
When Institutional Design Is Flawed: Problems of Cooperation at the United Nations War Crimes Commission, 1943–1948

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Abstract

The United Nations War Crimes Commission (UNWCC) (1943–1948) was the principal multilateral institution set up by the Allied powers to consider evidence of war crimes committed by the enemy in World War II. From the outset, the UNWCC's main purpose was to achieve post-war 'preparedness' in relation to war crimes, so that the delays and mistakes made in trying suspected German war criminals after World War I were not repeated. Although the UNWCC was originally conceptualized as a fact-finding body, it did not have its own investigatory arm or the resources to undertake investigations. Rather, the evidence of war crimes was meant to be gathered by each member nation and then submitted to the UNWCC for consideration. The limited flow of information to the UNWCC in 1943–1944, however, made it clear that this self-reporting system was flawed, putting at risk the goal of preparedness. This article first examines how problems of national level UNWCC collaboration were recognized and the concerns about information flow that were articulated. Second, it examines the unsuccessful proposal put forward by the Australian representative, Lord Wright of Durley, to modify the institutional design of the UNWCC to incorporate an investigatory function. While the UNWCC achieved far too much in its short lifespan to be considered a failed organization, the flaws in its institutional design created collaboration problems during the war and also ensured that it was too easily sidelined by the Allied governments after the war.

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1 Introduction

The United Nations War Crimes Commission (UNWCC) is, perhaps, the prime example of international cooperation in the area of war crimes during and after World War II.¹ The creation of an international body to ‘investigate’ evidence of apparently unprecedented levels of war crimes in World War II was first publicly announced in the United Kingdom (UK) and in the United States (USA) on 7 October 1942. President Franklin Delano Roosevelt, for instance, announced:

With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to co-operate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes. ... It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organised murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith.²

Despite the importance publicly ascribed to the tasks of this new commission, the United Nations Commission for the Investigation of War Crimes, or the United Nations War Crimes Commission as it soon became known, was not constituted in London until a year later, on 20 October 1943.³

The UNWCC was remarkable for a number of reasons, not least of which was its extraordinarily small budget; it was claimed in 1948, as the UNWCC wound up, that it had been the ‘least expensive International Commission known in history’.⁴ More importantly, its establishment purportedly demonstrated the concerted political will and cooperation of numerous countries, including various governments then in exile, to work jointly on the issue of the war crimes of the Axis powers. Eventually, there were 17 member nations: Australia, Belgium, Canada, China, Czechoslovakia, Denmark, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, the UK, the USA and Yugoslavia. Noticeably, the Soviet Union declined to join, as the other governments would not agree to each Soviet state being separately represented.⁵

In creating the UNWCC, the Allied powers’ principal aim was to cooperatively formulate policies and practices in anticipation of – after the war – the efficient and effective prosecution of the Axis perpetrators of war crimes. Looking back on the UNWCC’s beginnings, barrister D.E. McCausland, KC, reflecting a widely held view at the time, wrote that its key purpose had been to ensure that the anticipated post-war

¹ ‘United Nations’ was the formal name for the Allied powers fighting against the Axis powers following the Declaration by United Nations of 1 January 1942 and is not to be confused with the post-war United Nations. See *Yearbook of the United Nations* (1947), Part 1: 1. Origin and Evolution, at 1.

² Roosevelt’s statement was published in War Cabinet, Memorandum by the Lord Chancellor, ‘United Nations War Crimes Commission’, Doc. W.P. (44) 294, 2 June 1944, Annex no. 2, file LCO2/2976, National Archives (TNA). See also *History of the United Nations War Crimes Commission and the Developments of the Laws of War (History of the UNWCC)* (1948), at 105–106.

³ On the establishment of the United Nations War Crimes Commission (UNWCC), see Kochavi, ‘Britain and the Establishment of the United Nations War Crimes Commission,’ 107 *English Historical Review* (1992) 323.

⁴ *History of the UNWCC*, *supra* note 2, at 134.

⁵ On the Soviet Union, see *ibid.*, at 111–112.

trials of enemy war criminals did not ‘degenerate into a farce’, as they did after World War I due to a ‘lack of preparation’.⁶ As then chairman and Australian representative Lord Wright of Durley explained in the House of Lords in March 1945, the members of the Commission were ‘animated by a desire to achieve justice according to the forms of justice, and have a profound desire to achieve it so that this time there shall be no fiasco, no failure of justice, no immunity granted to these malefactors’.⁷

The primary wartime tasks of the UNWCC were thus initially identified as the examination of the evidence of war crimes; the compilation of lists of persons wanted for trial as war criminals; and liaison with member governments as to whether the evidence was sufficient to warrant further action. The point of doing so at an international level might seem superfluous when the vast majority of post-war trials went on to be conducted at the national level, but, as Lord Wright pointed out, the UNWCC was intended to provide an ‘impartial judgment’ on each case. In his words, the UNWCC’s putative impartiality made it ‘impossible to say when arrests are made of persons listed by the Commission that they were made on the partial unchecked statement of a single government or nation. This is a vital element in the whole scheme which aims at justice not revenge’.⁸ Eventually, the UNWCC’s remit was expanded to also include the consideration of questions of law, method and policy regarding war crimes and international criminal law and the making of formal recommendations to member governments. A number of very significant legal issues were thus debated in detail in the UNWCC, including whether certain acts were war crimes, the status of certain defences (such as military necessity and obedience to superior orders) and whether a United Nations or International War Crimes Court should be established.⁹

Yet, as was evident in the years after the UNWCC was established, even the ‘profound desire’ on the part of member nations to work together to bring war criminals to justice without undue delay after the war – a commendable ambition – could not always overcome the difficulties of cooperation in practice. Australia played a particularly important role at two critical moments in the life of the UNWCC. First, Lord Atkin, Australia’s representative since the founding of the UNWCC, passed away in June 1944 and had to be replaced at a time of great concern – both internally within the UNWCC and externally – for the progress being achieved towards the goal of war crimes preparedness. Lord Atkin’s passing and the search for a new Australian representative, while unrelated, opened up opportunities for discussion among Australian officials about how the UNWCC could and should be improved so that it achieved its overarching purpose of preparedness. Second, Lord Atkin’s replacement as the

⁶ D.E. McCausland, *The War Crimes Commission: A Review*, September 1945, at 1, file A2937, 274, National Archives of Australia (NAA).

⁷ United Kingdom (UK), *Parliamentary Debates*, House of Lords, vol. 135, no. 36, 20 March 1945, at 677 (Lord Wright), file A2937, 273, NAA.

⁸ Chairman’s Introductory Speech, printed in National Offices Conference, Royal Courts of Justice, London, Minutes and Documents, 31 May–2 June 1945, Annex VI, at 7, file A10953, 17, NAA.

⁹ See, e.g., Draft Convention for the Establishment of a United Nations War Crimes Court, Doc. C.50, 30 September 1944; Explanatory Memorandum to Accompany the Draft Convention for the Establishment of a United Nations War Crimes Court, Doc. C.58, 6 October 1944, both file A2937, 284, NAA.

Australian representative, Lord Wright, began his tenure in late 1944 by forcefully advocating for reform to the UNWCC. Although Lord Wright's efforts were not particularly successful, the resignation of Sir Cecil Hurst, the British representative and chairman of the UNWCC at the end of 1944, and the withdrawal of Herbert C. Pell, the American representative, opened up another opportunity for Lord Wright. Lord Wright succeeded to the chairmanship in January 1945, just as members' minds seriously began to turn to the precise mechanisms and procedures by which suspected major and minor war criminals should and would be tried in both theatres of the war.

This article examines, first, how the institutional design of the UNWCC as an information receiving and assessment body, rather than as an investigatory body, enabled problems of cooperation at the national level as well as the concerns that were articulated both within and without the UNWCC about the potential impact on the UNWCC's goal of war crimes preparedness. Second, it explores the unsuccessful proposal put forward by Lord Wright to modify the institutional design of the UNWCC to overcome the problems of cooperation by incorporating an investigatory function into the UNWCC. Somewhat fortunately for Lord Wright, who was soon in charge, other factors soon spurred the flow of war crimes information from member nations to the UNWCC. The UNWCC achieved far too much in its short lifespan to be considered a failure, as the Allied governments were certainly better prepared for war crimes prosecutions than they were after World War I. However, the flaws in the UNWCC's institutional design created problems for member cooperation during the war, while also ensuring that the UNWCC would be too easily sidelined by the Allied governments after the war.

2 Institutional Design and the UNWCC

The design of the UNWCC in terms of institutional structure, governance and membership, operation and financing was not that dissimilar to other multilateral institutions in this period, albeit its remit was narrowly focused on war crimes. The UNWCC can be regarded as a successor organization to the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919 Commission) and, during World War II, it had institutional and interpersonal links to the London International Assembly and the Commission for Penal Reconstruction and Development.¹⁰ It was also a policy-based precursor organization to the post-war Far Eastern Commission, which also had a War Criminals Committee, and to the significantly larger inter-Allied United Nations. Indeed, the UNWCC briefly shared quarters with the Preparatory Committee of the United Nations in London. The UNWCC, therefore, was part of a chain of multilateral institutions in the 20th century that dealt with international criminal law, albeit one often overlooked retrospectively in favour of the International Military Tribunal at Nuremberg and, to a lesser extent, the International Military Tribunal for the Far East (IMTFE).

¹⁰ On these connections, see 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, 1941–1944', 25 *Criminal Law Forum (CLR)* (2014) 45.

The UNWCC functioned as an autonomous international organization financed by contributions from member nations, including Australia and the UK, which provided the premises and outfitting for free.¹¹ As such, the UNWCC was a ‘creature of the various Allied Governments’ that were members and was ‘responsible to them, and to them alone’.¹² Organizationally, the UNWCC was headed by a chairman, consisted of representatives from each member nation and was supported by a small Secretariat headed by a secretary-general.¹³ Although the representatives did routinely meet as a full commission, three principal committees were set up to deal with different matters: a Committee on Facts and Evidence (often referred to as Committee I), an Enforcement Committee (Committee II) and a Legal Committee (Committee III).

International relations theorists have suggested that the power of multilateral institutions comes from three main sources: delegated authority, moral authority and expert authority. Delegated authority is the power to represent the collective will of its member states. Moral authority is the power to command legitimacy as the international decision maker with respect to a particular domain. Expert authority is the power to gather technical or specialized knowledge so as to set the terms of debate over a particular issue.¹⁴ The UNWCC’s exercise of authority in the field of international war crimes was undermined by certain institutional weaknesses, not the least was that to undertake every action regarding war crimes expected of it – and there were massive expectations during the war – it would need a ‘large staff and adequate premises, and it had always been short of both’.¹⁵ The UNWCC went through changeovers of key personnel in the Secretariat at various points and no less than three separate premises during its lifespan. More crucially, with 17 member nations and, in some cases, a revolving door of national representatives to the UNWCC, and numerous contentious issues of law and procedure up for debate, there were always going to be problems of cooperation, including simple personality clashes. Interestingly, the most significant problem was not the one between nations, as might be expected, although there were plenty of those, but, rather, one between individual member nations and the UNWCC, often to the great exasperation of national representatives to the UNWCC who were working hard to make the UNWCC work. This problem was, at its core, the outcome of institutional design flaws, which affected its ability to command international authority.

The main institutional design problem of the UNWCC was that, although it was originally conceptualized as an investigatory body – hence, the original name of the United Nations Commission for the *Investigation* of War Crimes – when it was

¹¹ On the legal status of the UNWCC, see E. Schwelb, *The Legal Status of the United Nations War Crimes Commission*, Doc. Misc.7, 7 January 1946, file A2937, 272, NAA.

¹² UK, *Parliamentary Debates*, *supra* note 7, at 676 (Lord Wright).

¹³ A list of significant personnel involved with the UNWCC can be found in *History of the UNWCC*, *supra* note 2, Appendix 1. Detailed lists of Secretariat staff were also occasionally prepared. See the lists dated August and October 1947, file A2937, 306, NAA.

¹⁴ M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004), at 25; J. Samuel Barkin, *International Organization: Theories and Institutions* (2006), at 23–24.

¹⁵ National Offices Conference, Minutes and Documents, *supra* note 8, at 16.

constituted in 1943, it did not have the organization, staff or other resources to be an investigatory body. Indeed, as the UNWCC lacked its own investigatory arm for fieldwork, it is more accurately described as an information assessment body.¹⁶ As Australian representative Lord Atkin noted at the inaugural meeting to establish the commission on 20 October 1943, even the term ‘fact-finding Commission’, which was then being used to describe the UNWCC, was ‘inaccurate and rather dangerous’, as only courts or tribunals could legally ‘find’ facts.¹⁷ Instead of the UNWCC undertaking its own investigations, the bulk of war crimes information was supposed to be voluntarily reported to the UNWCC by separate ‘National Offices’ set up by individual member nations. In Australia, for example, the designated National Office was the Department of External Affairs. This organizational design showed, as Carsten Stahn has recently concluded, ‘a level of interaction between international and domestic authorities that was unprecedented at the time’.¹⁸

As Lord Wright later recognized, however, the obvious consequence of reliance on an institutional design of self-reporting was that if, for any reason, the National Offices ‘failed to perform their duty properly in collecting material for charges and reporting charges to the Commission, the whole system would break down or be ineffective’.¹⁹ Lord Wright observed in July 1945 that he had had ‘many headaches’ since becoming chairman in January.²⁰ It seemed to him to be the ‘immeasurable moment for the future of mankind’ that it be established ‘before all the world that the rule of law exists among nations, that certain things are international crimes for which the guilty individuals can and should be punished, that now is the occasion and opportunity to demonstrate this by a practical and unmistakable example’.²¹ Yet he had ‘found in some quarters actual opposition and in very many coolness’ to this idea.²² Indeed, he thought that ‘[e]ach member of the Commission knows that some National Offices have been eager and efficient, but some very much the reverse’.²³

This argument about institutional design differs from that offered by a number of previous scholars in relation to the operational analysis of the UNWCC. Arie Kochavi,

¹⁶ UNWCC representatives and staff did venture forth into Europe to inspect, e.g., liberated German concentration camps. See Visit of Delegation to Buchenwald Concentration Camp in Germany, Report adopted by the Commission on 3 May 1945, Doc. C.101, 5 May 1945, file A2937, 286, NAA. UNWCC representatives were also observers at national and international war crimes trials in Europe and in the Pacific. UNWCC Chairman and Australian Representative Lord Wright, for instance, accepted Australia’s invitation to attend the opening of the International Military Tribunal for the Far East in 1946. See cablegram from the External Affairs Officer, London, to the Department of External Affairs, 7 March 1946, file MP742/1, 336/1/408, NAA. However, these trips only ever occurred on a piecemeal, ad hoc basis and never constituted a regular part of the UNWCC’s operations.

¹⁷ *History of the UNWCC*, *supra* note 2, at 122. For the minutes of this meeting, see file LCO2/, 2974, TNA.

¹⁸ Stahn, ‘Complementarity and Cooperative Justice Ahead of Their Time? The United Nations War Crimes Commission, Fact-Finding and Evidence’, 25 *CLR* (2014) 223, at 225.

¹⁹ Chairman’s Introductory Speech, *supra* note 8, at 2.

²⁰ Lord Wright, Punishment of War Criminals, speech delivered at the Czechoslovak Institute, London, 25 July 1945, file A1066, H45/580/1, PART 1, at 1, NAA.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, at 2.

for example, blames the UNWCC's failures on political intransigence by member states as well as what he calls 'unavoidable objective difficulties' – namely, the difficulties of obtaining precise information about war crimes while Allied territories were still occupied by the Axis powers.²⁴ A 2014 symposium on the UNWCC focused largely on political and legal issues that confronted the UNWCC, with little regard for the UNWCC's internal deficiencies.²⁵ Only M. Cherif Bassiouni has recognized the centrality of the UNWCC's institutional limitations, including the lack of 'an investigatory staff, adequate support staff, or sufficient funds to conduct its work'. Unfortunately, he goes into little detail and analysis of the institutional design flaws.²⁶

Issues of multilateral ineffectiveness are not, of course, unique to the UNWCC. Several comparable international organizations were beset by similar problems, with varying outcomes. The 1919 Commission, for example, was hamstrung by its lack of prosecutorial authority. Established at the end of World War I, the 1919 Commission consisted of 15 members appointed by the five Allied powers – the USA, the British Empire, France, Italy and Japan – as well as five other states deemed to have a special interest – Belgium, Greece, Poland, Romania and Serbia. The Commission was tasked with inquiring into, and reporting on, the responsibility of both the instigators of the war and those who had violated the laws and customs of wars, with a view to eventual prosecution.²⁷ After two months of investigating incidents involving more than 20,000 persons, the Commission settled on a list of 896 alleged war criminals. The Commission lacked, however, any legal authority to prosecute. Instead, it was left to the Allies to form a separate prosecutorial body. For largely political reasons, these plans for an international war crimes tribunal were abandoned after the war, replaced by piecemeal national war crimes trials. For example, just 45 of the 896 individuals named by the Commission were tried at the Leipzig War Crimes Trials of 1921, held under the auspices of the German national justice system.²⁸ The Commission was thus unable to ensure its investigations led to prosecution, suffering from what Bassiouni terms an 'institutional vacuum between the investigation and prosecution stage'.²⁹ It is these highly criticized German trials to which Lord Wright referred, when

²⁴ Kochavi, *supra* note 3, at 323–349; A.J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (1998), at 101.

²⁵ Schabas *et al.*, 'The United Nations War Crimes Commission and the Origins of International Criminal Justice', 25 *CLR* (2014) 1; Goldstone, 'United Nations War Crimes Commission Symposium', 25 *CLR* (2014) 9; Plesch and Sattler, 'A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and Its Associated Courts and Tribunals', 25 *CLR* (2014) 17; Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court', 25 *CLR* (2014) 171; Oette, 'From Calculated Cruelty to Casual Violence: The United Nations War Crimes Commission and the Prosecution of Torture and Ill-Treatment', 25 *CLR* (2014) 291. Stahn notes the absence of any direct investigative capacity but sees the UNWCC's concomitant reliance on cooperation with the National Offices as a core strength of the UNWCC's model of international criminal justice. See Stahn, *supra* note 18.

²⁶ M. Cherif Bassiouni, *Introduction to International Criminal Law* (2012), at 550.

²⁷ 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14 *American Journal of International Law (AJIL)* (1920) 95.

²⁸ *Ibid.*

²⁹ Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780', 88 *AJIL* (1994) 784, at 786.

he stated in March 1945 that, this time, there ‘shall be no fiasco, no failure of justice, no immunity granted to these malefactors’.³⁰

In contrast with the 1919 Commission, the League of Nations Permanent Mandates Commission (PMC) enjoyed much greater legal latitude in its work. Beginning its life in Geneva in October 1921 and ending with the onset of World War II, the PMC oversaw the scheme by which formerly German and Ottoman territories in Africa, the Middle East and the Pacific were entrusted to the various Allied powers. Authorized under the League Covenant to advise the League Council ‘on all matters relating to the observance of the mandates’, the PMC supervised the administration of the mandates through a complex process of review.³¹ The PMC first examined the annual reports submitted by the mandatory powers, along with any relevant petitions. The PMC then convened in Geneva with a representative of the mandatory power. After private deliberations, the PMC completed its report, to which the mandatory powers were allowed to respond, before the report was sent to the League Council to make its recommendations.³² In recognition of the political sensitivity of its work, the nine members of the PMC were all sourced from the non-mandatory powers, bar the early director, Philip John Baker. Overall, as Susan Pedersen persuasively argues, the PMC ‘proved a more independent body than anyone could have predicted’. The result of an exceptionally stable and close-knit membership – a total of just 28 individuals served as members across the two decades of its active existence – coupled with a widespread commitment by mandatory powers to a sort of textualism that ensured compliance with League processes.³³ This outcome occurred despite the fact that the PMC shared many of the institutional limitations of the UNWCC, including a relatively small staff and the lack of any means of visiting the mandatory territories.

Like the UNWCC, the Far Eastern Commission (FEC) – formed in the wake of Japan’s surrender in World War II – proved susceptible to the interests and whims of its member states. Composed of representatives from 11 Allied nations – Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the UK, the USA and the Soviet Union – and headquartered in Washington, DC, the FEC was formed to oversee and advise on the post-war administration of Japan by the supreme commander of the Allied Powers, General Douglas MacArthur, including on the international military trial of Japanese war criminals.³⁴ In the opinion of George Hubbard Blakeslee, political advisor to the chairman of the FEC, the first two years of the FEC’s existence were largely successful, the result of member states reaching a general consensus on how to manage the occupation.³⁵ In later years, however, the FEC was often delayed by the

³⁰ UK, *Parliamentary Debates*, *supra* note 7, at 677.

³¹ Covenant of the League of Nations, contained in the Treaty of Versailles, Avalon Project, Yale University, available at <http://avalon.law.yale.edu/imt/parti.asp> (last visited 16 March 2017).

³² S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (2015), at 66.

³³ *Ibid.*, at 63.

³⁴ US Department of State, *Activities of the Far Eastern Commission: Report by the Secretary General* (1947), at 28.

³⁵ G.H. Blakeslee, *The Far Eastern Commission: A Study in International Cooperation: 1945 to 1952* (1953), at 223–224.

lack of adequate instructions provided by national governments to their respective delegates, and members frequently clashed over policy decisions, with many criticizing the USA for using the executive authority of the supreme commander to bypass the FEC.³⁶ Communication between members and the supreme commander was further hampered by the FEC's location in Washington, some 7,000 miles away from Japan.³⁷ By February 1949, the FEC issued a directive stating that no further trials for Class A war crimes were to be commenced, while fixing dates for the conclusion of prosecution for Class B and Class C crimes. The FEC was finally disbanded in April 1952.³⁸

Keeping in mind that the UNWCC was an Allied organization, and it can probably be assumed that no nation joined it simply to subvert it, why would a nation sign up to an international organization only to weaken its authority by non-compliance with the self-reporting requirements? Certainly, in some nations, particularly those under German or Japanese occupation, governments were often working in exile with limited resources and access to information until liberation. But this does not account for non-compliant nations that were not occupied, such as the UK, the USA and even Australia itself. In those nations, government officials sometimes exhibited disinterest in the UNWCC or, even worse, actively worked against the UNWCC, including by deliberately undermining their own representatives. American representative Herbert C. Pell, for instance, was hampered from the outset by a lack of support from influential figures in the US State Department, which eventually led to his unwilling, forced resignation from the UNWCC, thus clearing the way for Lord Wright to take the leadership.³⁹ Alas, the varied motives and reasons for why some governments were less compliant or non-compliant with the UNWCC cannot be covered in this article, as they are complex and remain to be explored at length. It is unquestionable, however, that the institutional design of the UNWCC enabled cooperation problems in terms of information flow from member nations to the UNWCC.

3 Identification of Cooperation Problems

Critics within and outside the UNWCC began to take note of a problem of nations' cooperation with the UNWCC as early as 1944, only months after its official establishment. The British Lord Chancellor, Lord Simon, was demonstrably concerned about the UNWCC's apparent lack of progress in accumulating and assessing evidence of Axis war crimes. Having personally announced the Allied intention to form the body that became the UNWCC in the UK in October 1942, Lord Simon had already chafed at the long delay until the UNWCC was constituted in October 1943, warning that he

³⁶ *Ibid.*, at 230–231. See also Y. Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2008), at 12.

³⁷ Blakeslee, *supra* note 35, at 234–238.

³⁸ *Ibid.*, at 234.

³⁹ On Pell and his struggles with the US State Department, see Cox, 'Herbert C. Pell, U.S. Representative on the United Nations War Crimes Commission', in J. Simon Rofe and A. Stewart (eds), *Diplomats at War: The American Experience* (2013) 151; Cox, 'Seeking Justice for the Holocaust: Herbert C. Pell versus the US State Department', 25 *CLR* (2014) 77.

had been ‘so anxious lest Parliamentary questions should arise which would seem to catch us napping’ on the issue of war crimes.⁴⁰ In June 1944, Lord Simon advised the War Cabinet in London that, although the UNWCC had been operating since October 1943, some member nations, including the USA, had not yet even established their National Offices.⁴¹ Moreover, up until the end of March 1944, only about 70 cases of war crimes had been transmitted by various National Offices to the UNWCC, all concerning crimes committed in the European theatre. Of these 70, Lord Simon observed, ‘half are incomplete, and a large number of the cases can only be described as trivial in character’.⁴² He thought that the prospect of the UNWCC being ready at the end of the war to institute war crimes proceedings was, given the ‘present working’ of the Commission, ‘exceedingly meagre’.⁴³ He attributed the ‘paucity’ of results to ‘an unduly narrow construction’ of the UNWCC’s terms of reference, which was discouraging member nations from transmitting information about war crimes to the UNWCC unless the evidence pointed to ‘some particular enemy individual being responsible’.⁴⁴

A number of national representatives to the UNWCC were similarly concerned about the UNWCC’s progress. The chairman, Sir Cecil Hurst, wrote in March 1944 that he had reluctantly come to the conclusion that it would ‘not be possible for the Commission to accomplish with satisfaction, either to itself or to the Governments which appointed it, the task which it was set up to perform’.⁴⁵ He agreed that the war crimes cases thus far put forward were limited in number, often incomplete and in some cases ‘trivial in character’, such as the case that accused 14 men of ‘dragging a statue off its pedestal and cutting off its head’.⁴⁶ While he argued that ‘[d]rastic changes seem to be necessary’ to the UNWCC’s terms of reference, he did not recommend any changes to the National Offices system, as:

[t]his work ought not to be done by the Commission. It is no part of its duty to ferret out the individual atrocities which the enemy has perpetrated. If the Commission were to attempt to take over the work of the National Offices, there would be the risk that individual Governments, dissatisfied at the results of the Commission’s efforts, would try and lay the blame on the major powers for a position for which it is their own Governments who are responsible.⁴⁷

Yet other representatives were starting to question the level of cooperation of National Offices and whether changes were required to the self-reporting system of evidence gathering. Marcel de Baer, the Belgian representative, wrote a letter to Hurst in July 1944 in which he advised that, in his view, there was ‘a lack of co-operation by the National Offices. With the exception of Poland, Great Britain, and to a certain extent Czechoslovakia, there is little evidence that the National Offices are seriously taking up

⁴⁰ Letter from Lord Simon to Anthony Eden, Secretary of State, 27 July 1943, file LCO2/2974, TNA.

⁴¹ Memorandum by the Lord Chancellor, ‘United Nations War Crimes Commission’, *supra* note 2, at 1.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*, at 2.

⁴⁵ Memorandum by Sir Cecil Hurst, ‘United Nations War Crimes Commission’, 30 March 1944, at 1, file LCO2/2976, TNA.

⁴⁶ *Ibid.*, at 2.

⁴⁷ *Ibid.*, at 3.

the question [of war crimes]'.⁴⁸ Poland was indeed at the forefront of compliant member nations: of the 248 names then on the UNWCC's provisional list of 'men whose surrender should be demanded', 139 names had been placed there at the instigation of the Polish National Office.⁴⁹ De Baer suggested that the general lack of cooperation might be attributed, variously, to a lack of interest in punishing enemy war criminals compared to an interest in punishing traitors and quislings; a lack of faith that there would be any serious measures or outcomes against war crimes; fear of revenge in the future from a resurgent Germany (a point showing Eurocentrism at work); a lack of personnel to do the work and the difficulty of obtaining evidence from occupied countries.⁵⁰ As he did to other representatives, Hurst subsequently issued a letter to Australia's deputy representative, John Oldham, asking him to 'draw the attention' of the Australian government to the 'statistics' about cases being transmitted to the UNWCC.⁵¹

Interestingly, as de Baer had noted, albeit by omission to his list of nations who had 'seriously' engaged with the question of war crimes, Australia was also not cooperating all that well with the UNWCC. In mid-1943, Australia had predated the official establishment of the UNWCC by appointing its own commissioner to investigate war crimes, Sir William Flood Webb, then Chief Justice of the Supreme Court of Queensland. Yet, while Australia engaged with the UNWCC, and various representatives participated in its work, Australia largely failed to provide any war crimes information to the UNWCC. When the Australian high commissioner in London, former Prime Minister Stanley Bruce, was to meet with Hurst in June 1944, he was advised in a briefing note that it might be 'advisable' to 'soft pedal' on the topic of Webb's investigatory work with Hurst since 'Australia appears to have gone ahead without reference' to the UNWCC.⁵²

Even after Webb's work was underway, little information except that it was ongoing was passed to the UNWCC. For example, even though Webb presented his first official war crimes report to the Australian government in March 1944, it was not until August 1944 that a Summary of the Report on Japanese Atrocities and Breaches of the Rules of Warfare was forwarded for presentation to the UNWCC.⁵³ As the title suggests, this document was only a summary of the full report. To make matters worse, since certain details in it were regarded as 'most secret' for 'military reasons', the names of persons and units had been omitted, rendering it rather scant of useful particulars.⁵⁴ Although Hurst thanked Australia for forwarding the summary and said he

⁴⁸ Letter from Marcel de Baer to Sir Cecil Hurst, 24 July 1944, at 1, file A2937, 275, NAA.

⁴⁹ Letter from Sir Cecil Hurst to John Oldham, 4 August 1944, file A2937, 275, NAA.

⁵⁰ Letter from de Baer to Hurst, *supra* note 48, at 1–2.

⁵¹ Letter from Hurst to Oldham, *supra* note 49. Oldham was a solicitor assigned as assistant external affairs officer, London, from 1939 to 1945.

⁵² 'Note for Mr Bruce, United Nations War Crimes Commission. Sir Cecil Hurst, 10 a.m. Tuesday, 27th June', 26 June 1944, at 2, file A2937, 275, NAA.

⁵³ Letter from Paul Hasluck for the Secretary, Department of External Affairs to the External Affairs Officer, London, 9 August 1944, file A2937, 275, NAA.

⁵⁴ *Ibid.*

would ‘study the report with interest’, its extreme brevity leads one to question how much use it would have been to the UNWCC.⁵⁵

The trickling flow of information from the National Offices to the UNWCC was not a problem solely caused by the number of National Offices trying to communicate and work with the UNWCC or by the tyranny of distance to London. Indeed, the same issue regarding the provision of information was evident at the subsidiary Far Eastern and Pacific Sub-Commission in Chungking, where the Chinese National Office was the only such provider. For example, although the Sub-Commission met for the first time in November 1944, cases were not submitted in ‘appreciable numbers’ until mid-1945.⁵⁶ As Keith Officer, Australia’s representative to the Sub-Commission, privately wrote in April 1945, the situation at the Sub-Commission was ‘far from satisfactory’. Officer thought that it was ‘somewhat satirical to read’ that the Chinese representative to the UNWCC who had reported on the work of his National Office had been ‘complimented thereon!’⁵⁷ As Officer pointed out, by May 1945, only 38 cases had now been submitted by the Chinese National Office, but, of them, only four were in ‘proper form’, and even those had ‘insufficient evidence’.⁵⁸ Officer feared that if the ‘position’ became known the Sub-Commission would be the ‘object of ridicule and criticism’.⁵⁹

As Officer’s consternation suggests, concerns about the UNWCC’s progress were largely based on fears of public expectations for punishing war criminals: expectations that had been raised to very high levels by the Allied governments’ own rhetoric about dishing out justice. The fears arose from what the public might say if the apparent lack of significant progress towards preparedness became widely known. Press criticism of the UNWCC was already stirring in 1944, compounded by the fact that the UNWCC generally maintained a policy of quiet diplomacy, rather than active publicity, about its activities. In part, this was to maintain the illusion of Allied solidarity as well as to account for the fear that publicity would invite reprisals against Allied nationals, millions of whom were held prisoner by the Axis powers at this point. Although both were very reasonable considerations, a lack of strong public engagement produced a vacuum of information that enabled press criticism. As one internal report urged in early 1945, the policy of ‘secret diplomacy’ had to be abandoned, as the results were ‘disastrous’. The report pointed out:

We cannot maintain the policy of ‘secret diplomacy’ practised up to date. The results are disastrous. If we had for instance published the fact that the Commission has already put Hitler and the members of his gang called Government, on [War Crimes Suspects] List No. 1 of November 22nd 1944, the whole Press Campaign of January 1945, also some stupid remarks about our attitude towards the arch-criminals would have been impossible.⁶⁰

⁵⁵ Letter from Sir Cecil Hurst to John Oldham, 28 September 1944, file A2937, 275, NAA.

⁵⁶ P.H. Chang, Concise Report of the Sub-Commission, 15 February 1946, incorporated in Minutes of the Twenty-Third Meeting of the Far Eastern and Pacific Sub-Commission, Doc. SM.23, 15 April 1946, at 2, file A4144, 93/1946, NAA.

⁵⁷ Letter from Keith Officer, Australian Legation, Chungking to John Oldham, Australian External Affairs Office, London, 28 April 1945, file A4144, 730/1945, NAA.

⁵⁸ Letter from Keith Officer, Australian Legation, Chungking to the Department of External Affairs, 21 May 1945, file A4144, 730/1945, NAA.

⁵⁹ *Ibid.*

⁶⁰ B. Ečer, Memorandum on the Present Position of the United Nations War Crimes Commission, the Work Already Done, and Its Future Tasks, Doc. C.76, 8 February 1945, at 9, file A2937, 285, NAA.

Compounding the vacuum of official information was the steady flow of leaks, often critical ones, from inside the UNWCC to the press. De Baer thought it obvious in July 1944, for instance, that a journalist from the *Daily Mail* newspaper had ‘some contacts with one or more of our numbers’.⁶¹

4 Australia’s Proposal for Institutional Change

Coincidentally, with the growing concerns about member nations cooperating with the UNWCC, the need to select a new representative after Lord Atkin’s death opened up space within Australia for discussion about the UNWCC and its progress, somewhat ironically given that Australia was itself part of the problem. As High Commissioner Bruce advised Prime Minister John Curtin in July 1944, ‘[t]he necessity of appointing a successor to Lord Atkin as the Australian Representative on the Commission has led me to examine closely how the work of the Commission is progressing’.⁶² Bruce reported that, after private discussions with Hurst, and with Pell, the American representative, he thought that the ‘position was far from satisfactory’ and that Australia could ‘make a contribution towards its more effective working’. In his view, ‘[w]hat the Commission requires is more drive in getting on with the job it was created to do, namely, to devise ways and means by which the war criminals will be brought to justice and to prepare for the decision of Governments the question of high policy that have to be faced’.⁶³

After being appointed the new Australian representative to the UNWCC, Lord Wright came to share Bruce’s critical opinion about progress to date and began urging action to ensure that war criminals did not escape justice. His ‘impression of the progress so far achieved’ within the UNWCC, he wrote to the War Cabinet in early September 1944, led him to ‘fear that many war criminals may escape their just retribution’.⁶⁴ Similarly, he wrote to the Lord Chancellor that:

[i]t is obviously necessary to get evidence and apprehend criminals at the earliest possible moment. If there is delay before anything effective is done, the whole thing will become stale and die out, evidence and criminals will disappear, and there will be a fiasco as at the end of the last war. ... It is obvious that the War Crimes Commission has no machinery for collecting evidence. It can only act, apparently, on information furnished to it.⁶⁵

While Lord Wright initially focused his attention on the need to prepare the machinery for locating and detaining suspected war criminals and for post-war trials, he soon refocused his attention on a reform scheme that had been devised by John Oldham, Australia’s deputy representative, one that would modify the UNWCC system ‘now in use for the collection of evidence in respect of war crimes’.⁶⁶

⁶¹ Letter from de Baer to Hurst, *supra* note 48, at 1.

⁶² Telegram from Stanley Bruce to the Prime Minister, Canberra, 3 July 1944, at 1, file A2937, 275, NAA.

⁶³ *Ibid.*

⁶⁴ Letter from Lord Wright to Sir Edward Bridges, Offices of the War Cabinet, 5 September 1944, file A2937, 274, NAA.

⁶⁵ Letter from Lord Wright to the Lord Chancellor, 13 September 1944, file LCO2/2976, TNA.

⁶⁶ Reported in UNWCC, Minutes of Thirty-Eighth Meeting, 7 November 1944, revised text, at 3, file TS26/67, TNA.

The motivations behind Australia's reform proposal were apparent in a briefing note prepared in early November 1944 – probably by Oldham – which suggested that Lord Wright stress to the UNWCC that it had not, so far, carried out the duty placed on it 'in a manner commensurate with its responsibilities', as '[n]obody can honesty [sic] say that the present system of presentation [of information] by National Offices has succeeded'.⁶⁷ The note continued: 'What is clear is that the present system of obtaining particulars [of atrocities and war crimes] has failed substantially and that the method at present employed by the National Offices has to be radically altered'.⁶⁸ The note predicted that when the public became aware of the meagre amount of work done, which could happen at 'any time', 'a storm will break'.⁶⁹ Interestingly, a paragraph struck out of the briefing note in pencil – suggesting that Lord Wright himself perhaps deleted it – ominously warned that '[t]he Australian Government is not prepared to continue the responsibilities entailed in membership of the Commission without this problem being settled in a thorough going manner'.⁷⁰

In short, Australia's reform proposal argued that it was unsatisfactory for the UNWCC to simply declare that the National Offices of member nations had been given the duty of providing information and they were failing to do so,⁷¹ as if that discharged the UNWCC's responsibility. Indeed, as the UNWCC itself had been 'specifically charged' with the duty of collecting and assessing information, it could not 'abdicate its responsibilities of obtaining particulars of war crimes'.⁷² The key part of the proposal, therefore, was to turn the UNWCC into an information-gathering body in its own right by creating an investigation arm, which would help guide and supplement the workings of the National Offices. The investigation branch, the proposal argued, should be headed by a man who 'should possess imagination, drive and initiative' and who was 'answerable' to the UNWCC but had a 'large measure of independence in carrying out his duties'.⁷³ These duties were to 'see that appropriate progress is being made in obtaining particulars of the thousands upon thousands of cases of war crimes committed' by combing the records of various governments.⁷⁴ Somewhat more radically, the proposal also suggested that 'travelling investigatory groups' from the UNWCC should go on circuit from town to town obtaining particulars of war crimes that 'any inhabitant might bring before it'.⁷⁵

Lord Wright launched Australia's reform proposal in discussions in the meeting of the Commission on 7 November 1944, arguing that, given the clear failure of the

⁶⁷ Apprehension of War Criminals, Memorandum for Lord Wright, 6 November 1944, at 1, file A2937, 273, NAA.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ The United Nations War Crimes Commission: The Apprehension of War Criminals, undated but circa November 1944, at 4, file A2937, 273, NAA.

⁷² *Ibid.*, at 3–4.

⁷³ *Ibid.*, at 1.

⁷⁴ *Ibid.*, at 1–2.

⁷⁵ *Ibid.*, at 2.

self-reporting system, there was a 'practical need ... for a detective organisation'.⁷⁶ While the majority of representatives present generally welcomed the proposal, they clearly disagreed with its suggestions. Representatives argued that more information would be forthcoming to the UNWCC when countries were no longer occupied by the enemy; pointed to practical problems in sidelining or dispensing with the National Offices; and predicted that jurisdictional problems would arise if UNWCC agents were to unilaterally operate at will in sovereign territories. Harking back to the caution struck out of Lord Wright's briefing note, Oldham warned the meeting that, notwithstanding the general lack of accord on the proposal, it was nonetheless 'maintained' by Australia, for if the 'existing situation' was not 'improved' Australia 'would have to reconsider its position in regard to the Commission'.⁷⁷ The debate on Australia's proposal continued somewhat desultorily at the Commission's next meeting on 15 November 1944, although Erik Colban, the Norwegian representative, pointed out that the proposal had 'already stimulated him to greater activity', and he had 'no doubt' it had the 'same effect on other members'.⁷⁸ The Commission decided in that meeting to refer Australia's proposal to Committee II for more detailed discussion.⁷⁹

When brought before Committee II, Lord Wright also launched discussion of the proposal. He pointed out that Australia's proposal was 'not intended to be a definitive' one but, rather, sought to 'help the Commission to formulate a workable scheme'.⁸⁰ He suggested that, in addition to an 'Investigation Bureau', liaison officers should be appointed to act between the Bureau and member nations, not to 'intrude officiously' on the work of National Offices but to 'advise, help and stimulate' work.⁸¹ Lord Wright advised that he was pleased that the proposal had appeared already to have excited some action, including that Greece had just established its National Office. He suggested, therefore, that if Australia's proposal had 'to any extent ... stimulated these activities it has not been useless'.⁸² As this half-hearted praise might suggest, Lord Wright seemed to understand that, notwithstanding the importance of achieving the UNWCC's purpose of preparedness and the proven weakness of the institutional design, the impetus for change was then insufficient. He told de Baer in a private meeting on 1 December 1944, for instance, that 'obviously a majority of members of the Commission were very dis-satisfied with the way the Commission was working, but it looked as if nobody would take sufficiently strong steps to put it on the right lines'.⁸³

⁷⁶ UNWCC, Minutes of Thirty-Eighth Meeting, *supra* note 66, at 2.

⁷⁷ UNWCC, Minutes of Thirty-Eighth Meeting held on 7 November 1944, original text, at 5, file TS26/67, TNA.

⁷⁸ UNWCC, Minutes of Thirty-Ninth Meeting held on 15 November 1944, at 3, file TS26/67, TNA.

⁷⁹ *Ibid.*

⁸⁰ Suggested Statement by Australian Representative to Committee II at Commencement of Discussion on C.62, Proposal by Lord Wright for a Modification of the System Now in Use for Collection of Evidence in Respect of War Crimes, undated but circa November 1944, at 1, 4, file A2937, 273, NAA. See also Committee II Docs. II/37 and II/37(i), file A2937, 280, NAA.

⁸¹ *Ibid.*, at 2–3.

⁸² *Ibid.*, at 2.

⁸³ Note of Meeting with General de Baer, 1 December 1944, at 2, file A2937, 273, NAA.

De Baer told Lord Wright that, in his view, the ‘only hope for the Commission was a strong lead from either the British or the Americans’, and he hoped that Pell, the American representative, could be ‘induced to take the chairmanship’ from Hurst.⁸⁴

Australia’s reform proposal returned from Committee II to the Commission for discussion on 20 December 1944. This time, Lord Wright’s proposal to turn the UNWCC into a proper investigatory body in its own right was rejected. Instead, the UNWCC affirmed that the National Offices of the member nations were the ‘bodies primarily concerned with collecting evidence regarding war crimes’.⁸⁵ In Lord Wright’s view, this rejection came because the National Offices ‘refused to agree to what seemed a partial surrender of their sovereignty’ to the UNWCC.⁸⁶ Lord Wright did have a partial win: the UNWCC agreed to certain ‘modifications’ to its organization, including that an official with ‘experience of criminal work’ be added to its staff.⁸⁷ This official – to be known as a ‘Central Investigation Officer’ – was to assist the National Offices at their request and the UNWCC by drawing attention to war crimes information and ‘generally to help’ with the preparation and consideration of war crimes cases and the drawing up of the war crimes lists of suspects.⁸⁸ Additionally, the UNWCC recommended that in view of the expected increase in workload, ‘close contact’ between the UNWCC and the National Offices should be ‘maintained, where necessary, by the appointment by the Governments of officials for the purpose, or in some other appropriate way’, which essentially reflected Australia’s suggestion for ‘liaison officers’ to be appointed.⁸⁹ Yet, despite the UNWCC’s decision to appoint such a ‘Central Investigation Officer’ in December 1944, no action was taken to appoint one. As Lord Wright said in late February 1945, the ‘failure to carry out the proposal has caused me anxiety’.⁹⁰ In fact, no such officer was ever appointed and nor were new liaison officers ever appointed, even by Australia.

5 Lord Wright Takes Over as UNWCC Chairman

Throughout 1944, some national representatives to the UNWCC clearly held the view that the leadership of the inaugural chairman, Sir Cecil Hurst, was partially responsible for the UNWCC’s poor progress towards its goal of preparedness. One New Zealand report offered the pithy observation that ‘[t]he Chairman, Sir Cecil Hurst, is of course eminent, but also old’.⁹¹ De Baer told Lord Wright in December 1944, for

⁸⁴ *Ibid.*, at 2–3.

⁸⁵ UNWCC, Australian Proposal for a Modification of the System Now in Use for the Collection of Evidence in Respect of War Crimes, Doc. C.66(1), 21 December 1944, file A2937, 284, NAA.

⁸⁶ Untitled document, 12 February 1945, at 3, file A2937, 274, NAA.

⁸⁷ UNWCC, *supra* note 85.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Reported in untitled file note, 28 February 1945, at 1, file A2937, 273, NAA.

⁹¹ In fact, the original observation, with the adjectives later struck out in pen, was that Hurst was ‘very eminent, but also very old’. Memorandum from J.V. Wilson to A.D. McIntosh, Secretary of External Affairs, 22 November 1944, at 1, file ACIE 8798 EA/2161, 106/3/32, Part 1, Archives New Zealand.

example, that ‘one had to fight to get Hurst to do anything’ and that Hurst had been ‘very obstructive right from the beginning’.⁹² In fact, de Baer alleged that Hurst had driven Lord Wright’s predecessor, Lord Atkin, ‘frantic at times’.⁹³ De Baer acknowledged to Lord Wright, however, that there were ‘very obstructive forces behind Hurst as chairman’, possibly alluding to the UK’s Foreign Office.⁹⁴ Although the Treasury Solicitor’s Office, not the Foreign Office, was the designated National Office of the UK, the Foreign Office wielded a great deal of power in formulating the UK’s war crimes policies and appeared to be holding up official government responses to the UNWCC’s proposals placed before all member governments. For instance, the Foreign Office was still debating in October 1944 the exact terms of a reply to a letter that Hurst sent to the Foreign Office asking for an official response of His Majesty’s government in May 1944.⁹⁵ As one observer confided to Lord Simon in late November 1944, while the Foreign Office ‘repudiates the idea that they are slow to deal with Hurst’s letters’, he thought that Hurst had:

made out his case [against the Foreign Office] on this head. I cannot conceal from myself the idea that the Foreign Office are not deeply interested in the subject [of war crimes]. They are, no doubt, very busy with things which appear to them to be much more important, and the general impression left in my mind is that they regard the whole thing as a nuisance, but perhaps a necessary nuisance.⁹⁶

Australian High Commissioner Bruce also met with Lord Simon in early December 1944 to ‘deliver a warning’ about ‘disturbing developments’ within the UNWCC, including that ‘there was rising inside the Commission in some quarters a growing impression that we [the UK] did not want to pursue war criminals too diligently for ulterior reasons’.⁹⁷

As 1944 drew to an end, Hurst apparently realized that he was in – or had been placed in – an untenable position by his own government. He wrote a ‘private and secret’ note to the other representatives, advising them that he was ‘dissatisfied’ with his government’s inaction on the UNWCC’s proposals.⁹⁸ He observed: ‘Nothing has happened and I am reluctantly forced to the conclusion that nothing is going to happen, and I am therefore left with the feeling that I can personally do no more.’⁹⁹ Hurst then advised that, due to the ‘work of the Commission [being] somewhat beyond me physically’, he had submitted his resignation as the UK’s representative.¹⁰⁰ Hurst

⁹² Note of Meeting with General de Baer, *supra* note 83, at 1–2.

⁹³ *Ibid.*, at 2.

⁹⁴ *Ibid.*, at 1.

⁹⁵ For Hurst’s letter and the drafts of a response, which was finally sent on 30 October 1944, see file LCO2/2976, TNA.

⁹⁶ Letter from Lord Schuster to Lord Simon, 24 November 1944, file LCO2/2976, TNA.

⁹⁷ Reported in letter from Lord Simon to Foreign Secretary Anthony Eden, 6 December 1944, file LCO2/2976, TNA.

⁹⁸ Sir Cecil Hurst, Note, 2 January 1945, at 1, file A2937, 273, NAA.

⁹⁹ *Ibid.* Although the note was ‘private and secret’ when initially communicated, this key sentence was later excerpted in an official document of the UNWCC. Eéer, *supra* note 60, at 1.

¹⁰⁰ Hurst, *supra* note 98, at 2.

concluded: ‘I need scarcely say how sorry I am not to be able to carry on with them [the other representatives] until the end of the war the great work in which we have been co-operating.’¹⁰¹

Hurst’s resignation, publicly articulated as being on the grounds of ill health – which was surely one reason for it – cleared the way to the UNWCC chairmanship for another, perhaps more forceful, candidate in early 1945. This appeared very unlikely to be Lord Finlay, Hurst’s replacement as the UK’s representative. As Bruce advised H.V. Evatt, Australia’s minister for external affairs and attorney-general, in a ‘personal and most secret’ cablegram, ‘[f]eeling in [the] Commission appears to be against appointment of new United Kingdom representative, Finlay, as Chairman. This [is] due to [the] fact that members generally have for time being lost confidence in United Kingdom Government’s attitude towards Commission’.¹⁰² Given the absence from London at the time of Hurst’s most likely successor, the American representative Pell, who was fatefully struggling with his own government, Lord Wright was appointed acting chairman on 17 January 1945. With Pell’s forced resignation from the UNWCC, Lord Wright was elected chairman, unopposed, on 31 January 1945.¹⁰³ Lord Wright wrote to Evatt that he was ‘very proud of my appointment and will do everything possible to promote the success of the Commission and to achieve its very important purpose’.¹⁰⁴

Now chairman, Lord Wright was quick to deny in the London press that the ‘success and even the continuation of the work’ of the UNWCC was ‘in danger’ because of a lack of significant progress. He declared: ‘There is no question of this Commission’s ceasing to discharge the task placed upon it by the Governments of the United Nations.’¹⁰⁵ Yet Lord Wright continued to voice strong concerns about the institutional design of the UNWCC, reiterating in February 1945 that the ‘whole work’ had been ‘vitiating by a certain fundamental weakness’, namely, that it depended ‘mainly on information conveyed to it by the National Offices’.¹⁰⁶ At this stage, Lord Wright openly pinpointed the UK’s National Office as a weak point. He thought that the National Office – consisting of one departmental officer in the Treasury Solicitor’s Office, P.H.B. Kent, and an assistant – was understaffed and lacking in authority. He observed that the ‘complications and delays’ from that National Office were ‘notorious’ and that ‘[n]o one, I think, would pretend that it is at present efficient’.¹⁰⁷ He recommended: ‘What seems to me essential is that the National Office be established as an independent executive body, should have full authority to require assistance of any Government department which may be in a position to find or supply information’.¹⁰⁸

¹⁰¹ *Ibid.*

¹⁰² Cablegram from Stanley Bruce to H.V. Evatt, 27 January 1945, file A2937, 274, NAA.

¹⁰³ Telegram from Stanley Bruce to the Prime Minister and Department of External Affairs, 31 January 1945, file A2937, 274, NAA.

¹⁰⁴ Telegram from Lord Wright to H.V. Evatt, 9 February 1945, file A2937, 274, NAA.

¹⁰⁵ ‘Policy on War Crimes: Lord Wright Chairman of Commission’, *The Times* (London, 1 February 1945), at 4.

¹⁰⁶ Untitled file note, *supra* note 90, at 2.

¹⁰⁷ The British National Office, Memorandum by Lord Wright, 16 March 1945, at 1–2, file A2937, 273, NAA.

¹⁰⁸ *Ibid.*, at 2.

Lord Wright's criticism of the UK's National Office was odd, given that the inaction of the Foreign Office probably then posed the greater threat to the UNWCC's efficiency and progress. While this mistake can possibly be attributed to Lord Wright's lack of knowledge about what the Foreign Office had been doing (or not doing) in 1944, prior to him joining the UNWCC as Australia's representative, his comments on the UK's domestic arrangements were also a misjudgment, as they went well beyond the scope of his position and authority. Facing criticism, Lord Wright soon conceded that he had 'no control' over the UK's National Office, which was 'purely the responsibility' of the UK government.¹⁰⁹ He continued: 'My advice though well meant was somewhat officious.'¹¹⁰

Perhaps fortunately for Lord Wright, a 'great change in the situation and a considerable increase in the inflow of information' to the UNWCC occurred in early 1945.¹¹¹ Yet this change was not caused by Lord Wright's leadership nor any improved institutional design but by fundamental changes in the progress of the war itself: countries occupied by the enemy were being slowly liberated, prisoners of war and civilian internees were being freed and repatriated and the end of the war, at least with Germany, was noticeably in sight. More information about specific war crimes and their perpetrators was starting to flow to the UNWCC. The UNWCC was, by now, also trying to more carefully manage its image in the press, including by releasing official statements for public use that were clearly designed to counter criticism about any lack of progress. A number of newspaper articles in this period specifically mention the positive progress being made by the UNWCC and its state of readiness for prosecutions. Some of them, however, have a curiously defensive tone, suggesting that the UNWCC's official statements were simply being printed verbatim. For instance, a report in *The Times* in May 1945 stated: 'It is pointed out that the commission has dealt promptly with all charges and information sent to it by the various Governments, and that this phase of its work is up to date.'¹¹²

Notwithstanding some progress in the flow of information from member nations to the UNWCC in early 1945, the importance of cooperation between the national members and the UNWCC remained an ongoing theme of concern. As the UNWCC's second progress report in March 1945 acknowledged, '[s]uffice it to say that the continued co-operation of all concerned in those many problems involving war crimes is essential, and the help of those who must join in the task as the hour of retribution nears both necessary and welcome'.¹¹³ In order to facilitate greater cooperation between the National Offices and the UNWCC and also between the separate National Offices, a conference of the National Offices was held from 31 May to 2 June 1945. In his introductory speech to the conference, Lord Wright highlighted that the conference's

¹⁰⁹ Letter from Lord Wright to Richard Law, M.P., 6 June 1945, at 1, file A2937, 274, NAA.

¹¹⁰ *Ibid.*

¹¹¹ UNWCC, Second Progress Report, Doc. C.84, 29 March 1945, at 2, file A1066, H45/580/1, Part 1, NAA.

¹¹² 'Two More Lists of War Criminals. Nazi Leaders Included', *The Times* (London, 5 May 1945), at 2.

¹¹³ UNWCC, *supra* note 111, at 7.

‘purpose’ was to ‘enable the representatives of the different National Offices to meet, compare notes and discuss the whole position, with the object of pooling information and improving their methods’.¹¹⁴ The conference came at a momentous time in his view, as the ‘time has now come when the mere collection of material must change over into action. Action here means the trial of criminals and their conviction, sentence and punishment where appropriate’.¹¹⁵

Among the topics discussed at the conference were relations between the UNWCC and the National Offices and how to improve the flow and recording of information.¹¹⁶ Radomir Živković, the Yugoslav representative, presented a short paper on the need to establish ‘closer connections’ between the UNWCC and the National Offices. Živković called for the UNWCC to ‘collect on its own initiative, wherever possible, particulars and evidence not available to the National Offices’, which somewhat revived Lord Wright’s earlier, unsuccessful, reform proposal.¹¹⁷ After some discussion, the joint statement of the National Offices prepared at the end of the conference included the recommendation that, ‘[i]n the event that particular war crimes in an enemy country cannot be investigated by the investigating teams of the United Nations concerned, the [United Nations] War Crimes Commission should itself despatch an investigating team’.¹¹⁸ Like Lord Wright’s earlier proposal for the UNWCC to be transformed to include investigatory powers, however, this recommendation was never converted into action.

6 Conclusion

With the end of the war, first, in Europe in mid-1945 and, then, in the Pacific in August 1945, the UNWCC was starting to take on an air of irrelevancy, as nations began to use their own initiative in dealing with war crimes, with scant reference to the international authority of the UNWCC. The Four Power Agreement in London on the trial of major German war criminals, for instance, did not involve the other Allied nations, including Australia, who were only invited later to ‘adhere to the agreement’.¹¹⁹ Australia designed and commenced its own military trials of principally Class B Japanese accused war criminals in late November 1945, having decided that there was no need to refer specific cases of war crimes to the UNWCC for approval to prosecute before trials were convened.¹²⁰ What these varying developments showed

¹¹⁴ Chairman’s Introductory Speech, *supra* note 8, at 3.

¹¹⁵ *Ibid.*, Annex VI, at 1.

¹¹⁶ *Ibid.*, Annex I, Agenda.

¹¹⁷ R. Živković, Establishment of Closer Connections between the United Nations War Crimes Commission and the National Offices and the Strengthening and Assisting of those Offices, National Offices Conference, Minutes and Documents, also printed in *supra* note 8, Annex V, at 1.

¹¹⁸ Statement Presented by Representatives of the National Offices and Reservations Thereon Made at the Last Meeting of the Conference, National Offices Conference, Minutes and Documents, also printed in *supra* note 8, Annex IX, at 2.

¹¹⁹ Telegram from External Affairs Office, London to Department of External Affairs, 24 August 1945, file A2937, 271, NAA.

¹²⁰ On the Australian trials, see G. Fitzpatrick, T. McCormack and N. Morris (eds), *Australia’s War Crimes Trials 1945–51* (2016).

was that the domestic-international interaction on war crimes that was the very premise of the UNWCC had broken down. The UNWCC had largely lost its authority, limited though it was, over the war crimes activities of its member nations.

It seemed to be Lord Wright's lot to have to make repeated appeals for cooperation from the National Offices with the UNWCC. For example, he wrote individually to representatives of each member nation and various others of his contacts in August 1945, urging them to 'impress' upon their governments the 'importance' of member nations providing the UNWCC with the information it required to perform its functions.¹²¹ At the same time, the UNWCC stepped up its efforts to justify its existence and performance to the public. A press report in *The Times* on 31 August 1945 advised, for example, that 21 of the 24 war criminals now awaiting trial before the International Military Tribunal at Nuremberg had been officially listed by the UNWCC and had had official dossiers prepared on them for the use of the prosecutors. Moreover, '[t]housands of further dossiers' on other war criminals were 'ready for the use of prosecutors'.¹²² Yet efforts to persuade governments and the public that the UNWCC was both relevant and crucial to the effort to prosecute war criminals appeared doomed to failure. McCausland's review of the UNWCC, written in September 1945, observed: 'The Commission is prevented by its terms of reference from being a dynamic body. But it is not compelled to be static. Through force of circumstances, largely unavoidable, it has relapsed into a passive role but the changes of the last few months make it possible to emerge from that role into leadership.'¹²³

Alas, time would quickly prove that the UNWCC had passed the point of most use. By the time that the UNWCC was debating Australia's first list of 'Major Japanese War Criminals and Those Holding Key Positions' in early 1946, for instance, the International Prosecution Section in Tokyo was already deliberating on the names to be indicted for the IMTFE without reference to the UNWCC. Although the UNWCC lingered on until 31 March 1948, its most significant achievements in its later years resided, as it does today, in its expert authority. The UNWCC compiled extensive reports about international and national war crimes trials, compared and analysed them and wrote up its own institutional history. The volumes of law reports quickly became a useful authority for international criminal law and have been much cited in the post-war period. In the end, however, the flaws in the UNWCC's institutional design – like those in the Far Eastern Commission – ensured that the UNWCC could never exercise full delegated, moral or expert authority in the area of war crimes.

Although the UNWCC was not as effective as it could have been, given its design flaws, it was nonetheless quite a personal success for Lord Wright, by then at the tail end of his own eminent legal career. John Oldham, Australia's deputy representative, wrote to a friend that Lord Wright was 'a very able and energetic man, and despite his great age, his eagle eye has not lost any of its piercing qualities' and that he was 'certainly an inspiring man to work for'.¹²⁴ Similarly, Zivković, the Yugoslav representative,

¹²¹ See, e.g., Lord Wright's letter to John Oldham, 30 August 1945, file A1066, H45/580/1, Part 1, NAA.

¹²² 'War Criminals. Thousands More Dossiers', *The Times* (London, 31 August 1945), at 3.

¹²³ McCausland, *supra* note 6, at 1.

¹²⁴ Letters from John Oldham to Keith Officer, Australian Legation, Chungking, 10 April and 15 June 1945, both in file A4144, 730/1945, NAA.

publicly commended his ‘vigorous leadership’. Lord Wright, he said, ‘besides being a great lawyer, is well known as a man of action’.¹²⁵ In due course, Lord Wright was commended for his leadership of the UNWCC. He was made a Knight Grand Cross of the Order of St Michael and St George in 1948, which Australia’s Department of External Affairs ascertained was ‘for work as Chairman’ of the UNWCC, although the published list for the award merely described him as ‘lately’ a law lord.¹²⁶ Evatt congratulated Lord Wright on his achievement with the message:

Without the invaluable work and leadership, together with the great energies you displayed in connection with punishment of more atrocious war criminals of World War II, the abortive results in this sphere of law which followed on World War I would have been repeated. We are deeply grateful for all you have done on behalf of Australia.¹²⁷

Still, if Lord Wright had been able to energize the other national representatives by his leadership to adopt his reform proposal in 1944, the UNWCC may have become far more effective in pursuing its mission of preparedness for war crimes prosecutions. For instance, the complex question of which major Japanese war criminals to include on the indictment for the IMTFE may have been settled far earlier than it was. Not only could this have avoided the somewhat unseemly ad hoc processes undertaken by the International Prosecution Section, but it possibly may have lessened the claims of selective justice often applied to the IMTFE. While the UNWCC was a definite improvement on what occurred after World War I in relation to war crimes preparedness, various problems (above all, that of its institutional design) meant that it was not as effective as it could have been.

¹²⁵ Record of Conference held on May 6th, 1945, between Members of the United Nations War Crimes Commission and Members of the United States Senate and House of Representatives, Speech by Radomir Živković, Doc. C.115, 24 May 1945, at 11, file A2937, 286, NAA.

¹²⁶ Telegram from Peter Heydon to External Affairs, 11 June 1938 [sic], file A2937, 274, NAA.

¹²⁷ Message from H.V. Evatt repeated in letter to Lord Wright, 16 June 1948, file A2937, 274, NAA.