £47,955, represents approximately £1.66 million ($2.16 million) in today's money—a small fraction of the operating budget of major international criminal legal institutions. Stuart Ford, the former assistant prosecutor at the ECCC, estimates that UN member states had 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[98], by contrast. It even compares favorably to many legal capacity-building projects today—the EU's recent program of financial assistance to Bosnian-Herzegovinian lawyers to assist with war crimes processing was €14.86 million ($17.3 million) over five years[99].

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94 William Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice," *Harvard Journal of International Law* 49 (2008), 55.

95 Ibid., 58, 60–62.

96 Ibid., 59–60.

97 UNWCC, *History,* 1948, 134.

98 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," *Saint Louis University Law Journal* 55 (2011), 956–957.

99 Delegation of the European Union to Bosnia and Herzegovina & European Union Special Representative in Bosnia and Herzegovina, The EU releases 2.9

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In some ways, this is an unfair comparison—the UNWCC only aimed at bolstering a specific part of the legal system of the prosecuting countries in question, meaning that the majority of the costs would be borne by them rather than the international system. In addition, the UNWCC was operating under wartime, *in extremis* conditions that allowed it to marshal legal expertise more cheaply, and dealt with an earlier, less complex international legal landscape. Nonetheless, the fact that the UNWCC managed to operate a basic but effective centralized program of technical assistance —which, as Lord Wright noted, had its first meeting sheltering in the cellar of the Law Courts under cruise missile bombardment[100]—does suggest that it is an approach worthy of some consideration. Ford notes 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"[101]—by improving the ability of domestic courts to carry out these sorts of trials, using some form of centralized technical assistance agency, justice could be arrived at more cheaply.

Legitimation

Another way that the UNWCC model could inform contemporary international legal institutions would be through encouraging a culture of legitimation, ensuring that each member states' cases were reviewed and scrutinized by a panel of leading jurists from other members.

One of the most direct ways that the UNWCC interacted with trial systems was through the work of Committee I (Facts and Evidence) in legitimating cases. As discussed above, in the interests of demonstrating that there was a *prima facie* case for prosecution, each case was reviewed by a panel of eminent jurists, to ensure that there was a case to be answered for. This was by no means a "rubber stamp" process—the *History of the UNWCC* shows that 454 cases were withdrawn by member states, adjourned, or outright dropped by the Commission. In many other cases, those named in indictments were given provisional status as "suspects", rather than "accused", indicating a lower confidence interval due to lack of evi-

million EUR for war crimes processing in Bosnia and Herzegovina, December 12, 2015, http://europa.ba/?p=39322 (accessed September 9, 2018).

100 UNWCC, *Minutes of One Hundred and Thirty Fifth Meeting – M135* (March 31, 1948), 15–16.

101 Ford, "Leadership in International Criminal Law," 957.

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dence of specific suspects' wrongdoing, or a failure to properly indicate the legal basis for a charge.

This was typically used as a spur to encourage governments to improve the quality or specificity of their case files, and in many cases, this was exactly what happened. In the charge file of SS Lieutenant General Gunther Pancke, Committee gave the original dossier a "suspect" designation in October 1944, but upgraded him to a full "accused" in 1945 after Danish sources provided a selection of primary source reports identifying him for his role in mass killings, and the Commission merged its own investigation of Pancke with that of the Danish government[102]. In other cases, national offices provided their own revised and redrafted indictments containing more detailed material to upgrade this status—the initial Greek indictment of Major Paul Radomski, commander of the Haidari concentration camp, for example was extremely brief and provided few details, but the later follow-up—with specific details of the dates and crimes committed, as well as witness statements by specific named individuals, was merited an "accused" designation[103]. Without specific documentation from the Greek National Office it is difficult to say for sure, but it seems that receiving the UNWCC's imprimatur served as a spur to improve indictment reporting.

Thus, information-sharing and case-review by the Commission and its member states—spurred by Committee I's identification of areas of weakness and potential improvement in its cases—could improve the ability of states to bring effective charges in domestic settings. States did not necessarily *have* to participate in the Commission's processes, but the fact that they did, and, as seen in the Greek case above, put significant effort into improving their charge files, suggests that the possibility of international legitimacy from a country's peers did draw them to participate, improving the willingness of states to bring effective charges.

This sort of approach—international checking and legitimation of cases at a pre-trial stage—could be a significant boon for domestic genocide prosecutions. These have, in many cases, run into problems where there may have been a case to answer, but there was insufficient evidence to prove the charges listed, or another charge should clearly have been ap-

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102 UNWCC, *Danish Charges against German War Criminals (Lieutenant General Gunther Pancke)*, Registered No: 2868/D/G/2 / 9/Com/G/9. Case No. 2, April 11, 1946.

103 UNWCC, *Greek Charges against Germn War Criminals (Major Paul Radomski)*, Registered No: 384/Gr/G/6, Case No. 7 / G2/G/7, November 7, 1944 / May 1, 1946.

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plied based on the evidence available to the courts. The guilty verdict in the Kravica case in Bosnia-Herzegovina, for example, was annulled leading to a retrial in 2013, due to the court erroneously using the 2003 Penal Code retroactively[104], while in Kosovo, the Vukovic case was overturned and subject to retrial not only because of poor trial standards, but also because of an inadequately precise and poorly proven charge of genocide, where a charge of war crimes would have been more clearly provable[105]. In both cases, flaws early in the trial process led to verdicts being overturned, often in part due to extensive international pressure, leading to extensive retrials. These could have been minimized with some degree of Committee I-style "sense checking", in which states prosecuting major crimes (and, being in post-conflict situations, also likely dealing with disrupted legal infrastructure) could submit their cases to pre-trial review to ensure that there was at least a *prima facie* case to answer. Indeed, the ICTY seems to have over time developed a similar procedure in its own (albeit international) process, describing a similar (but informal) "peer-review" process for indictments, which "helped produce a consistent approach … often exposed problems with an indictment [and] highlight[ed] the need for better evidence or further investigation, and produced suggestions for improvement"[106]. Such an approach could be broadened to internationally-supported domestic trials for major crimes, much as the UNWCC did, with similar results.

Persuading states to participate in such a process is likely to be difficult —since it would represent a ceding of judicial independence to external scrutiny, which might not approve an indictment—but by reducing the costs of retrial, formalizing a process of judicial review at an earlier stage, reducing the likelihood of politically unpopular "failed trials", and providing international approval for *prima facie* cases, states could be persuaded to participate in the process. In addition, such an approach might also help ease tensions surrounding extradition and transfer of defendants between countries that might otherwise be suspicious about extraditing their citizens to other states, on the grounds that they did not believe they would

104 Justice Report, *Kravica – News, Analysis and Opinion: Justice Report* (2013), http://www.justice-report.com/en/cases/kravica-news-analysis-and-opinion/29/2#o29 (accessed September 9, 2018).

105 Michael Hartmann, *Re: 12-year prison sentence in Kosovo war crimes trial*, University of Buffalo JUSTWATCH Listserv (2002), https://listserv.buffalo.edu/cgi-bin/wa?A2=ind0210&L=JUSTWATCH-L&D=0&P=281955 (accessed September 9, 2015).

106 ICTY, 2009, 39.

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receive a fair trial. By increasing transparency surrounding the pre-trial process, and by giving states a stake in legitimation-based processes to ensure that their citizens received a fair and effective trial and were not simply facing illegitimate charges in a kangaroo court, this could improve the likelihood of trials going ahead in the first place. In the UNWCC's case, the reality fell short of the ideal, as we have seen, given the difficulty extraditing accused war criminals from US custody, but this could still prove useful, especially in post-conflict situations where former belligerent countries are wary about extraditing accused war criminals to each other. This is an issue that has been particularly noted in the former Yugoslavia, for example, with Human Rights Watch noting in 2006 that post-conflict war crimes prosecutions were severely hampered by extradition difficulties in Republika Srpska[107] and Bosnia-Herzegovina[108]. While providing a forum in which they could review each others' cases to indicate that there was a *prima facie* case would not solve every problem with this—and might risk tit-for-tat disruption of trials, especially since members would not be bound together by the intense interstate bonds produced by the common experience of fighting World War Two together—such a model might reassure states and national publics about the prospect of extraditing their citizens, by allowing them oversight enough to tell that there was not simply a show trial awaiting them. This would encourage recalcitrant states to overcome domestic opposition to war crimes cases. In a similar way, this might also reduce the likelihood of international support for war crimes prosecutions from deadlocking in venues such as the UNSC, where one state or another might veto prosecutions; while the risk of bad-faith obstructions (to protect geopolitical allies) might be increased by adding more areas for disruption, it would provide states genuinely concerned that allied states were not receiving a fair trial more opportunities to ensure cases were fairly grounded without blocking the whole prosecution process.

Finally, pre-trial legitimation of indictments might help increase trial speed. Drawn-out trials of perpetrators accused of major crimes are often associated with negative results; they can often result in the deaths of elderly perpetrators while on trial (as in the cases of Slobodan Milosevic and

107 Human Rights Watch, *A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic* (2006), https://www.hrw.org/reports/2006/bosnia0306/bosnia0306web.pdf (accessed September 9, 2018), 36–37.

108 Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina* (2006), https://www.hrw.org/reports/2006/ij0206/ij0206web.pdf (accessed September 9, 2018), 20–21.

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Efrain Rios-Montt in the former Yugoslavia and Guatemala, and 43 former members of the Derg government in Ethiopia across the ten years of the trial[109]), additional trauma for victims as they deal with drawn-out uncertain legal processes, and, as mentioned above, greater expense. These issues were recognized by the UNWCC—while, as French representative M. Gros noted, "[al]though the notion of swift justice is found in manuals of military law, "justice" is something that does not admit of qualifying adjectives"[110], the organizers of the Commission widely noted that speedy trials, brought with as little delay as possible, were desirable. They would reduce the risks of vigilante violence, reduce the risk of the "escape of the guilty"[111], and ensure that justice was actually done rather than dragging out over time. Many ensuing UNWCC-supported trials were perhaps too quick for modern standards of criminal justice (many lasting between four and five days; trials of major criminals such as Amon Goeth (Commandant of Plaszow Camp) and Rudolf Höss (Commandant of Auschwitz) lasting a little longer, and even more complex trials such as the Belsen Trials, lasting 54 days in court[112]), and many of these would be unacceptable for modern human rights or legal commentators—Goeth, for example, was executed eight days after he was found guilty, without appeal. Nonetheless, this does suggest that some sort of pre-trial, legitimizing body that spurred states to gather strong indictments that stood up to international scrutiny could be helpful to the prosecutions of major criminals, by enabling the swifter and more engaged process of domestic justice. Reducing the needs for trials to be "reset", and assisting preparatory work on trials, could therefore both be useful.

Verification

As mentioned above, the UNWCC's primary role was in coordinating indictments, reviewing early stage cases, and providing a centralized planning structure for the decentralized system of national offices, domestic judicial systems, and military courts that made up the wartime and postwar

109 Edward Kissi, *Revolution and Genocide in Ethiopia and Cambodia* (Lanham: Lexington Books, 2006), 103.
110 Dan Plesch and Shanti Sattler, "A New Paradigm of Customary International Law," *Criminal Law Forum* 25.1 (2013), 28–29, n39.
111 UNWCC, *History,* 109.
112 UNWCC, *Law Reports of Trials of War Criminals: Volume I* (London: His Majesty's Stationery Office, 1948), 1–21.

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criminal justice system. As well as this function—that its then-chairman, Lord Wright described as akin to a "committing magistrate"[113]—it also sat at the center of a large-scale system of information-gathering, in the work of its Research Office (and the briefings it provided), as well as in bodies like CROWCASS.

Many of these initiatives have been replicated or superseded by present-day initiatives. With modern international human rights bodies—such as the Office of the High Commissioner of Human Rights, and the wealth of international human rights NGOs that support their work—and digital communication, there is less need for a centralized clearinghouse of information on suspected war criminals and human rights violations. In addition, bodies such as Interpol are more active in tracking alleged perpetrators across different jurisdictions, and ensuring that perpetrators are tracked down. This is a trend that the ICC has sought to develop – the Court's LEN (Law Enforcement Network) project, for example, aims "to pool resources, share relevant information and identify areas for potential judicial cooperation"[114], bringing together Interpol, domestic, and international legal and law enforcement officials to build cooperation to track down suspects and support apprehension and extradition.

Even so, this is an area where the UNWCC's more ambitious approach could prove valuable, at least in terms of setting a high bar. The advent of the digital age, and increased NGO activity, has not obviated the value of informational clearinghouses to centralize and collect information from varieties of sources, to support domestic trials. In a different context, resources like the UNHCR's Refworld resource to collect documentation on human rights abuses leading to refugee flight in a range of countries, for example, and is heavily used in refugee law. While Interpol and the LEN do carry out extensive work tracking those responsible for major crimes, they do not do so at the ambitious scale that Simpson noted with CROWCASS—in 2011, for example, LEN had only trained 32 officials from 14 states, over a period of "years"[115]. Even without conflicts on the scale of the Second World War, modern conflicts often result in large numbers of atrocity crimes suspects fleeing across national boundaries, meaning that the demand for a robust system of suspect tracking and information exchange remains.

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113 UNWCC, *National Offices Conference*, 1945, 7.

114 ICC Assembly of States Parties, *Report of the Court on complementarity* (2011), 9, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-23-ENG.pdf (accessed September 9, 2018).

115 ICC Assembly of States Parties, 2011, 9.

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Conclusion

As we have seen, major, internationalized prosecutions of "archcriminals" were not the only realization of wartime and postwar thinking on international criminal justice. Predating, running concurrently with, and continuing after the International Military Tribunals in Nuremberg and Tokyo was a system of domestic prosecution of a wide range of defendants—the United Nations War Crimes Commission. Little-known today—in part because of its politicized closure and the sealing of its archives—it coordinated and supported trials on a much grander scale than the IMT, addressing a wide range of crimes and developing legal thinking considerably. As such, by studying the UNWCC's activities, and understanding postwar war crimes trials in light of the processes it set in motion, we can gather a more complete and nuanced understanding of the legacy of Nuremberg as simply one part of a broader program of accountability for atrocity crimes.

This account is not just of historical interest, however, but is relevant to scholars and practitioners of international criminal law today. The UNWCC provides an innovative approach to the implementation of positive complementarity, increasing the capability (and in some cases, willingness) of states to justly prosecute major crimes in domestic settings; by studying it, contemporary observers can draw upon "worked examples" of such measures in practice. While international criminal law patterned after the International Military Tribunals at Nuremberg and Tokyo remains a key part of international criminal justice, the UNWCC's history shows how international courts focusing on top-level perpetrators and operating at significant expense do not have to be the be-all and end-all of international criminal justice; indeed, while the Nuremberg trials were running, domestic courts drawing on international legitimation, technical/administrative assistance, and information were prosecuting a wide range of accused war criminals. Could these form models for organizations today?

We should be cautious, but optimistic, about the potential of the UNWCC as a model for international criminal justice, and a complement to a Nuremberg-inspired model. As we have noted elsewhere, many of the conditions that made it particularly effective do not pertain today[116]; the intense camaraderie of the Allies in the Second World War (patchy as it may

116 Dan Plesch, Thomas Weiss, and Leah Owen, "UN War Crimes Commission and International Law: Revisiting World War II Precedents and Practice," Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence* (2015), 95.

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have been), confluence of legal and human rights expertise, and the unconditional surrender of the Axis states are a fairly unique historical moment. In addition, as noted in the second section of this chapter, the idea of international assistance and coordination for domestic trials is one that has already been realized, to varying extents, by different states; it is important to avoid "institutional bloat" and redundant efforts to realize positive complementarity. Nonetheless, there are four ways in which the UNWCC's legacy could be particularly relevant to contemporary practice:

Firstly, by drawing together a wide range of states, under inauspicious circumstances, to organize a pioneering program of complementary justice responsible for organizing more trials than all other international tribunals since, the UNWCC's work can serve as an inspiration for future efforts. In its pioneering legal thinking on prosecution of sexual violence, joint criminal enterprise and command responsibility, and crimes against humanity, it could help the work of modern tribunals. UNWCC thinking and policies have already been used in an Amicus brief in the prosecution of Hissène Habre, and the ECCC in Cambodia, but greater mainstreaming of its archival record could assist a wide range of prosecutions today, especially ones for crimes predating the ICTR and ICTY.

Secondly, the UNWCC offers an example of cheap, effective technical assistance, focusing on administrative support. While technical support today often takes the form of advice on questions of law, and personnel, the UNWCC's impact in fields as prosaic as standardized reporting forms and the sharing of best practice around pins in maps should not go understated.

Thirdly, the UNWCC provided a rigorous system of legitimation and "peer review" of indictments. Today, such a program could increase transparency, avert problems of legal basis that might endanger trial outcomes or fairness, and even encourage trust in fraught post-conflict regions.

Fourthly, the UNWCC demonstrated the value of centralized information pooling and coordination, especially for tracking suspects, witnesses, and evidence between different jurisdictions.

Exactly what an organization building upon these principles would look like is difficult to say, and requires investigation beyond what is outlined here. Nonetheless, these represent often-overlooked avenues of potential development in modern-day international criminal law, and are a reminder of the potential benefits of positive complementarity. By the end

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of their lifespans, both the ICTY[117] and ICTR[118] began to approach several similar conclusions about the benefits of complementarity, and recorded them in their best/developed practice documents—but the UNWCC represents an organization *built* on such principles, and is thus an important source for future development in this field that should not remain forgotten.

During the Second World War—at a time when Allied victory was still very much in doubt—countries from China to Norway, and Yugoslavia to the United States condemned Axis atrocities, and committed themselves to seeking justice and accountability for them—to "the uttermost ends of the earth", if necessary. They did not only seek to do so, however, in a centralized, international court that only prosecuted countries or heads of state, but also called perpetrators of every stripe to answer for their acts in domestic courts, closer to the crimes they were accused of committing. In this way, they prefigured modern notions of positive complementarity, blending international support and domestic trial structures to great effect. By learning from this, and implementing it in contemporary thinking and practice on international criminal justice, we can ensure that the legacy of wartime criminal justice—not just of Nuremberg—can be properly realized today.

117 ICTY, 2009.

118 International Criminal Tribunal for Rwanda Office of the Prosecuto, Complementarity in Action: Lessons learned from the ICTR Prosecutor's referral of International Criminal Cases to national jurisdictions for Trial (2015), 24–25, https://reliefweb.int/sites/reliefweb.int/files/resources/150210_complementarity_in_action.pdf (accessed September 9, 2018).

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