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## Late Republican China and the Development of International Criminal Law: China's Role in the United Nations War Crimes Commission in London and Chungking

Anja Bihler\*

Dealing with inconceivable as well as expected atrocities the dedicated men and women of the UNWCC performed admirably. History should judge their effort kindly.<sup>1</sup>

### 16.1. Introduction

During the height of the Second World War, the Allied Nations set up an organisation to deal with the problem of war criminals. The United Nations War Crimes Commission ('UNWCC') consisted of a main commission in London and later the Far Eastern and Pacific Sub-Commission ('the Sub-Commission') in Chungking, China.<sup>2</sup> The members of the UNWCC were delegates who had been selected by the Allied governments, and their main task was to review and classify evidence of wartime atrocities and draw up a list of war crimes suspects.<sup>3</sup>

Until recently the UNWCC has attracted rather scant scholarly attention and was often dismissed as having been of little importance. The

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<sup>1</sup> George J. Lankevich (ed.), *United States Archives, New York: United Nations War Crimes Commission*, Garland Publishing, New York, 1990, p. ix.

<sup>2</sup> Chungking is the old romanisation for the Chinese city of Chongqing.

<sup>3</sup> The governments were supposed to set up a so-called National Office, an organ that would collect and submit evidence of war crimes committed in the respective country to the UNWCC.

main reason for this was the perceived failure of the UNWCC to assert any direct influence on the most important post-war trials in Nuremberg and Tokyo. Only now, when most of the materials documenting the work of the UNWCC have become more easily accessible, is there a renewed interest in this topic. The wealth of information now allows for a far more detailed and careful assessment of the efforts that were made in the UNWCC. A number of recent publications have already shown that historical research on the UNWCC gives us a better understanding of its contribution to the development of international criminal law. The legal discussions that took place between the representatives of the member countries have proven to be especially helpful for clarifying the evolution of several important concepts in the history of international criminal law.

This chapter seeks to contribute to the ongoing effort of re-evaluating the contributions of the UNWCC by focusing on the role of one of the participating nations: the Republic of China ('China').<sup>4</sup> This allows not only for a more nuanced and detailed understanding of the work of the UNWCC but also an opportunity to explore non-European contributions to the development of international criminal law. This chapter does not intend to make any contribution to the theoretical discussion on Eurocentrism in international law, but merely seeks to emphasise the international quality of the UNWCC.<sup>5</sup> To revisit the legal discussions that took place in the UNWCC gives us a more complete picture of the legal opinions prevalent at the time, including those of scholars from smaller and less influential countries.

The chapter is divided into four main sections. Parts one and two consist of a historical introduction to China's participation in the UNWCC in London and in the Sub-Commission in Chungking. Part three focuses on the legal discussions that were held in the main UNWCC and its Legal Committee and it sheds light on China's position on several issues of international law. The fourth and final part discusses the series of war crimes trials reports that were issued by the UNWCC and their continuing importance for modern international criminal law.

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<sup>4</sup> In this chapter the term Republic of China is used to refer to the Chinese nation between 1912 and 1949.

<sup>5</sup> For an overview see for instance Martti Koskenniemi, "Histories of International Law: Dealing with Eurocentrism", in *Rechtsgeschichte*, 2011, vol. 19, pp. 152–77.

## 16.2. China and the UNWCC in London

China was just one of several nations<sup>6</sup> that decided to join the UNWCC, but was the only member that had an additional panel set up in its own territory. This first part illustrates the role China played in the process of setting up the UNWCC, from the initial stage when the idea was developed until the time when the first meetings were convened.

### 16.2.1. Developing the Idea of a War Crimes Commission

In the 1940s news about atrocities being committed by the Germans continued to arrive in London, where not only the British but also a number of politicians belonging to the exile governments had gathered.<sup>7</sup> While powerless to directly stop the atrocities, they seemed to have the faint hope that public condemnation of these acts as war crimes could potentially prevent further outrages. The memory of the failure to hold perpetrators of war crimes responsible after the Great War<sup>8</sup> was still fresh in the minds of many and it impressed on them the need to work towards a common strategy amongst all the Allies. Both the US President Franklin D. Roosevelt and the British Prime Minister Winston Churchill had previously made statements condemning wartime atrocities, but those statements had been vague and had not entailed any concrete measures. With the US still being a neutral country at the time Roosevelt condemned the German killing of hostages<sup>9</sup>, Churchill had declared that

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<sup>6</sup> Countries with representatives when regular meetings began in 1944: Australia, Belgium, Britain, China, Czechoslovakia, France, Greece, India, Luxembourg, Netherlands, Norway, Poland, United States, Yugoslavia; additional countries that had participated at the constituent meeting of the UNWCC on 20 October 1943: Canada, New Zealand, Union of South Africa.

<sup>7</sup> For an overview see Martin Conway, "Legacies of Exile: The Exile Governments in London During the Second World War and the Politics of Post-War Europe", in Martin Conway and José Gotovitch (eds.), *Europe in Exile: European Exile Communities in Britain 1940–45*, Berghahn Books, Oxford, 2001, pp. 255–74.

<sup>8</sup> "According to traditional interpretations, this attempt at trying German war criminals proved abortive to the point that, in the Allied discussions during the Second World War, 'the fiasco of the Leipzig trials' was regarded as an ideal example of how *not* to proceed"; see Jürgen Matthäus, "The Lessons of Leipzig: Punishing German War Criminals after the First World War", in Patricia Heberer and Jürgen Matthäus (eds.), *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, University of Nebraska Press, Lincoln, 2008, p. 3.

<sup>9</sup> "Franklin D. Roosevelt On the execution of hostages by the Nazis", *Department of State Bulletin*, 25 October 1941.

“[r]etribution for these crimes must henceforth take its place among the major purposes of the war”.<sup>10</sup>

In an effort to nudge forward more concrete actions, nine of the smaller Allied nations issued a joint declaration, the so-called St James’s Declaration (‘the Declaration’), on 13 January 1942 in which they condemned German action as contrary to international law.<sup>11</sup> Article 3 of the Declaration stated that the signatories “place amongst their principal war aims the punishment, through the channel of organized justice, of those guilty and responsible for these crimes, whether they have ordered them, perpetrated them, or in any way participated in them”.<sup>12</sup>

Although China was not a signatory to the Declaration, the Chinese government had sent an observer and later confirmed in writing that they subscribed to the principles of the Declaration and “intended, when the time comes, to apply the same principles to the Japanese occupying authorities in China”.<sup>13</sup> After this first initiative more concrete steps towards the fulfilment of the St James’s goals were taken later that year by the bigger powers. During a House of Lords debate on 7 October 1942, the Lord Chancellor Lord Simon spoke for the British government and expressed the need to set up a commission to deal with the question of war criminals “without further delay”.<sup>14</sup> The same day Roosevelt equally issued a statement in support of the British suggestion declaring that the US government was “prepared to cooperate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes”. “It was not the intention of the

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<sup>10</sup> Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, p. 15.

<sup>11</sup> Signatory nations: Belgium, Czechoslovakia, the Free French National Committee, Greece, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia; Present as observers: Britain, the US, the USSR, China and India.

<sup>12</sup> Full text of the Declaration reprinted in “The Inter-Allied Conference, January 13 1942”, in *Bulletin of International News*, 1942, vol. 19, no. 2, pp. 50–53.

<sup>13</sup> Telegram, The Ambassador to the Polish Government in Exile (Biddle) to the Secretary of State, 14 January 1942, in United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1942 General; the British Commonwealth; the Far East*, (“Foreign Relations of the United States 1942”), US Government Printing Office, Washington, DC, 1942, p. 45.

<sup>14</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (“History of the UNWCC”), His Majesty’s Stationery Office, London, 1948, pp. 109–10.

government”, the statement continued, “to resort to mass reprisals but to mete out just and sure punishment”.<sup>15</sup> The British had informed the European Allies about the statements in advance but had not found the time to “obtain the views of the Soviet and Chinese governments”.<sup>16</sup>

This shows that China was not yet involved in the process when the idea for a war crimes commission was still being developed and discussed. The initial initiative was a product of the hope and determination of the smaller allies to engage the big powers in a dialogue about war crimes and the punishment of war criminals. The focus was clearly on German crimes committed in the European theatre of war; Japanese atrocities in Asia did not seem to have played a decisive role.

### **16.2.2. China's Role in Setting Up the UNWCC**

Even though the British had pledged to set up a commission without further delay, it took another year before the inaugurating meeting of the UNWCC was finally held on 20 October 1943. The long delay between the initial announcement and the actual setting up of the UNWCC reflected not only the rather low priority the governments had accorded to the project but also the slow process of communication, especially with the Soviet Union and China.<sup>17</sup> The one-year interval, however, had still not been enough to come to an agreement with the Soviet Union over the number of delegates it would be entitled to send. Consequently, no Soviet delegate attended this first or any of the following meetings of the UNWCC. The lack of support from the Soviet Union seriously weakened its influence.

China, on the other hand, was given a rather prominent role in the process of setting up the UNWCC. A reason for this is revealed in an internal memorandum of the British Foreign Office from December 1942. The author of the memorandum voiced his opinion that “the Chinese are very touchy about being treated as one of the four major Allies and [...] I think it would save subsequent ill feeling and trouble if they were now

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<sup>15</sup> “President Franklin D. Roosevelt's Statement of War Crimes”, White House News Release, 7 October 1942.

<sup>16</sup> Telegram, The Ambassador in the United Kingdom (Winant) to the Secretary of State, 6 October 1942, in *Foreign Relations of the United States 1942*, p. 60, see *supra* note 13.

<sup>17</sup> Kochavi, 1998, p. 27, see *supra* note 10.

included in the preliminary consultations”.<sup>18</sup> This point of view was apparently adopted or shared by the Foreign Office. When they subsequently sent a memorandum inquiring about China’s position on the UNWCC, the Foreign Office expressed the desire to “concert our general line of action with United States, Soviet, Chinese governments”,<sup>19</sup> thereby granting China an equal standing with the other major powers.

China, probably pleased with the demeanour of the British, eventually answered that the Chinese government agreed with the British suggestions and had only minor amendments to make with regard to the details of the working of the UNWCC.<sup>20</sup> Interestingly enough, the Chinese Executive Yuan (executive branch of government) had already issued the decision that China would join the UNWCC on 15 June 1943, but had instructed the Ministry of Foreign Affairs and the Judicial Administration Bureau to wait until a favourable answer from the US had been received before sending a reply to London.<sup>21</sup>

British deference to the Chinese and Chinese attention to the US were a reflection of the special political constellation of the three countries at that time. The discussion about setting up a war crimes commission took place in a period during which the US was willing to support China as an emerging great power and to grant China the political status accordingly.<sup>22</sup> Chiang Kai-shek, Chairman of the National Government, was well aware of the fact that China was the weakest of the four allies,<sup>23</sup> but was still enraged when Churchill spoke about the “big three”

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<sup>18</sup> Internal Memorandum, 11 December 1942, FO 371/34363, National Archives, UK (“TNA”), cited in Wenwei Lai, “Forgiven and Forgotten: The Republic of China in the United War Crimes Commission”, in *Columbia Journal of Asian Law*, 2012, vol. 25, no. 2, p. 310.

<sup>19</sup> Confidential memorandum, UK Foreign Office to the Chinese Embassy in London, March 1943, Guoshiguan File 020-010117 0051-0057.

<sup>20</sup> Message to the Chinese Embassy in London, date unclear, Guoshiguan File 020-010117-0020-0094.

<sup>21</sup> Decision Executive Yuan, 68th meeting, 15 June 1943, Guoshiguan file 014-000001-444-0932.

<sup>22</sup> John W. Garver, “China’s Wartime Diplomacy”, in James C. Hsiung and Steven I. Levine (eds.), *China’s Bitter Victory: The War with Japan, 1937–1945*, M.E. Sharpe, Armonk, NY, 1992, p. 24.

<sup>23</sup> Rana Mitter, *China’s War with Japan, 1937–1945: The Struggle for Survival*, Allen Lane, London, 2013, p. 300.

instead of the “big four”.<sup>24</sup> Churchill, on the other hand, thought that it was “affectation on the part of the US to pretend that China is a power in any way comparable to the other three”.<sup>25</sup> So it seems safe to assume that the special status accorded to China was more an attempt to please the US than any real reflection of the political importance China possessed at the time.

China, on the other hand, did claim a special status for itself in the UNWCC based on the argument that China was the country that had suffered the most and the longest at the hands of the enemy.<sup>26</sup> This again was closely related to the different perceptions of China's role in China and in the West. The Chinese thought of their country as the “first and most consistent foe of axis aggression”, but when it came to the Western Allies China was “a battered nation on its knees waiting for the American and British to save it from certain destruction at the hands of the Japanese”.<sup>27</sup>

In the words of the later Chinese delegate to the UNWCC, China had decided to join the UNWCC for reasons of international solidarity.<sup>28</sup> This explanation aptly reflected China's newly developing self-understanding as a major power at the time. China was eager to be represented in the UNWCC even though it was, especially in the beginning, a distinctly European affair. With the exception of India and Australia, which were still participating as British Dominions, the Republic of China was the only country representing the Asia-Pacific region.

### 16.2.3. China's Representatives in the UNWCC

V.K. Wellington Koo, as an eminent diplomat and acting ambassador to Britain, suggested that the Chinese government should wait for the US to appoint a delegate first and only then select its own representative who

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<sup>24</sup> *Ibid.*, p. 301.

<sup>25</sup> *Ibid.*

<sup>26</sup> History of the UNWCC, p. 114, see *supra* note 14.

<sup>27</sup> Mitter, 2013, p. 244, see *supra* note 23.

<sup>28</sup> United Nations War Crimes Commission, Minutes of Eighteenth Meeting Held on 16 May 1944 (“Minutes No. 18”) (<http://www.legal-tools.org/doc/f2acc0/>).

would need to match the US representative in terms of rank.<sup>29</sup> “If Washington should merely send a technical man, we might appoint Dr. Y.L. Liang, a good lawyer well versed in international law”, Koo argued. “If the US should appoint an ambassador other than the American ambassador in London as its representative, we might appoint [...] ambassador Wunsz King”.<sup>30</sup> The government’s final decision was to appoint Wellington Koo himself with Liang Yunli as the second representative and Wunsz King as his substitute.<sup>31</sup>

Members of the UNWCC were first of all representatives of the sending governments and supposed to act in the best interest of their countries. Many of the members of the UNWCC, however, were legal scholars with more or less strongly held professional opinions. In addition, the question of war crimes and war criminals was for many a personal and often emotional topic. In some cases this led to situations of conflict between the national representatives and the national governments.<sup>32</sup> In contrast, the Chinese members of the delegation dutifully reported the matters discussed back to Chungking and only acted on instruction. On several occasions, however, they were forced to voice their personal opinions because the communication between London and Chungking was unsatisfactorily slow and instructions often did not arrive in time for the meetings of the UNWCC.<sup>33</sup> It is thus interesting to take a closer look at these representatives in order to understand parts of their personal backgrounds and motivations.

In selecting the Chinese ambassador to Britain as its representative, the Chinese government made an obvious and safe choice but at the same time they had also selected a person only moderately popular in the British diplomatic circle. When Koo was originally appointed ambassador

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<sup>29</sup> V.K. Wellington Koo [顾维钧], *Gu Weijun huiyilu* [顾维钧回忆录], Zhonghua shuju, Beijing, 1997, p. 603.

<sup>30</sup> Lai, 2012, p. 312, see *supra* note 18.

<sup>31</sup> The names are rendered in the form in which they appear in the UNWCC documents. The Chinese names are as follows: Dr. Koo: Gu Weijun [顾维钧], Dr. Liang: Liang Yunli [梁鋈立], Dr. King: Jin Wensi [金问泗].

<sup>32</sup> Kochavi, 1998, p. 92, see *supra* note 10.

<sup>33</sup> United Nations War Crimes Commission, Minutes of Sixty-Ninth Meeting Held on July 11th, 1945 (“Minutes No. 69”) (<http://www.legal-tools.org/doc/4bb57e/>). For instance the minutes of the fifth meeting of the Far Eastern and Pacific Sub-Commission on 15 March 1945 only reached the members of the main UNWCC in London on 11 June 1945.

in 1941 the initial reaction in the British Foreign Office was decidedly negative, and Britain even suggested the Chinese might want to reconsider their decision. Some in the Foreign Office intensely disliked him, describing him as one of Britain's bitterest enemies from the 1920s.<sup>34</sup> His anti-British and pro-American attitude was well known. He had even allowed himself to make a rather undiplomatic comment in an early book published in 1912 that may serve to illustrate the point. When discussing British merchants in Canton who had resisted the application of Chinese law to themselves, Koo offered the following explanation:

The disrespect toward the territorial laws, predicable of foreigners in China generally, was so aggravated, in the case of the British at Canton, by the characteristic Anglo-Saxon pride and faith in the superiority of their own race and in the supremacy of their own institutions that they could not see how any of their countrymen could have committed a crime in China.<sup>35</sup>

The US delegate Herbert Pell, on the other hand, had been Koo's friend since their time as classmates at Columbia University. Pell called Koo "one of the most intelligent men Columbia ever graduated", while Koo admitted that it was his friend Pell "who helped China most in the UNWCC".<sup>36</sup> Even as a student at Columbia Koo had been concerned with questions of international law and graduated with a thesis on the legal status of aliens in China.<sup>37</sup> Later he became the Chinese representative to many important international conferences and continued to use international law as the preferred tool to improve China's international standing.<sup>38</sup>

Liang Yunli was probably the most proficient in the topic of war crimes and the most specialised in questions of international law. Before attending the meetings of the UNWCC he had already been involved in the London International Assembly ('LIA'), a predecessor organisation of

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<sup>34</sup> Stephen G. Craft, *V.K. Wellington Koo and the Emergence of Modern China*, University Press of Kentucky, Lexington, 2004, p. 140.

<sup>35</sup> Wellington Koo, *The Status of Aliens in China*, Columbia University, New York, 1912, p. 80.

<sup>36</sup> Lai, 2012, p. 313, see *supra* note 18.

<sup>37</sup> Jonathan Clements, *Wellington Koo: China – Makers of the Modern World*, Haus Publishing, London, 2008, p. 31.

<sup>38</sup> Craft, 2004, p. 20, see *supra* note 34.

the UNWCC, working on questions of international criminal law. He had received law degrees both from China and the US, and had served in several legal and political positions in China before being sent to London to join the Chinese embassy. He became a member of the UNWCC's Legal Committee and even asked for his name to be substituted for that of Koo on the official lists, insisting that he had been elected in his own right and not as a substitute for the Chinese main delegate.<sup>39</sup> In 1946 he transferred as a member to the newly established United Nations in New York and went on to become the Director of the Division of Development and Codification of International Law.

Wunsz King, like Koo, was a graduate of Columbia University and their career paths had crossed early on. They had both been part of the Chinese delegation to the 1919 Peace Conference, King as the secretary to the delegation, Koo as the leading delegate.<sup>40</sup> He had spent time working for the Chinese Ministry of Foreign Affairs and at the League of Nations before becoming ambassador to the Netherlands in 1941. After his transfer to London he was the ambassador to the Netherlands and Belgium; later he also became the ambassador to Czechoslovakia, Poland and Norway.<sup>41</sup> In the memoirs of his diplomatic work King described his work for the UNWCC in just two short sentences, merely recalling that he had been asked to temporarily act as the substitute for Koo who was attending the Dumbarton Oaks Conference.<sup>42</sup> But this was clearly a task he did not attach too much importance to; it faded into the background as compared to other more pressing issues he had attended to as an ambassador.

The representatives China selected, including the representatives who attended the National Office Conference at the Royal Courts of Justice, were without exception well qualified for the work of the UNWCC. This becomes glaringly obvious if contrasted with the background of, for instance, the US representative Pell, who possessed no legal qualification but was a Harvard University friend of Roosevelt.<sup>43</sup>

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<sup>39</sup> United Nations War Crimes Commission, Minutes of Eighty-Sixth Meeting Held on November 14th, 1945 ("Minutes No. 86") (<http://www.legal-tools.org/doc/0ad815/>).

<sup>40</sup> Clements, 2008, p. 73, see *supra* note 37.

<sup>41</sup> Jin Wensi [金问泗], *Waijiao gongzuo de huiyi* [外交工作的回忆], Chuanji wenxue chubanshe, Taipei, 1968, p. 90.

<sup>42</sup> *Ibid.*, p. 102.

<sup>43</sup> Kochavi, 1998, pp. 51–52, see *supra* note 10.

The qualification of the Chinese team, however, is probably more accurately described as a reflection of the high quality of Chinese diplomats generally at the time and should not be understood as a sign that the Chinese government attached special importance to the UNWCC. In fact the attendance record of Koo and Liang was far from complete because they were also frequently chosen to attend other important international conferences, such as the Dumbarton Oaks<sup>44</sup> and the San Francisco conferences.<sup>45</sup> This resulted in quite a number of meetings of the Legal Committee without any Chinese representative at all.

#### 16.2.4. Determining the UNWCC's Competencies

Soon the core question of what the competencies of the UNWCC should be was discussed. During the preliminary meeting on 20 October 1943, Simon had already stated the British position that the UNWCC had essentially two purposes: first, to investigate and record evidence of war crimes; and second, to report cases in which sufficient evidence was available.<sup>46</sup> The British seemed especially wary of the UNWCC having too much influence and they sought to restrict it to the function of collecting evidence. When negotiating the setting up of the UNWCC, the Foreign Office had already been worried that it would "develop its own momentum" which might result in unwanted suggestions to the governments.<sup>47</sup> It soon became clear, however, that even if the UNWCC were just to discharge the duty of classifying offences it would still occasionally need to discuss questions of law. Britain thus suggested that a separate body, the so-called Technical Committee, should be established to deal with all questions of law. This idea did not find the support of the majority of the UNWCC and Bohuslav Ečer, the Czech delegate, was especially vocal in his objection. He argued that the UNWCC, as a body "composed of highly qualified lawyers and experts, and presided over by one of the most distinguished international lawyers and experienced international judge, should not be confined solely to this work for which a body of well-trained officials would be sufficient".<sup>48</sup> The Chinese

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<sup>44</sup> Koo, 1997, p. 630, see *supra* note 29.

<sup>45</sup> *Ibid.*, p. 618.

<sup>46</sup> History of the UNWCC, p. 113, see *supra* note 14.

<sup>47</sup> Kochavi, 1998, p. 28, see *supra* note 10.

<sup>48</sup> *Ibid.*, p. 93.

delegate agreed on the point that the Technical Committee was superfluous.<sup>49</sup>

### **16.3. China and the Sub-Commission in Chungking**

The UNWCC consisted of both a main commission situated in London and a Sub-Commission situated in China's wartime capital Chungking.<sup>50</sup>

#### **16.3.1. China's Role in Setting Up the Sub-Commission**

The British had, from the beginning, suggested that the UNWCC might sit in different panels in addition to the headquarters. In a memorandum enquiring about the Chinese position on joining, the Foreign Office had suggested that "if London were accepted as the headquarters, his Majesty's government would propose that panels of the commission should, if the governments concerned so desire, be established in Washington, Moscow, Chungking".<sup>51</sup> The Foreign Office was apparently aware of the fact that the Chinese government attached great importance to Japanese war crimes being examined in Chungking, and thought to secure general acceptance for this proposition that they considered to be a "concession"<sup>52</sup> and an "attempt to please China".<sup>53</sup>

The Chinese government had, indeed, from the early stages of the consultations expressed their determination to have a panel set up in China. As soon as the main commission in London had successfully been established the Chinese representative Koo started lobbying for this cause. During an ambassador's lunch in April 1944, especially organised for this purpose, Koo tried to impress on his fellow diplomats that "the creation of a Far Eastern panel or branch of the war crimes commission had been contemplated from the outset" and that the Chinese government "was

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<sup>49</sup> Telegram Ambassador in the United Kingdom (Winant) to the Secretary of State, January 27 1944, United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1944* ("Foreign Relations of the United States 1944"), vol. 1, US Government Printing Office, Washington, DC, 1944, p. 1274.

<sup>50</sup> After the end of the war the Sub-Commission transferred to the new Chinese capital Nanjing.

<sup>51</sup> Confidential Memorandum, UK Foreign Office to the Chinese Embassy in London, March 1943, Guoshiguan File 020-010117 0051-0057.

<sup>52</sup> Lai, 2012, p. 311, see *supra* note 18.

<sup>53</sup> Kochavi, 1998, pp. 51–52, see *supra* note 10.

anxious to have the branch created, as it had a very large number of cases of war crimes to submit".<sup>54</sup> A special committee on the establishment of a Sub-Commission was set up and Koo was duly elected as the Chairman. Again he stated that "a large number of Chinese cases were ready for examination and his government accordingly thought the Far Eastern panel of the commission which had been contemplated from the outset might now be brought into being".<sup>55</sup> Koo was also able to make use of the private connection with Pell who supported him in his endeavour.<sup>56</sup> When the question turned to the competencies the new panel had Pell argued that the panel should take the form of a Sub-Commission rather than a committee and enjoy the greatest degree of independence possible; a suggestion that was finally accepted by the UNWCC.<sup>57</sup> The efforts that were made to have a separate panel set up for the Far East shows that China was not content with playing a role in Europe but wanted a leading position in Asia instead. The idea was to turn Chungking into the centre for the prosecution of war criminals in Asia, just as London was in Europe.

### 16.3.2. The Sub-Commission and its Representatives

The foreign delegates to the Sub-Commission were mostly the diplomatic representatives to China at the time.<sup>58</sup> As was the case with the headquarters in London, the Chinese government selected highly qualified persons to attend to the work of the Sub-Commission. Wang Chung-Hui,<sup>59</sup> whose name had also been included in the discussion on who should become the Chinese delegate to London,<sup>60</sup> was elected as the Chairman of the Sub-Commission. He was the secretary general of the Supreme National Defence Council, and could look back on an illustrious career in law and politics, having served as the Minister of Foreign

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<sup>54</sup> Summary of Discussion, 13 April 1944, Guoshiguan file 020-010117-0051-0058.

<sup>55</sup> Committee on the Establishment of a Far Eastern and Pacific Sub-Commission, Meeting 1, 4 May 1944, Guoshiguan File 010117-0051-0063.

<sup>56</sup> Lai, 2012, p. 313, see *supra* note 18.

<sup>57</sup> *Ibid.*, p. 314.

<sup>58</sup> For a complete list of delegates of the Sub-Commission see History of the UNWCC, p. 130, *supra* note 14.

<sup>59</sup> Wang Chung-hui: Wang Chonghui [王宠惠].

<sup>60</sup> "If Dr. C.H Wang could represent us it would be ideal", Dr. T.V. Soong to Dr. K.C. Wu, 16 April 1943, Guoshiguan File 020-010117-0020-0126.

Affairs, Minister of Justice and judge at the Permanent Court of International Justice.<sup>61</sup> He commanded respect among lawyers as well as diplomats and had a reputation for being one of the foremost legal scholars in China.<sup>62</sup> He, too, was absent for a long period of time representing China at international conferences<sup>63</sup> before he finally resigned from the Sub-Commission in July 1946,<sup>64</sup> arguing that his numerous other responsibilities did not allow him to adequately fulfil his role as Chairman. P.C. Chang, the counsellor of the Executive Yuan, served the Sub-Commission as secretary general until he was appointed the new Chinese general counsel in New York in February 1946.<sup>65</sup>

### 16.3.3. The Sub-Commission's Competencies

The inaugural meeting of the Sub-Commission was held in Chungking on 29 November 1944<sup>66</sup> and it was off to a rather slow start. Despite many previous assurances to the contrary, the Chinese National Office was not able to supply the Sub-Commission with sufficient cases to examine. The Sub-Commission turned out to be the type of institution the British had initially imagined for London: almost exclusively concerned with reviewing evidence and compiling name lists of war crimes suspects. Legal questions were referred back to London for decision.<sup>67</sup> Judging from the available documents, it seems as if the Sub-Commission did not produce any draft legislation or memoranda or even the general recommendations on how to deal with Japanese war criminals. All in all

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<sup>61</sup> For an overview over life dates and career see Duan Caihua [段彩华], "Wang Chonghui xiansheng dashi nianbiao" [王宠惠先生大事年表], in Humenzhen renminzhengfu (ed.), *Wang Chonghui yu zhonghua minguo* [王宠惠与中华民国], Guangdong renmin chubanshe, Guangzhou shi, 2007, p. 390.

<sup>62</sup> Liu Baodong [刘宝东], "Faxuejia Wang Chonghui: shengping zhushu sixiang" [法学家王宠惠:生平著述思想], in Humenzhen renminzhengfu, 2007, p. 100, see *supra* note 61.

<sup>63</sup> He attended the San Francisco Conference in 1945.

<sup>64</sup> His successor was Dr. Liu Chieh, the Vice Minister of Foreign Affairs.

<sup>65</sup> Report of the British Embassy in Chungking, 21 February 1946, TNA, FO 371/57567.

<sup>66</sup> Report of the Far Eastern and Pacific Sub-commission of the United Nations War Crimes Commission, Guoshiguan File 020-010117-0054-0035.

<sup>67</sup> Question of deliberate bombardments being referred back to the main commission, Sub-Commission. United Nations War Crimes Commission, Minutes of the Thirty-Fifth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes of Commission, 10 a.m. Tuesday, December 10th, 1946, Ministry of Foreign Affairs ("Minutes No. 35" (<http://www.legal-tools.org/doc/234ffd/>)).

the connection between the UNWCC in London and the Sub-Commission was rather weak and communication between the groups was slow and cumbersome. Even Liang stated that the Chinese embassy in London had no more information available to them than those contained in the minutes which the Sub-Commission routinely sent to headquarters.<sup>68</sup>

#### 16.3.4. The Sub-Commission's Work and Foreign Critique

What began as a prestige project soon turned into a source of embarrassment for the Chinese government. After they had put enormous efforts into setting up their own panel, the work of the Sub-Commission remained unsatisfactory. So unsatisfactory, indeed, that the foreign delegates soon started reporting back to their governments in very unfavourable terms.

Initially there was a period of delay because the Chinese National Office had failed to submit cases on the standard forms used by the UNWCC.<sup>69</sup> The National Office, however, continued to elicit dissatisfaction when the cases they eventually submitted were not readily forthcoming, low in number and of insufficient quality. George Atcheson, the US delegate to the Sub-Commission, spoke of the "apparent inability of the present Chinese National Office to present cases appropriately prepared and investigated".<sup>70</sup> The delegates first chose the most diplomatic avenue of addressing the issue during the regular meetings of the Sub-Commission. During the fifth meeting in March 1945, for instance, the Australian delegate, Keith Officer, voiced his dissatisfaction over the fact that since its inception the Sub-Commission had not handled a single case. Other members agreed and the Secretary General was urged

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<sup>68</sup> The United States Commissioner, United Nations War Crimes Commission (Hodgson) to the Secretary of State, 6 August 1945; United States Department of State, *Foreign Relations of the United States: Diplomatic Papers, 1945, in The British Commonwealth, The Far East* ("Foreign Relations of the United States 1945"), vol. 6, US Government Printing Office, Washington, DC, 1945, p. 904.

<sup>69</sup> United Nations War Crimes Commission, Minutes of the Fourth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 4 p.m. Friday, February 23rd, 1945, at 305 Chung San Road, Chungking ("Minutes No. 4") (<http://www.legal-tools.org/doc/d8a3e5/>).

<sup>70</sup> Memorandum, George Atcheson, 3 April 1945, cited in Lai, 2012, pp. 330–31, see *supra* note 18.

to “expedite (the) work (of the National Office) so as to ensure a steady flow of cases to the Sub-commission for examination”.<sup>71</sup>

When no improvement was achieved the delegates started to think about ways to exert external pressure on the Chinese government. The British ambassador Seymour called on the chargé d’affaires of the US embassy and “express[ed] his concern over the lack of progress being made by the Chinese national office [...] due to the failure by the Chinese government to take the necessary action to make this office effective”. When reporting back to the department of state the chargé mentioned that he was “of the opinion that the situation may have to be taken up with the Generalissimo<sup>72</sup> and direct instructions [might have to be] issued by him in order to make Chinese participation really effective”.<sup>73</sup>

It seems that the work of the Chinese National Office was unsatisfactory due to a combination of factors. In part it was the unwillingness of the Chinese government and in part the inability to carry out the required work to an appropriate standard. It might seem surprising to suggest lack of commitment to the work of the Sub-Commission after the Chinese government had so vehemently insisted on a Sub-commission to be set up. But the time between the lobbying process in London and the complaints in Chungking had seen a change in the Chinese policy towards the prosecution of war criminals. While there had been genuine interest in prosecuting war criminals during the final years of the war, the issue of war crimes was no longer a priority for the Chinese government after the war had come to a close.<sup>74</sup> On the other hand, the Chinese National Office was also plagued by practical difficulties in their attempt to submit *prima facie* cases to the Sub-Commission. China had already started collecting evidence of Japanese atrocities a few years earlier, but a lot of the material that was initially collected lacked detailed information on the war

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<sup>71</sup> Far Eastern and Pacific Sub-Commission, Minutes of the Fifth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations for Crimes Commission, 4 p.m. Friday, March 16th, 1945, at 305 Chung San Road, Chungking (“Minutes No. 5”) (<http://www.legal-tools.org/doc/3494b3/>).

<sup>72</sup> “Generalissimo” was another term used to refer to Chiang Kai-shek.

<sup>73</sup> The Chargé in China (Briggs) to the Secretary of State, 20 April 1945, in *Foreign Relations of the United States 1945, 1945*, pp. 96–97, see *supra* note 68.

<sup>74</sup> Zuo Shuangwen [左双文] “Guomin zhengfu yu chengchu riben zhanfan jige wenti de zai kaocha” [国民政府与惩处日本战犯几个问题的再考察], *Shehui kexue yanjiu* [社会科学研究], 2012, no. 6, p. 150.

crimes suspects required for criminal prosecutions.<sup>75</sup> In 1944 the Chinese government had already set up a new structure charged with a more systematic collection of evidence,<sup>76</sup> the Chinese Commission for War Crimes Investigation ('Chinese Commission').<sup>77</sup> But the quality and number of cases that the Chinese Commission had been able to prepare for the Sub-Commission was insufficient still and led to the massive complaints from the foreign representatives.

The representatives' strategy to exert pressure was eventually effective and the Chinese government finally had no choice but to react to the criticism. "On June 7th 1945, the Chinese Ministry of Foreign Affairs notified the Sub-Commission by letter that the Chinese National Office had been abolished and its work of investigating war crimes had been entrusted to the Ministry of Justice and translation work to the Ministry of Foreign Affairs. Hope [was expressed] that soon there would be a steady flow of cases to the Sub-Commission for examination".<sup>78</sup> What the government did to address the criticism was to set up yet another commission on how to deal with war criminals,<sup>79</sup> which started work on 6 December 1945<sup>80</sup> and consisted of six different government bodies working together.<sup>81</sup>

In addition to the reorganisation of the National Office, the Chairman Wang Chung-Hui had also left the Sub-Commission, leading to a situation where the "work of the Sub-Commission [...] [was] almost

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<sup>75</sup> Toshiya Ikō [伊香俊哉], "Zhongguo guomin zhengfu dui riben zhanfan de chuzhi fangzhen" [中国国民政府对日本战犯的处置方针], translated by Lu Peng [芦鹏], in *Nanjing datushashi yanjiu* [南京大屠杀史研究], 2012, no. 4, p. 91.

<sup>76</sup> *Ibid.*, p. 92.

<sup>77</sup> Official Chinese name: Diren zuixing diaocha weiyuanhui [敌人罪行调查委员会]. Guo Biqiang [郭必强] and Jiang Liangqin [姜良芹] (eds.), *Nanjing datusha shiliaoji* [南京大屠杀史料集], vol. 19, *Rijun zuixing diaocha weiyuanhui diaocha tongji* [日军罪行调查委员会调查统计], Jiangsu renmin chubanshe, Nanjing, 2006, p. 70. Minutes of the 5th Meeting of the Chinese Commission for War Crimes Investigation, 29 July 1944.

<sup>78</sup> Far Eastern and Pacific Sub-Commission, Minutes of the Sixth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 4 p.m. Friday, June 8th, 1945, at 305 Chung San Road, Chungking ("Minutes No. 6") (<http://www.legal-tools.org/doc/941c34/>).

<sup>79</sup> 战犯处理委员会 [Commission on War Criminals].

<sup>80</sup> Ikō, 2012, p. 91, see *supra* note 75.

<sup>81</sup> Zuo, 2012, p. 150, see *supra* note 74.

suspended”.<sup>82</sup> After the reorganisation of the Chinese National Office it was “functioning more efficiently”<sup>83</sup> but the only nation willing to file cases with the Sub-Commission now was China itself.<sup>84</sup> With regard to the Sub-Commission, China had become a victim of its own ambitions. After having invited all the foreign delegates to participate in the Sub-Commission in Chungking, they were in an excellent position to supervise and comment on the Sub-Commission’s progress and to witness the sudden change in the war crimes policy of the Chinese government.

All of this led the Chairman of the UNWCC in London, Lord Wright, to conclude later that the UNWCC “had not been of first rate importance in the Far East” and that “affairs in the Far East had better be left to the Far East unless some particular connection arose”.<sup>85</sup> Given all the negative reactions and practical difficulties the Sub-Commission faced it is not surprising that there was the desire to wind it up at an early date. Stating that it considered its task already completed, the Sub-Commission informed the delegates in London of their request, arousing suspicion amongst some of them. Two delegates remarked that from the minutes of the Sub-Commission it was clear that “very big numbers of complaints were still under investigation” and thus found it hard to reconcile this with the Sub-Commission’s own statement.<sup>86</sup> After some discussion, however, a resolution was passed to wind up the Sub-Commission by 31 March 1947.<sup>87</sup>

#### 16.4. China and the Legal Discussion in the UNWCC

After the idea of a Technical Committee had been abandoned discussions on questions of law became an important and, from today’s perspective, especially interesting part of the UNWCC’s work. Because of their

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<sup>82</sup> Chang Pingshuen to Wang Huacheng, 18 June 1945, Guoshiguan File no. 020-010117-0052-0167.

<sup>83</sup> Telegram, The Ambassador in China (Hurley) to the Secretary of State, 28 July 1945, in *Foreign Relations of the United States 1945*, p. 901, see *supra* note 68.

<sup>84</sup> Telegram, The American Ambassador in China (Hurley) to the Secretary of State, 9 September 1945, in *Ibid.*, p. 924

<sup>85</sup> United Nations War Crimes Commission, Minutes of the Hundred and Thirty-First Meeting Held on 29 October 1947 (“Minutes No. 131”) (<http://www.legal-tools.org/doc/574109/>).

<sup>86</sup> United Nations War Crimes Commission, Minutes of Meeting Held on Wednesday, 12th March 1947, at 3 p.m. (“Minutes No. 124”) (<http://www.legal-tools.org/doc/981934/>).

<sup>87</sup> *Ibid.*

continued relevance for modern-day international criminal law only discussions pertaining to war crimes, crimes against humanity and aggression will be taken into consideration for the purpose of this chapter. Before turning to the questions of the law proper it might be helpful to keep in mind one caveat: when speaking about 'war crimes' many delegates used the term interchangeably to mean either war crimes in the strict sense or a general term encompassing a variety of crimes including crimes against humanity and aggression. In addition, the term was used to denote the legal concept of war crimes as well as a concept to delineate the jurisdiction of the UNWCC. At times there also seemed to have been a fair amount of confusion among the delegates themselves about these different levels of discussion. An additional difficulty in trying to follow the legal discussions presents the fact that, on suggestion of the US delegate Pell, debates in the UNWCC were not recorded.<sup>88</sup> This means that a big part of the discussion that took place can only be reconstructed indirectly, relying on private documentation or correspondence between the delegates and the national governments.

#### 16.4.1. War Crimes

With the official name being the "United Nations War Crimes Commission"<sup>89</sup> it is not surprising that Cecil Hurst, then Chairman, chose to raise the question of what constitutes a war crime during the first meeting of the UNWCC. Ečer felt that the term "War Crime was a conception of the past and [that] it had been surpassed by the method of total war". He suggested "Axis crimes" as a novel term that would include not only crimes as defined by international law but also as a concept wider in scope. Unsurprisingly other delegates were not prepared to go so far. Lord Atkin, who represented Australia, however, equally felt that the offenders had gone "right outside the realms of law" and he stressed that "it was important to free oneself from legalistic notions, whereby crimes could only be punished if they fell within the definition of war crimes". The Chinese delegate, Koo, said "that the Commission

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<sup>88</sup> Kochavi, 1998, p. 95, see *supra* note 10.

<sup>89</sup> The name United Nations War Crimes Commission was a suggestion by the Americans to find a more legal-sounding name for what the British had initially called the Commission for the Investigation of War Atrocities.

must approach its task from a practical point of view” and that “all war crimes should be punished according to the conscience of humanity”.<sup>90</sup>

After the initial euphoria had been replaced by an atmosphere of pragmatism, the UNWCC decided to follow a more conventional path. “It decided to proceed upon the footing that international law regards as a war crime any offence against the laws and customs of war [...] The Commission further decided however that it would be convenient for the purposes of its own work to adopt the list of war crimes prepared by the Responsibilities Commission of the Paris Peace Conference 1919 [the ‘Commission on Responsibilities’] so that the National Offices might know the various headings under which war crimes can be grouped”.<sup>91</sup> An additional factor in this decision was that both Italy and Japan had been involved in the drafting process for the list while Germany had at least never openly objected to it.<sup>92</sup> The UNWCC treated the document as an open list that could be amended if circumstances so demanded.<sup>93</sup> To China, the list soon acquired additional meaning and importance because it was heavily relied upon during the drafting of the War Crimes Trials Regulations in 1946.<sup>94</sup> Article 3 of these Regulations, containing a definition of acts that would be considered a war crime, was basically a reproduction of the list drawn up by the Commission on Responsibilities. The only noticeable difference being that in the Chinese legislation the individual items appeared in a different order and that a number of additional items were added to the original list.

The discussion about the definition of the term war crime is an example of how the work of the UNWCC influenced the Chinese interpretation and usage of an international legal instrument. The UNWCC seemed to have fostered the mutual exchange of ideas among

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<sup>90</sup> United Nations War Crimes Commission, Notes of Unofficial Preliminary Meeting Held at 2:30 p.m. on the 25th October 1943, at the Royal Courts of Justice, London (“Unofficial Preliminary Meeting”) (<http://www.legal-tools.org/doc/ad8990/>).

<sup>91</sup> UNWCC Progress Report, Adopted by the Commission on 19 September 1944, Guoshiguan File 020-010117-0021-0035.

<sup>92</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919*, Clarendon Press, Oxford, 1919, p. 80.

<sup>93</sup> Guoshiguan File no. 020-010117-0053-0010.

<sup>94</sup> War Crimes Trials Regulations [战争罪犯审判条例], 24 October 1946.

the delegates and across national borders; it also facilitated the introduction of new thinking on international law.

#### 16.4.2. Crimes Against Humanity

The realities of the war presented the delegates with atrocities that failed to fit into the established categories of war crimes. Two factors were especially problematic: the period of time during which an atrocity was committed and the status of the victims. Some crimes had been committed before the start of the actual war and some of the victims were enemy nationals suffering under the hands of their own rightful governments. Classical legal doctrine, however, only considered a crime to be a war crime if it was committed against enemy nationals during the time of hostilities.

The question of the time frame had been a very important concern for the Chinese from the very beginning and Koo had already stated during the very first meeting of the UNWCC that his government “reserved the right [...] to raise the question of the period of time which [will be] investigated”.<sup>95</sup> China's main concern was to extend the jurisdiction of the UNWCC to all acts committed after 18 September 1931, the date of the so-called Mukden incident that marked the beginning of the Japanese invasion in Manchuria.<sup>96</sup> The British, however, seemed worried that if the Chinese suggestion was accepted the Czechs might then demand investigations into the Sudetenland Crisis in March 1939 which might raise uncomfortable questions for Britain, which had supported the annexation in the Munich agreement of 1938.<sup>97</sup> In the end, the question of the time period proved to be only a minor problem for the UNWCC, and both the main body as well as the Sub-Commission decided to deal with cases that had occurred before the official start of the war.

A far bigger issue was whether the UNWCC should restrict itself to cases where the victims were Allied nationals. This question was especially pressing because of the German atrocities committed against the German Jewish community and other German citizens. In one of the

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<sup>95</sup> History of the UNWCC, p. 114, see *supra* note 14.

<sup>96</sup> Telegram, Ministry of Foreign Affairs to the Chinese embassy in London, undated, Guoshiguan File 020-010117-0020-0094.

<sup>97</sup> Kochavi, 1998, p. 55, see *supra* note 10.

first meetings of the Legal Committee, Pell drew attention to these circumstances. Some delegates, especially the British, Greek and Norwegian, were of the opinion that crimes committed by Germans against their own nationals could not be included in the term war crimes “however compelling the need to punish them” might be.

A different position was represented by the US, and strongly supported by Czechoslovakia and the Netherlands.<sup>98</sup> The Czech delegate prepared a report on this matter, arguing that these offences should not be considered an internal matter of the affected countries.<sup>99</sup> After some further study the Legal Committee submitted a report coming to the conclusion that the UNWCC would need to bring its “methods and principles [...] into line with the principles expressed in the Allied declarations”<sup>100</sup> and suggested to define ‘crimes against humanity’ as “crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed”.<sup>101</sup> In 1944 Liang argued for China, however, that he preferred a strict definition of war crimes which would exclude atrocities committed by a government against its own citizens.<sup>102</sup> Other delegates were also unsure whether their governments would support such a progressive policy. The Chairman of the UNWCC finally decided to address a letter to the British government asking if they desired that the UNWCC restricted itself to crimes committed against Allied nationals. The failure of the British government to respond to the UNWCC’s letter in a timely manner turned into an *éclat*. It became obvious how sensitive the issue had become when Ečer withdrew from all committees and threatened to leave the UNWCC over the dispute. Pell reported back to Washington that he feared the issue would enrage the Jewish community and would “arouse [them] into hostility”.<sup>103</sup> The British government, however, answered that they were

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<sup>98</sup> History of the UNWCC, p. 174, see *supra* note 14.

<sup>99</sup> *Ibid.*, p. 175.

<sup>100</sup> *Ibid.*, p. 176.

<sup>101</sup> *Ibid.*

<sup>102</sup> Lai, 2012, p. 319, see *supra* note 18.

<sup>103</sup> The American delegate at the United Nations War Crimes Commission (Pell) to the Secretary of State, 27 September 1944, in Foreign Relations of the United States 1944, p. 1367, see *supra* note 49.

of the opinion that the UNWCC should only deal with crimes committed against Allied victims.<sup>104</sup>

In the end the UNWCC never took a definite stand on this question until the drafting of the Nuremberg Charter.<sup>105</sup> Only in January 1946, after it was clear that the International Military Tribunal would not only prosecute for war crimes in the strict sense but also for crimes against humanity and aggression, did a new round of discussions regarding the definition of war crimes and especially the limits of the jurisdiction of the UNWCC begin.

The Chairman felt strongly that the authority of the UNWCC should extend to all war crimes in the widest sense. Liang felt unable to contribute to the discussion because he had not received instructions from Chungking in time.<sup>106</sup> When the discussion resumed at the next meeting he felt compelled to speak on his own responsibility and stated that he was of the opinion that “crimes against peace and against humanity should be put on the same footing as War Crimes in the limited sense, and that the Commission’s jurisdiction included them”.<sup>107</sup> Because he had still received no instructions from his government he had to abstain from voting.<sup>108</sup> I have not been able to find material that would explain why the Chinese government failed to send any instructions on this question. But it seems reasonable to suggest that they did indeed support Liang’s opinion on this point, because the concept of crimes against humanity was eventually included in the Chinese War Crimes Trials Regulations.<sup>109</sup>

It is interesting to note, however, that the Sub-Commission in Chungking followed a different course on this question and decided that Japanese crimes against Japanese citizens would not be included in the work of the Sub-Commission.<sup>110</sup> As a result, atrocities committed against

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<sup>104</sup> History of the UNWCC, p. 176, see *supra* note 14.

<sup>105</sup> *Ibid.*

<sup>106</sup> United Nations War Crimes Commission, Minutes of Ninety-Second Meeting Held on 3rd, January 1946 (“Minutes No. 92”) (<http://www.legal-tools.org/doc/f786cd/>).

<sup>107</sup> United Nations War Crimes Commission, Minutes of Ninety-Third Meeting Held on January 30th, 1946 (“Minutes No. 93”) (<http://www.legal-tools.org/doc/78e610/>).

<sup>108</sup> Countries also abstaining: the US, Canada, New Zealand, Norway, France.

<sup>109</sup> War Crimes Trials Regulations [战争罪犯审判条例], 24 October 1946.

<sup>110</sup> Far Eastern and Pacific Sub-Commission, Minutes of the Thirty-Sixth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 10

those from Korea and Taiwan, who still had Japanese citizenship during the war, were also excluded.

### 16.4.3. War of Aggression

Whether or not waging an aggressive war should be considered a crime under international law and whether it should be included in the term ‘war crimes’ and fall under the jurisdiction of the UNWCC was, according to the Chairman “[b]y far the most important issue of substantive law to be studied by the Commission and its Legal Committee”.<sup>111</sup>

In March 1944 the Czech representative argued in the Legal Committee that the paramount crime of the Axis leaders was the starting of the war. The Legal Committee at first agreed and included the idea in a draft resolution on the “Scope of the Retributive Action of the United Nations”.<sup>112</sup> They advocated the view that waging a war of aggression should be treated as a war crime and fall under the jurisdiction of the UNWCC. The representatives, however, were unsure whether their respective governments would support such an interpretation.<sup>113</sup> A special Sub-Committee was entrusted with the task of studying the question further.<sup>114</sup> The British representative came to the conclusion that “aggressive war however reprehensible did not represent a crime in international law”.<sup>115</sup> The majority of the Sub-Committee and the Legal Committee agreed and reports were handed to the main UNWCC for discussion.<sup>116</sup> Ečer’s minority report only found support among the delegates from Australia, China, New Zealand, Poland and Yugoslavia.<sup>117</sup>

Both Koo and Liang were absent from London when this important topic was discussed and King represented the Chinese interests in the

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a.m. Tuesday, January 14th, 1947, Ministry of Foreign Affairs (“Minutes No. 36”) (<http://www.legal-tools.org/doc/dc1e12/>).

<sup>111</sup> Jonathan A. Bush, “‘The Supreme Crime’ and Its Origins: The Lost Legislative History of the Crime of Aggressive War”, in *Columbia Law Review*, 2002, vol. 102, no. 8, p. 2348.

<sup>112</sup> History of the UNWCC, p. 180, see *supra* note 14.

<sup>113</sup> *Ibid.*, p. 181.

<sup>114</sup> The Sub-Committee consisted of the British, Czechoslovak, Dutch and US representatives.

<sup>115</sup> History of the UNWCC, p. 181, see *supra* note 14.

<sup>116</sup> *Ibid.*, p. 182.

<sup>117</sup> *Ibid.*, p. 183.

UNWCC. He reacted to the British suggestion that aggression, *de lege lata*, was not a crime under international law in the following manner:

With all his admiration for Professor McNair's legal opinion, and for the opinion so ably expressed [...] he was inclined to think that [...] while sound in theory, was too narrow and legalistic and lagged far behind the movement of the enlightened public opinion which regarded those acts as illegal, and considered that the political and military leaders responsible should be tried and punished. Was it not, he asked, within the competence of this Commission to bring this matter to the attention of the Governments so that the question might be settled on the political level? Perhaps, in due course, another attempt would be made to codify International Law, and some ruling might then be given to the effect that acts for the preparation and launching of wars of aggression was illegal, and that their authors should be punished.<sup>118</sup>

Koo later stated in a message to the Chinese Ministry of Foreign Affairs that Hurst tried to draft a formula that would be acceptable to all parties and tried to avoid the need to actually vote in the full UNWCC. Koo said that Hurst and he agreed that there was "no difference of opinion expressed before the commission on fundamental question whether such acts should be punished as criminal [...] Difference of opinion was on how they should be punished whether on political level or by judicial process".<sup>119</sup> The majority of delegates, however, thought the question was a critical one and preferred to wait for instructions from their governments.<sup>120</sup> As a result no final report or recommendation was adopted on this issue in the end.<sup>121</sup>

Probably not a pure coincidence, it was the representatives from Czechoslovakia and China who fought for criminal responsibility to be

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<sup>118</sup> United Nations War Crimes Commission, Minutes of Thirty-Fifth Meeting Held on October 10th, 1944, Report on Whether Preparation and Launching a War Can Be Considered a War Crime, ("Minutes No. 35") (<http://www.legal-tools.org/doc/daeb97/>).

<sup>119</sup> Telegram, Chinese Embassy in London to the Chinese Ministry of Foreign Affairs, 26 December 1944, Guoshiguan File 020-010117-0052-0033.

<sup>120</sup> The American Representative in the United Nations War Crimes Commission to the Secretary of State, 2 November 1944, in Foreign Relations of the United States 1944, p. 1391, see *supra* note 49.

<sup>121</sup> History of the UNWCC, p. 185, see *supra* note 14.

attached to aggression. Both countries had lost parts of their territory to Germany and Japan before the actual war and under the eyes of the world community. As one of the signatories of the Munich Agreement in 1938 that had granted Germany the annexation of the Sudetenland, Britain had understandably little enthusiasm to have the topic discussed.<sup>122</sup> China had lost Manchuria to the Japanese in 1931 and spent considerable time and energy in trying to convince the international community and the League of Nations to acknowledge this as an act of aggression. Koo had been the Chinese delegate representing China's interest before the League of Nations in 1931 in the Manchuria conflict and in 1937 over further Japanese aggression. Both times he had been only moderately successful. The Lytton Report in 1932 had not contained an outright condemnation of Japan but recognised the special nature of Japanese rights in Manchuria instead.<sup>123</sup> In August 1937 Koo at least achieved a condemnation of Japanese aerial bombing of Chinese cities and saw the League of Nations reject the Japanese claim that it was acting in self-defence but again no concrete measures followed.<sup>124</sup>

The UNWCC was thus another forum for China to raise the question of Japanese aggression in China one more time. If the UNWCC were willing to adopt aggression as a war crime falling under its jurisdiction, there was a chance that several Japanese would be listed as war crime suspects for participation in a war of aggression. This would in turn help to establish that Japan had been guilty of aggressive behaviour towards China since 1931.

#### **16.4.4. Putting the Discussion into Perspective**

While the foregoing account focuses on the legal discussions in the UNWCC, it is important to remember that they did not take place in isolation but formed just one part of a longer and ongoing discourse on war crimes. Several organisations in Europe and the US had already started discussing similar questions of international law before the UNWCC as an official body took up the topic. This fact is especially noteworthy as some of the members of the UNWCC had also been

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<sup>122</sup> Kochavi, 1998, p. 55, see *supra* note 10.

<sup>123</sup> Thomas W. Burkman, *Japan and the League of Nations: Empire and World Order, 1914–1938*, University of Hawaii Press, Honolulu, 2008, p. 170.

<sup>124</sup> *Ibid.*

members of those predecessor organisations. Unlike in the UNWCC, where the delegates had to represent the sending governments, the predecessor organisations had allowed them to participate in their private capacity and form their personal and professional opinions on questions of the prosecution of war criminals.

The International Commission for Penal Reconstruction and Development, for instance, was a semi-official group made up of members of the Law Faculty at the University of Cambridge and important scholars of international and criminal law.<sup>125</sup> As early as 1941 at least some of the members of this commission had come to the opinion that under the Kellogg-Briand Pact the initiation of a war might be considered a crime.<sup>126</sup> This is interesting to note, since the majority of the members of the UNWCC later found it impossible to agree with such a statement.

Another close connection existed between the UNWCC and the London International Assembly ('LIA') that had a number of members who consequently went on to become representatives in the UNWCC.<sup>127</sup> Even though the LIA was not an official body, its members were chosen by the national governments and in turn it made recommendations to the respective governments.<sup>128</sup> The LIA members had also concerned themselves with the questions of war crimes, crimes against humanity and aggression and had issued a recommendation that stated the following:

Moreover, [...] the commission recommended that those responsible for the crime of war i.e. unprovoked aggression should be branded as criminals and adequately punished. In respect of the extermination of Jews it was recommended that punishment should be imposed not only when the victims were allied Jews but even when the crimes had been

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<sup>125</sup> History of the UNWCC, p. 95, see *supra* note 14. Members listed: M. Aulie (Norway), Dr. Benes (Czechoslovakia), M. Bodson (Luxembourg), Prof. Cassin (France), M. de Baer (Belgium), Dr. de Moor (Netherlands), Dr. Glaser (Poland), M. Kaeckenbeck (Belgium), M. Stavropoulos (Greece), Dr. Vlajic (Yugoslavia).

<sup>126</sup> Bush, 2002, p. 2341, see *supra* note 112.

<sup>127</sup> De Baer (Belgium), Liang (China), Ečer (Czechoslovakia), Stavropoulos (Greece), de Moor (Netherlands), Bodson (Luxembourg) and Colban (Norway).

<sup>128</sup> Historical Survey of the Question of International Criminal Jurisdiction: Memorandum submitted by the Secretary General, United Nations General Assembly, International Law Commission, 1949, A/CN.4/7/Rev.1, p. 18.

committed against stateless Jews or any other Jews in Germany or elsewhere.<sup>129</sup>

It is tempting to speculate about the reasons the LIA delegates apparently had no difficulties in declaring crimes against humanity and aggression as criminal under international law. One explanation might be that they were acting in their private capacity and were able to express their personal opinions as legal experts without the need to take their governments' policy into considerations.

This short introduction is of course by no means a systematic or comprehensive account of the legal discussion that took place during the war. But it is already sufficient to suggest that there were individual legal scholars that had come to the conclusion that waging a war of aggression or atrocities committed by a state against its own nationals should entail criminal responsibility. The UNWCC, however, had a far more conservative approach, choosing to rely on the list of war crimes that had already been drawn up in 1919 and refusing to accept the more progressive ideas of a crime of aggression and crimes against humanity. Only when the London Conference created a new legal reality with the Nuremberg Charter was the UNWCC willing to change its course. China had supported the more conservative majority on the question of non-Allied victims but had been a supporter of the idea to criminalise the waging of an aggressive war.

### **16.5. UNWCC and the War Crimes Trials Reports**

Another important task that was carried out by the UNWCC was the collection and publication of a series of war crimes trials reports covering the national proceedings against war criminals in the member countries. The UNWCC published 15 volumes of transcripts of war crimes trials plus accompanying material such as the translations of national legislation and commentary prepared by the staff of the UNWCC between 1947 and 1949.<sup>130</sup> The UNWCC took the task of reporting on war crimes very

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<sup>129</sup> London International Assembly, *The Punishment of War Criminals: Recommendations of the London International Assembly*, London, 1944, p. 7.

<sup>130</sup> All the volumes are now available online.

seriously and started in 1945 to put pressure on the governments, including the Chinese, to report war crimes trials to the UNWCC.<sup>131</sup>

In the foreword to the first volume published in 1947, Wright, as Chairman of the UNWCC, expressed aptly what he considered to be the importance of this undertaking:

I cannot sufficiently emphasize what I regard as the great importance of these reports from the point of view of the future development of International Law as applied to war crimes. [...] these reports will show, for the practitioner or the student, the particular problems which have arisen and how in practice they have been dealt with and also show to the historian of the laws of war the practice of courts in applying those laws to particular cases. These reports are of the highest value and will prevent what would otherwise happen, namely the want of a correct record of the most significant cases which have been tried.<sup>132</sup>

And as Wright had predicted, the reports turned into an important, if not the most important, source on post-war class B and C war crimes trials. Until today these volumes continue to play an important role because they offer English translations of material that would otherwise be inaccessible to many. In order to illustrate its importance, it suffices to point out that modern *ad hoc* courts have made use of these cases reported by the UNWCC.<sup>133</sup> In many countries access to the trial records has also been restricted or at the very least requires the interested person to look for the material in historical archives.

Because of the strong reliance on the reports issued by the UNWCC, and the lack of access to alternative or additional material, it becomes essential to remember that the cases published were of course a very small selection of the overall number of cases available and a deliberate selection as such. According to the UNWCC, “the trials selected for reporting, however, are those which are thought to be of the

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<sup>131</sup> Letter, Lord Wright to Wellington Koo, 20 December 1945, Guoshiguan File 020-010117-0041-0044.

<sup>132</sup> United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 1, His Majesty's Stationery Office, London, 1947, p. x.

<sup>133</sup> For an example of International Criminal Tribunal for Yugoslavia usage of post-Second World War cases see: Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge University Press, Cambridge, 2013, pp. 75–76.

greatest interest legally and in which important points of municipal and international law arose and were settled”.<sup>134</sup>

The reader cannot help but to notice an imbalance in the numbers of cases that were published for each country. Out of the 89 cases selected for publication more than half were trials held by the US and the British courts.<sup>135</sup> One explanation for this can be found in the number of cases that each country submitted to the UNWCC. The US had submitted by far the highest number of cases followed by Britain, France and Australia.<sup>136</sup> No trial records at all were received from Denmark, Belgium, Czechoslovakia or Yugoslavia.<sup>137</sup> China, somewhat curiously, decided to send just a single report, that of the case of Takashi Sakai, that was printed in the fourteenth volume of the reports.

Archive material suggests that several important decisions made by Chinese tribunals were being translated into English for submission to the UNWCC in 1948.<sup>138</sup> It is unclear why only one report was sent in the end. It is probably sensible to assume the reason to be time constraints or a change in policy which had prevented more cases reaching London. This one case is of special importance because it is until today the only judgment that is readily available in an English translation. The majority of the original Chinese judgments are still not openly accessible, with the exception of a select few that were reproduced in Chinese newspaper articles in the 1940s.

So an interesting question to ask is surely why did the Chinese government decide to select this particular case? I have been unable to find material directly explaining why this case was selected over others but the special circumstances of the trial does offer a plausible explanation. Takashi Sakai was tried before the War Crimes Military

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<sup>134</sup> Text on the inside of the front cover of United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 15, His Majesty's Stationery Office, London, 1949 (“Law Reports of Trials of War Criminals”).

<sup>135</sup> 28 American Cases, 27 British Cases.

<sup>136</sup> Number of Cases reported to the UNWCC (number of cases published): United States 809 (28), Britain 524 (27), Australia 256 (5), France 254 (11), the Netherlands 30 (7), Poland 24 (4), Norway 9 (5), Canada 4 (1), China 1 (1). *Law Reports of Trials of War Criminals*, vol. 15, p. xvi, see *supra* note 134.

<sup>137</sup> *Law Reports of Trials of War Criminals*, p. 203, see *supra* note 134.

<sup>138</sup> Chinese Ministry of Defence to the Ministry of Foreign Affairs, 8 May 1948, Guoshiguan File 020-010117-0054-0092.

Tribunal of the Ministry of National Defence in Nanking in August 1946 for crimes against peace, war crimes and crimes against humanity. In addition to atrocities committed on the mainland, he was also indicted for his participation in the invasion of Hong Kong. As the “Conqueror of Hong Kong”<sup>139</sup> his case received enormous attention both from the Chinese as well as from the British side. The British authorities in Hong Kong initially tried to obtain permission to interrogate Sakai in Nanking<sup>140</sup> and have him handed over for trial in a British court in Hong Kong. When these requests met with resistance from the Chinese side the British relented but still insisted that at least a report on the trial should be sent to them because both British and Canadian soldiers had been victims in the case.<sup>141</sup> Under these circumstances one trial report could conveniently be used to satisfy demands from different sides as well as to placate public opinion. In addition, the *Shen Bao*, one of the major Shanghai-based newspapers at the time, had already published several articles on the trial of Sakai, including a full reprint of the judgment over a series of three articles.<sup>142</sup> It thus seems reasonable to assume that it was not an accidental decision to choose the case of Sakai for publication in the trial reports; on the contrary, this was a case meant and prepared for publication.

However, the effect that the Chinese were eventually able to achieve by selecting the Sakai case was far from ideal. Especially the legal content and argumentation of the case provoked harsh criticism by the UNWCC and especially from Wright. In his foreword to the volume that contained the decision, the Chairman of the UNWCC stated his opinion that the Chinese court had misinterpreted an important legal concept. He criticised the usage and interpretation of the concept of aggression as employed by the judges and came to the conclusion that this case should not be considered a suitable precedent in international law. He explained that:

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<sup>139</sup> Suzannah Linton, “Rediscovering the War Crimes Trials in Hong Kong, 1946–48”, in *Melbourne Journal of International Law*, 2012, vol. 13, no. 2, p. 340.

<sup>140</sup> T.W. Kwok Hong Kong to the Chinese Ministry of Foreign Affairs, 4 May 1945, Guoshiguan File 020-010117-0033-0019.

<sup>141</sup> Headquarters Land Forces Hong Kong to Dr. Wang Shih Chieh (Minister of Foreign Affairs), 20 June 1946, Guoshiguan File 020-010117-0033-0026.

<sup>142</sup> *Shen Bao* [申报] (Shanghai edition), 31 August 1946 / 4 September 1946 / 5 September 1946.

the main current of thought and decisions on crimes against peace which have been given since the end of the war has been that such crimes can only be committed as a matter of legal principle by accused individuals who may be described as acting on the policy-making level. In this particular case, however, it is difficult to see that the accused came within that category. I do not think that this decision can be relied on as substantially affecting the general current of authority on this matter.<sup>143</sup>

The fact that the Chinese judgments were, with that one exception, not reported in the war crimes trials reports make the Chinese cases practically inaccessible for a wider English-speaking audience. Even until recently, the original judgments in Chinese were also not readily available to the general public. So it is not surprising to see the Chinese post-war trials being described as an “obscure” topic even in recent literature.<sup>144</sup> This leads to a situation where judgments of Chinese military tribunals have been completely ignored in the research on international criminal law. The war crimes trials reports now have the unfortunate effect of perpetuating the negative assessment of the Chinese trials and the Chinese interpretation of international law in general based on the analysis of just a single case. I do not want to suggest that these cases should be used as precedents, nor do I even suggest that they have fulfilled basic requirements that might make them suitable for legal research. Whether these cases can still be of value for present-day international criminal law is a question that can only be answered after more careful and detailed study of the Chinese trials and a better understanding of the historical circumstances in which they took place.

## 16.6. Conclusion

The commission has suffered much reproach and depreciation. But it has kept its course. It has at least held aloft the banner of international justice. It has been a rallying centre for those who had that justice at heart. It would have

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<sup>143</sup> Law Reports of Trials of War Criminals, vol. 14, pp. x–xi.

<sup>144</sup> Roger S. Clark, “The Crime of Aggression: From the Trial of Takashi Sakai, August 1946, to the Kampala Review Conference on the ICC in 2010”, in Kevin J. Heller and Gerry J. Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, p. 390.

been a sad day for the future of mankind if justice were not vindicated. I feel that justice will be vindicated this time.<sup>145</sup>

After studying the UNWCC and its work for some time it is hard to not agree with the above quotation from Wright, who was speaking at a conference in the summer of 1945. While the UNWCC might not have been immediately influential on the big international tribunals held after the war, it was definitively a “rallying centre” for a number of very dedicated individuals attempting to use international law to achieve what they considered justice for the victims of the war. With the memory of the “fiasco of Leipzig” still present, and the reality of new and unimaginable atrocities committed during the war, the members of the UNWCC steadfastly advocated the use of law to vindicate justice and worked in a dedicated fashion towards this goal over a time span of several years. This in itself should suffice to guarantee acknowledgment of their tireless efforts. In addition, the work of the UNWCC proves to be a fascinating opportunity to study the discourse on questions of international law and international criminal law during and immediately after the Second World War.

The UNWCC counted some of the most eminent legal scholars among its members and was a forum where differing and diverse opinions could be voiced and discussed. Today, this allows us to reconstruct a more complete picture of the legal opinions held at the time because the UNWCC gave especially the smaller Allied countries the opportunity to argue their positions. It is especially interesting to see that China was actively involved in the work of the UNWCC as a country with comparatively little experience in the realm of international law. The US and Britain had only relinquished their extraterritorial rights in China in early 1943 and the Chinese municipal justice system was still regarded with much suspicion in the Western world.<sup>146</sup> This scepticism towards the Chinese, or what was more generally perceived as the “oriental legal system”, was also present among the members of the UNWCC.<sup>147</sup> During

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<sup>145</sup> Lord Wright speaking at the opening session of the National Offices Conference, “Justice Will be Vindicated”, in *The Times*, 1 June 1945, p. 2.

<sup>146</sup> Dong Wang, *China's Unequal Treaties: Narrating National History*, Lexington Books, Lanham, 2005, p. 93.

<sup>147</sup> Report of Commission II (later Commission I) On The Trial of War Criminals: Question 1 – Will Adequate Punishment of All War Criminals Be Procurable by the Application of the Penal Code of Each Nation Concerned, May 1942, TNA, TS 26/873.

his time as a member of LIA, Marcel de Baer, later the Belgian delegate to the UNWCC, for instance, stated the following opinion when reviewing national criminal legislations and whether they could be used to try war criminals:

Japanese or Chinese Law: I have endeavored in vain to obtain some precision about these criminal laws, but with due respect for our honoured Ally, and due admiration for the way in which they are fighting our common foe, even the Chinese law does not seem to coincide with Occidental ideas on this subject [...] Conclusion: With the exception of quislings and traitors I suggest it is not desirable that war criminals should be dealt with according to municipal law.<sup>148</sup>

While the municipal legal system was often still seen as deficient, China had a number of well-respected experts in the realm of international law. Given the ongoing discussion on the Eurocentric nature of international law, the study of the UNWCC offers a unique chance to understand more about the contribution of China as a non-Western nation to the development of international criminal law during this critically important period.

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<sup>148</sup> *Ibid.* On The Trial of War Criminals: Question 2 – Concerning the Criminals in Respect of Whom the Municipal Law Provides Means of Punishment, Is It Desirable That Any or All of Them Should Be Dealt with According to That Law?

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## **Historical Origins of International Criminal Law: Volume I**

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further consolidate this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume I comprises contributions by prominent international lawyers and researchers including Judge LIU Daqun, Professor David Cohen, Geoffrey Robertson QC, Professor Paulus Mevis and Professor Jan Reijntjes.

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