

# **The Missed Italian Nuremberg: The History of an Internationally-sponsored Amnesty**

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## ***Abstract***

*In the aftermath of the Nuremberg and Tokyo trials, most international lawyers focused on their importance and legacy. Although the legal and moral value of the two major trials against the (surviving) members of the Axis Alliance appears indisputable, their success runs parallel with the almost untold story of the decision to conceal the responsibilities of the Italian forces.*

*In October 1943, the Allied leaders had established the United Nations War Crimes Commission, an independent body tasked with investigating and recording the evidence of war crimes, and identifying where possible the individuals responsible; and reporting to the Governments concerned, when there was prima facie case for the prosecution of those individuals. Indeed, by March 1948 the Commission identified and listed more than 1,200 Italian nationals, who could have been held accountable for heinous war crimes, and in particular those committed on the territories of Ethiopia and Yugoslavia.*

*On 1 November 1943 the Big Three (UK, US and USSR) had also adopted the Moscow Declaration, agreeing that Italian war criminals had to be brought to justice. This proposition would be broadened by the Treaty of Peace with Italy, signed in February 1947, which Article 45 established that Italy should have arrested and surrendered for trial the persons accused of having committed, ordered, or abetted war crimes and crimes against peace or humanity by any Allied or Associated Power (including Ethiopia, since under Article 38 this provision would be applicable to all acts entailing the responsibility of Italy or Italian national towards it, from 3 October 1935).*

*Despite these initiatives, apart from the 40 trials the British conducted in Italy immediately after the end of the conflict, no Italian would be put under trial for the commission international crimes committed between 1935 and 1945.*

*In fact, since 1944 the Italian governments put in place diversionary strategies, with the effect of obstructing the enforcement of the obligations undertaken – and eventually the execution of the arrest warrants issued against Italian individuals. These strategies would never succeed, if at the same time the Italian governments hadn't made significant efforts to build strong ties with the Allies (and in particular US and UK) and to “reposition” the country.*

*As a result, while on the one hand Italy was authorized to submit charges to the UNWCC (thus being recognized also as a victim of war crimes), to establish a national Commission of Inquiry to assess the charges brought by Yugoslavia (with the declared task of identifying the individuals to be brought to justice), and to adopt a generalized amnesty aimed at “pacifying the country”; on the other, its counterparts, and in particular Yugoslavia and Ethiopia, were actively discouraged from requesting the execution of the arrest warrants issued against Italian high officers, including Marshal Badoglio, who had been entrusted in September 1943 with creating a first post-Fascist government together with King Victor Emmanuel III.*

*To sum up, the main proposition of this paper is that the missed prosecution of Italian alleged war criminals represents a debacle of the international community, for three main reasons.*

*First of all, because the members of the international community, and in particular the Great Powers, have been directly responsible for the non-enforcement of the new-born international criminal law, and in particular of the obligations undertaken by Italy between 1943 and 1947.*

*Secondly, because for reasons of expediency, the victims of the crimes committed by Italy, and in particular Ethiopians and Yugoslavs, have not been provided with the same kind of justice which was granted to the victims of the other two members of the Axis.*

*Lastly, because by granting a de facto amnesty to the individuals identified by the UNWCC as the most responsible for the crimes, it also paved the way for the adoption by the De Gasperi government of a generalized, de iure amnesty (the so-called “Togliatti Amnesty”), by which Italy “condoned” the crimes committed by Fascists and collaborators on the national territory. The combination of these initiatives would finally result in a “collective amnesia”, which constitutes a second victimization of the victims of those crimes, both at the national and international level.*

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## **1. Introduction: the History of the Missed Prosecution of Italian War Criminals, as emerging from the Official Records**

In January 1942, while the fortunes of Second World War were turning against the Axis powers, the Allied leaders started making efforts to concretely address the crimes committed by their enemies, and embarked on the endeavor of setting up those initiatives and bodies which would lay the

foundations of the Nuremberg and Tokyo trials.<sup>1</sup> In particular, at the end of the Inter-Allied Conference on the Punishment of War Crimes, held in London, the representatives of 18 Governments signed a declaration, vowing that “those guilty or responsible [for the commission of acts of violence inflicted upon the civilian populations], whatever their nationality”, would be “sought out, handed over to justice and judged”, and that “the sentences pronounced” would be “carried out”.<sup>2</sup>

As a result, the following year a “United Nations War Crimes Commission” was established to investigate those war crimes reported by national authorities. Five years later, the UNWCC had identified more than 1,200 Italian nationals who could have been held responsible for the commission of widespread and systematic crimes, on the territory of the occupied countries, in the execution of the policies of the Fascist regime. The crimes included the use of poisonous gas, mass murder, internment of thousands of civilians, acts of torture, and the bombardment of Red Cross hospitals and ambulances, and were especially committed during the Italo-Ethiopian War and the following occupation of the country (1935-1937) and the occupation of Yugoslavia (1941-1943).

In the same period, following the entry into force of the instrument of surrender, convinced that the Italian Army would help them in the liberation of the country, the Allies agreed to set up a fruitful collaboration with the new Italian government, led by King Victor Emmanuel III and Marshal Pietro Badoglio. Therefore, having set apart every prejudice against the former enemy (Badoglio himself had been the Chief of Staff of the Italian Army until December 1940, while the King had backed Mussolini’s regime until the 25 July 1943 *coup*), by February 1944 they started to hand back to this “unity government” the areas liberated from the Germans.

In the following years, while setting up the Nuremberg and Tokyo Tribunals, and despite the UNWCC’s efforts, the Allies would sacrifice the prosecution of major Italian war criminals on the altar of national reconciliation and political stability. In fact, apart from the 40 trials the British

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<sup>1</sup> On the issue of the early initiatives aiming at the punishment of war criminals, see A.J. Kochavi, *Prelude to Nuremberg. Allied War Crimes Policy and the Question of Punishment*, Chapel Hill/London, 1998; and D. Watson, “*Molotov and the Moscow Conference, October 1943*”, in *PERSA Papers*, 2002 (available at <https://www2.warwick.ac.uk/fac/soc/economics/staff/mharrison/archive/persa/> – last visited: 29 September 2016).

<sup>2</sup> The so-called St. James Declaration was signed, on 13 January 1942, by the representatives of the Governments of Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland, and Yugoslavia, at the presence of the representatives of Australia, Canada, China, India, New Zealand, the Union of South Africa, the United Kingdom (UK), the United States of America (US), and the Union of Soviet Socialist Republics (USSR). See M.C. Bassiouni, “*From Versailles to Rwanda in Seventy-Five Years: the Need to Establish a Permanent International Criminal Court*”, in *Harvard Human Rights Journal*, 1997, p. 21; and United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, p. 89 (available online at <http://www.unwcc.org/documents/> – last visited: 29 September 2016)).

conducted in Italy immediately after the end of the conflict,<sup>3</sup> the Allies – and the British in particular – didn't make any effort to fight against impunity. On the contrary, they discouraged the issuance of arrest warrants by Yugoslav and Ethiopian authorities.

As a result, Italian post-war governments were given *carte blanche* to deny Fascist regime's responsibilities (it's exemplary that only in 1996 would Italy admit the use of poisonous gas in Ethiopia during the Italo-Abyssinian War<sup>4</sup>). This cold-blooded cover-up of the heinous crimes committed by Italians represented a *de facto* amnesty for the individuals identified by the UNWCC,<sup>5</sup> and paved the way for the adoption of a *de iure* amnesty to thousands of individuals who had joined the Fascist Party or collaborated to the late Republic of Salò: the so-called *Togliatti Amnesty*.

This paper addresses the most salient decisions and initiatives that impeded the prosecution of the international crimes committed by Italy from 1935 to 1943, and that triggered a collective amnesia regarding the role played by Italy during those years, resulting in a second victimization of the victims of those crimes.

First of all, in order to define the contour of the obligations which violation would be facilitated and condoned by the Great Powers, it is necessary to analyze the legal instruments constituting the normative basis for the prosecution of the alleged Italian war criminals and the initiatives undertaken to enforce their provision.

Secondly, will follow an examination of the work of the United Nations War Crimes Commission, the inter-governmental and independent body instituted in October 1943 by 17 States, and tasked with assessing the evidence of war crimes and identifying where possible the individuals that should be held accountable for their commission.<sup>6</sup> This will particularly focus on the charges brought

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<sup>3</sup> An account of these trials is given by J.L. Garwood-Cutler, "The British War Crimes Trials of Suspected Italian War Criminals, 1945-47", in J. Carey, W.V. Dunlap, R.J. Pritchard (ed. by), *International Humanitarian Law: Origins, Challenges, Prospects, Vol. I – Origins*, 2003, New York, pp. 89 ss.

<sup>4</sup> On 8 February 1996, the Ministry of Defence, General Domenico Corcione, for the first time admitted that poisonous gas had been deployed during the Italo-Ethiopian War, and that General Badoglio was aware of it (see *Guerra d'Etiopia: il Governo ammette l'uso dei gas*, in *Adnkronos*, 8 February 1996 (available at [http://www1.adnkronos.com/Archivio/AdnAgenzia/1996/02/08/Altro/GUERRA-DETIPIA-IL-GOVERNO-AMMET-TE-LUSO-DEI-GAS\\_144700.php](http://www1.adnkronos.com/Archivio/AdnAgenzia/1996/02/08/Altro/GUERRA-DETIPIA-IL-GOVERNO-AMMET-TE-LUSO-DEI-GAS_144700.php) – last visited: 29 September 2016).

<sup>5</sup> In this spirit, it is symptomatic that General Guglielmo Nasi, who had been included by UNWCC in the lists of alleged war criminals, would be nominated by the then Italian Government as Governor of the Italian Trust territory of Somalia in February 1950, being the appointment withdrawn only as a result of the formal protest of Emperor Haile Selassie of Ethiopia (the episode is recalled in A. Del Boca, *Gli Italiani in Africa Orientale: Nostalgia delle Colonie*, Bari, 1984, pp. 57-61).

<sup>6</sup> Being the assessment of the individual liability available only in relation to the crimes committed in Ethiopia (the UNWCC archives are only partially accessible), when dealing with the conducts related to the occupation of the Balkans I will mostly refer to the findings of the Italian Commission of Inquiry.

against Italians by Yugoslavia and Ethiopia, the only two countries which would actively pursue the extradition of individuals listed by the UNWCC.<sup>7</sup>

Only then can one assess the impact of the Allies' political decisions: in particular, the political meddling in UNWCC's activities, and the unconditional support which the United States and the United Kingdom lent to Italian governments, especially between 1945 and 1946. In this spirit, an analysis of the findings of the Italian Commission of Inquiry, set up by De Gasperi government in the spring of 1946, will be made: in fact, if on the one hand this commission would largely contribute to frustrating the attempts of Yugoslav authorities to bring Italian war criminals to justice, on the other it provides us with a collection of documents which show that Yugoslavs were victims of systematic and widespread violations of human rights.

The final section will focus on the history and the effects of the so-called "Togliatti Amnesty", the decree drafted by the Minister of Justice and Secretary of the Italian Communist Party, Palmiro Togliatti, and adopted in June 1946 by the first De Gasperi government. In fact, while making their best efforts to secure the non-execution of any arrest warrant issued against Italian nationals, Italian authorities decided to grant a generalized amnesty in the name of national reconciliation, which led to the acquittal or release of thousands of Italians who had collaborated with the Fascist regime.

Besides the direct impact on the trials of former Fascist officers and collaborators, in fact, this act significantly contributed to the cleansing of the crimes committed by Italy before and during the Second World War, and to the "sanitization" of the narrative regarding the role and responsibilities of Italian armed forces.

## **2. The Normative Basis for the Prosecution of Italian War Criminals according to International Law**

On 8 September 1943, after months of secret negotiations, by two separate radio messages General Dwight Eisenhower and Marshal Pietro Badoglio finally announced the entry into force of the so-called "short armistice" between Italy and the Allies, which they had signed (respectively as "Commander-in-Chief of the Allied Forces, acting by authority of the Governments of the United

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<sup>7</sup> Even though I won't focus on the crimes committed in Greece, it's important to recall that this country submitted to the UNWCC the second longest list of alleged Italian war criminals. An account of the conducts of the Italians in Greece is given, among others, by D. Conti (*Criminali di guerra italiani*, Roma, 2011, pp. 5-6).

States and Great Britain and in the interest of the United Nations”, and “Head of the Italian Government”) in Cassibile (Sicily) 5 days before.<sup>8</sup>

This international agreement consisted of 12 general obligations, unconditionally accepted by Italy in order to put an end to the Allies’ military operations in the country. Among other things, Italy agreed on the cessation of all hostile activities, on transferring prisoners of war, aircraft and fleet, on surrendering the entire national territory, on withdrawing of Italian armed forces from all participation in the war, and on complying with the other “conditions of a political, economic and financial nature”, to be transmitted at later date.

According to this last obligation, which had the nature of an open clause, the following 29 September the Parties concluded a second agreement, the so-called “Instrument of Surrender”, signed at Malta by Eisenhower and Badoglio and entered into force the same day. Under this agreement, among other things, Italy undertook an obligation to apprehend and surrender into the hands of the United Nations “Benito Mussolini, his Chief Fascist associates and all persons suspected of having committed war crimes or analogous offenses whose names appear on lists to be communicated by the United Nations” (Article 29).<sup>9</sup>

This latter provision was later amended by the Protocol signed by Eisenhower and Badoglio on 9 November 1943 at Brindisi, and entered into force the same day. By this agreement, which for the first time saw the Soviet Union joining the Allies’ side, the Parties changed the title of the previous one into “Additional conditions of Armistice with Italy” and, among minor amendments, modified Article 29. In particular, according to the new wording of this provision, Italy was obliged to apprehend and surrender into the hands of the UN “Benito Mussolini, his Chief Fascist associates and all persons suspected of having committed war crimes or analogous offenses whose names appear on lists to be communicated by the United Nations and who now or in the future are on territory controlled by the Allied Military Command or by the Italian Government”.

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<sup>8</sup> Having considered the overwhelming presence of the German army on their territory and fearing immediate and violent reprisals, despite the agreement had also been approved by King Victor Emmanuel III, at first Badoglio had tried to postpone its entry into force to 12 September and to link it to the Allied Forces’ landing in the country. On the events surrounding the negotiations between Italian authorities and the Allies and those leading to the announcement of the armistice, see E. Aga-Rossi, *A Nation Collapses. The Italian Surrender of September 1943*, Cambridge, 2000, pp. 82-89 and 91-95; W. Cavalieri, *L’Aquila. Dall’armistizio alla Repubblica: 1943-1946. La seconda guerra mondiale a L’Aquila e provincia*, L’Aquila, 1994, p. 18-20; and G. Rochat (*Le guerre italiane 1935-1943. Dall’impero d’Etiopia alla disfatta*, Torino, 2008, pp. 421-433).

<sup>9</sup> Moreover, under Article 36, the Italian Government was bound to “take and enforce” all measures necessary for the execution of the instrument, and to “comply with any instructions issued by the Allied Commander-in-Chief for the same purpose”. A Control Commission, representing the UN and charged with regulating and executing the armistice “under the orders and general directions of the Allied Commander-in-Chief”, was established by the following Article 37.

### **3. The Adoption of the Peace Treaty: the Clauses on the Prosecution of the Italian War Criminals and the Obligation to surrender the Accused**

The Treaty of Peace with Italy, which was finally signed at Paris on 10 February 1947, and entered into force on the following 15 September,<sup>10</sup> contained a fully-fledged “war crimes clause”. In fact, its Article 45 – which reproduced Article 38 of the Draft Treaty adopted by the Council of Foreign Ministers (CFM) on 18 July 1946 – provided that Italy “shall take the necessary steps to ensure the apprehension and surrender for trial” of persons “accused of having committed, ordered, or abetted war crimes and crimes against peace or humanity” (para. 1, letter a). In case of a disagreement regarding the application of the cited provision, the issue shall be referred by any of the Governments concerned to the Ambassadors in Rome of the USSR, UK, USA, and France, “who will reach agreement with regard to the difficulty” (para. 3).

This provision was the result of a political compromise between the “Big Three”: on the one hand, UK and US, that were every day less eager to be involved in tracing and arresting the alleged war criminals, fearing the repercussions in the Italian public opinion; on the other, the Soviet Union, the champion of the Yugoslav government’s cause.<sup>11</sup>

The Italian authorities received the Draft with scorn. According to the Minister of Justice, Fausto Gullo (of the Italian Communist Party - PCI), the clause was at odds with Italian nationals’ right to liberty, since they would be exposed to every request of surrender, even the most arbitrary. Furthermore, he observed that, since para. 3 didn’t represent an effective remedy, and the wording of the article was based on an “aberrant interpretation” of a new practice of international law (the principle of individual criminal responsibility), a UN body should be mandated to assess the merits of every request.<sup>12</sup>

Therefore, during the Paris Peace Conference, the Italian delegates submitted a memorandum on the war crimes clause, contesting, among other things: 1) that the individuals responsible for the

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<sup>10</sup> *Treaty of Peace with Italy*, signed at Paris on 10 February 1947, entered into force on 15 September 1947, 61 Stat. 1245; *Treaties and Other International Acts Series* 1648.

<sup>11</sup> While the Soviet Union delegates had proposed a clause imposing on Italy an obligation to surrender all alleged war criminals requested by an Allied or Associated power, the U.S. had advocated for a specific Protocol to include provisions on the issue of war criminals. After a first compromise had been reached on the British position, namely the inclusion of a war crimes clause in the Peace Treaty, a second one had to be negotiated on the provision regarding the settlement of disagreements on its application. For an account of the negotiations, see E.G.H. Pedaliu, *Britain, Italy and the Origins of Cold War*, Basingstoke/New York, 2003, pp. 25-27.

<sup>12</sup> The letter is presented as an annex to F. Focardi, L. Klinkhammer, “*La questione dei «criminali di guerra» italiani e una Commissione di inchiesta dimenticata*”, in *Storia contemporanea*, 2001, pp. 517-518.

commission of crimes against peace or humanity that Italy would be called to arrest and surrender, namely the Fascist leaders and their accomplices, had already been subjected to “the direct justice of the Italian people”; 2) that the obligation to arrest and surrender should not stem from any request of Allied or Associated Powers, being necessary an assessment on a case by case basis, to be conducted by the Four Ambassadors; 3) that the accused should only be tried by judicial organs which offered guarantees regarding the protection of their right to a fair trial; 4) that the Moscow “Declaration Regarding Italy”, establishing that the alleged Italian war criminals shall be handed over to justice, did not imply that they should be transferred to the countries on whose territory they had committed crimes – as provided in the Declaration regarding Germany –, but that they should be tried by an international tribunal which respected the standard of fair trial.<sup>13</sup>

Nevertheless, and despite the sympathy for the Italian cause, at the end of the Paris Conference, UK and US representatives decided that the best way to deal with the delicate balance of post-war spheres of influence was to completely disengage with the matter of the punishment of Italian war criminals and put pressure on Italy to cooperate with the requesting countries. Therefore, they agreed with the Soviets on the “punitive” wording of Article 38, which would later become Article 45 of the Peace Treaty.<sup>14</sup>

Indeed, this provision not only extended the application *ratione materiae* of the clauses contained in the Armistices (including crimes against peace and against humanity), but it also imposed on Italy a legally binding obligation to execute *any* request submitted by Allied or Associated Governments, irrespective of any independent assessment of their legality.

Furthermore, according to Article 38 of the Peace Treaty the date from which its provisions would be applicable to all acts entailing the responsibility of Italy or Italian nationals towards Ethiopia was set at 3 October 1935, with the effect that Italy could have been held accountable for events which predated the creation of the Axis.<sup>15</sup>

However, the said provisions would soon become a dead letter, having been voided by some of their drafters and beneficiaries. On 14 August 1947, the United States issued a unilateral declaration to

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<sup>13</sup> E.G.H. Pedaliu, “Britain and the ‘Hand-over’ of Italian War Criminals to Yugoslavia, 1945-48”, in *Journal of Contemporary History*, 2004, pp. 514-515.

<sup>14</sup> *Idem*, pp. 519-525. The Author recalls (at p. 524) that in August 1946, the Yugoslav representative at the UNWCC had accepted its Chairman’s offer of a list of the names of the worst war criminals, whose cases did not imply any political considerations – a list which would be further reduced by the UNWCC Research Officer to 7 individuals charged with conducts which included brutality and the deliberate liquidation of civilian populations –, and that the Foreign Office had accepted this compromise, but decided that Britain would not apprehend and surrender the accused.

<sup>15</sup> On the Ethiopian position and initiatives during the negotiations of the Peace Treaty, see R. Pankhurst, *cit.*, pp. 109-117.



formally renounce the application of Article 45. Their example was followed on 16 April 1948 by the United Kingdom, which conditioned its renunciation to the prosecution of Italian war criminals by national judiciary. As to France, although its government would never issue such a declaration, by 1948 its authorities had decided not to address any further request to arrest and transfer the alleged war criminals to Italy. Finally, during 1948 also the Greek authorities unofficially communicated to the Italian government the decision to renounce to the application of Article 45.<sup>16</sup>

#### **4. The International Community Efforts to identify War Criminals: the Establishment of the United Nations War Crimes Commission (UNWCC)**

Just few days before the adoption of the Protocol to the Instrument of Surrender, on 30 October 1943 the foreign ministers of the US, UK and USSR concluded the so-called Moscow Declaration, composed of: a Joint Four-Nation Declaration, also signed by the Ambassador of the Republic of China in the Soviet Union; a Declaration Regarding Italy; a Declaration on Austria; and a Statement on Atrocities, personally signed by Roosevelt, Churchill and Stalin.<sup>17</sup>

According to the “Declaration Regarding Italy”, in furtherance of a policy “based upon the fundamental principle that Fascism and all its evil influence and configuration shall be completely destroyed and that the Italian people shall be given every opportunity to establish governmental and other institutions based on democratic principles”, the three Foreign Secretaries agreed, among other measures to put into effect, that “Fascist chiefs and army generals known or suspected to be war criminals shall be arrested and handed over to justice”. A proposition that was in line with another historical decision, agreed upon on 20 October, to formally establish, in accordance with the 13 January 1942 “St. James Declaration”, a United Nations War Crimes Commission (‘UNWCC’).

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<sup>16</sup> See *Commissione parlamentare d’inchiesta sulle cause dell’occultamento di fascicoli relativi a crimini nazifascisti* (Parliamentary Commission of Inquiry on the causes of the concealment of files concerning nazi-fascist crimes), Doc. No. 18/XXIII, *Relazione finale* (Majority Report), 8 February 2006, pp. 74-75 (available at [http://www.camera.it/\\_bicamerale/leg14/crimini/inddoc.htm](http://www.camera.it/_bicamerale/leg14/crimini/inddoc.htm) - last visited: 29 September 2016). The Commission was set up after 695 files concerning crimes committed in Italy by German nationals were found, in 1994, in a closet that had been hidden in the Military Prosecutor’s Office in Rome. Among the possible causes for the concealment of the files, the members of the Commission investigated also the hypothesis that Italian government was worried that the opening of trials against German nationals in Italy would be detrimental to the cause of the Italian war criminals. While the Majority Report resolutely rejects this hypothesis, the Minority Report recalls that in several official documents, it had been underlined that Italy couldn’t request the extradition of German alleged war criminals and at the same time resist the extradition of its nationals.

<sup>17</sup> “Declaration of the Four Nations on General Security”, reproduced in *A Decade of American Foreign Policy: Basic Documents, 1941-49. Prepared at the request of the Senate Committee on Foreign Relations by the Staff of the Committee and the Department of State*, Washington, 1950, pp. 9-14.

The UNWCC was an inter-governmental and independent body, created by the 17 Member States<sup>18</sup> that had participated to the Diplomatic Conference held at the Foreign Office in London, and later joined by Denmark, but not by the Soviet Union.<sup>19</sup> Under the terms of the 1943 agreement, the Commission was intended to serve two primary purposes: 1) to investigate and record the evidence of war crimes, identifying where possible the individuals responsible; and 2) to report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming”.<sup>20</sup> Thus, it represented that UN organ which, according to the Protocol to the Instrument of Surrender, would adopt the lists of persons suspected of having committed war crimes or analogous offences, to be apprehended and surrendered by Italy to the international community.

At the 25 January 1944 meeting of the UNWCC, the national representatives agreed on two procedural issues: the setting up of a “Committee I”, which would examine the information submitted by the Governments on the alleged crimes; and the establishment by the participating governments, pursuant to a recommendation of the Commission, of National Offices whose duty it would be to investigate the reports relating to war crimes, and to submit to the Committee reports on the offences investigated.

The members of Committee I would examine the charges filed by National Offices during weekly meetings, and approve the lists of war criminals to be distributed to the (national) authorities responsible for their apprehension.<sup>21</sup> In fact, the UNWCC was only involved in the preparatory investigatory work, the trials of the alleged war criminals was a separate question, to be determined by the national governments at a later stage<sup>22</sup>.

As its members always maintained, the UNWCC had no authority or responsibility for the act of extradition of an individual, its sole function being to advise the detaining authorities whether or not, in the Commission’s opinion, a *prima facie* case against that individual existed.<sup>23</sup>

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<sup>18</sup> Australia, Belgium, Canada, China, Czechoslovakia, Greece, India, Luxembourg, New Zealand, Norway, Poland, Union of South Africa – which was only involved in the setting up of the Commission, United Kingdom, United States, Yugoslavia, and the French Committee of National Liberation and the Netherlands’ Government-in-exile.

<sup>19</sup> As recalled by A.J. Kochavi (*cit.*, p. 61), “Kremlin did not need a United Nations commission, which could be expected to limit its freedom of action on implementing a policy calling for the immediate trial of war criminals upon their arrest”.

<sup>20</sup> See *History of the United Nations War Crimes Commission and the Development of the Laws of War*, *cit.*, p. 113.

<sup>21</sup> *Idem*, pp. 120-123.

<sup>22</sup> See A.J. Kochavi, *cit.*, p. 54.

<sup>23</sup> See *History of the United Nations War Crimes Commission and the Development of the Laws of War*, *cit.*, pp. 390-391 and 484.

Unfortunately, since its first official meeting, on 11 January 1944, the UNWCC members realized that this body had little political influence and support, for the Allied Powers didn't provide it with an adequate staff or sufficient funds.<sup>24</sup> Only after the Allies liberated German-occupied territories, and started grasping the extent of the atrocities committed by the Nazi, they began to develop a list of suspected war criminals and to press the UNWCC. By 31 March 1948, it had produced 8,178 "dossiers" on alleged war criminals and periodical lists of about 37,000 War Criminals, Suspects and Witnesses<sup>25</sup>; among them were 1,204 Italians, charged by the "Allied and Associated Governments" and listed by the Commission as war criminals.<sup>26</sup>

## **5. The UNWCC Contribution to the Assessment of the Crimes committed during the Occupation of Yugoslavia and the Italo-Abyssinian War**

Yugoslavia was the country on which territory the Italians had allegedly committed most of the international crimes they were accused of: 764 of the 1,204 Italian nationals listed by the Committee I of the UNWCC (63% of the total) would be charged by the Yugoslav Government.<sup>27</sup> In assessing these charges, not only the UNWCC would identify the alleged war criminals, but would also provide substantial contribution to the qualification of their conducts.

In particular, on 22 November 1946, the so-called Legal Committee (Committee III<sup>28</sup>) published a report on Yugoslav-Italian charges of Crimes against Humanity, giving an opinion as to whether "a considerable number of charges brought by the Yugoslav National Office against certain Italian nationals" had to be considered as crimes against humanity, and for what reason.<sup>29</sup>

Besides the assessment on the charges, the two most interesting and valuable conclusions reached by the committee were: 1) that Italian authorities had warned the Yugoslavs that those who refused

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<sup>24</sup> See M.C. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years", *cit.*, p.22 – also recalling that "within a few months of its creation, the first Chairman of the UNWCC, Sir Cecil Hurst, announced that the Commission would be unable to fulfill its mandate."

<sup>25</sup> *Idem*, pp. 22-23. See also *History of the United Nations War Crimes Commission and the Development of the Laws of War*, *cit.*, p. IV.

<sup>26</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War, Appendix III, Statistical Report of Cases Listed by Committee I*, pp. 509 and 511.

<sup>27</sup> See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War, Appendix III, Table V*, p. 511.

<sup>28</sup> On 1 February 1944, two more committees were established: Committee II (the so-called "Enforcement Committee"), to deal with the enforcement of the measures necessary to apprehend the persons listed; and Committee III (also known as Committee on Legal Questions or "Legal Committee"), tasked with advising the Commission on questions of law.

<sup>29</sup> United Nations War Crimes Commission, Committee III, *Yugoslav-Italian charges of Crimes against Humanity referred to Committee III by Committee I*, Report by Committee III (Second Draft), III/73, 22 November 1946 – available at <https://www.legal-tools.org/en/browse/record/2c306c/> (last visited: 29 September 2016).

to give up would be “completely annihilated”;<sup>30</sup> and 2) that “a great number of examples of crimes have been established” and *prima facie* cases had been made out for: shooting of prisoners while allegedly trying to escape, shooting of hostages, internment under inhumane conditions, torture, deportation to concentration camps, murder and attempted murder, wanton destruction of property, execution without trial, and other inhumane acts.<sup>31</sup>

Therefore, the committee recalled its General Propositions defining the term «crimes against humanity», where it stated that “systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity which thus becomes also the concern of International Law”. In fact, intervention by the international community was only triggered when crimes had been committed, which endanger the community itself and shock the conscience of mankind “either by their magnitude and savagery or by their great number or by the fact that a similar pattern is applied at different times and places”.

In conclusion, having taken into account the mass of information which had been presented by the Yugoslav representative<sup>32</sup>, the committee advocated the prosecution of these crimes at the international level, noting that “the inhumane acts described in (...) this paper and in the documents referred to, are, as a consequence of their magnitude and savagery, and of the great number, and as a consequence of the fact that a similar pattern was applied at different times and places, of such a kind, that they warrant the intervention by States other than [Yugoslavia]”. Moreover, the orders and warnings uttered by Mussolini in July 1942 demonstrated that “the systematic mass action which was in progress, was authoritative, and this authoritative character has transformed the number of individual common crimes, punishable merely under municipal law, into crimes against humanity, which thus have become the concern of International Law”.<sup>33</sup>

As to the Italo-Abyssinian war, it has to be recalled that at the time of the invasion of Ethiopia, charges had already been made by the Ethiopian Minister of Foreign Affairs and Emperor Haile

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<sup>30</sup> *Idem*, para. XIV.

<sup>31</sup> *Idem*, para. XV.

<sup>32</sup> The information would be substantially reproduced in a publication entitled “Italian Crimes in Yugoslavia” and submitted to the UNWCC by the Yugoslav Information Office in 1945 (available at <http://www.legal-tools.org/en/browse/record/ce5756/> – last visited: 29 September 2016). It’s also worth recalling other UNWCC reports and decisions dealing with the authoritative nature of Italian criminality in Yugoslavia, such as the report drafted by Committee I on the case of the Italian Courts in Dalmatia (United Nations War Crimes Commission, Committee I, *Report on the Yugoslav Case No. 940 (Italian Courts in Dalmatia)* I/13, 10 July 1945 – available at <http://www.legal-tools.org/en/browse/record/ab46a4/> (last visited: 29 September 2016)) and the note on the taking of hostages (United Nations War Crimes Commission, Committee I, *Note on the Yugoslav Case No. 1281 (Prefetto di Cattaro: Taking of Hostages)*, I/24, 17 August 1945 – available at <http://www.legal-tools.org/en/browse/record/3229c2/> (last visited: 29 September 2016)).

<sup>33</sup> Committee III Report, *cit.*, para. XVI.

Selassie, denouncing the use of poison gas and the bombing of Red Cross hospitals and ambulances;<sup>34</sup> consequently, the League of Nations had imposed sanctions on Italy, since it had resorted to war against a member of the League in violation of Article 16 of its Covenant.<sup>35</sup>

However, it was only during 1947, after the publication of the Peace Treaty, that the UNWCC would finally accept that Ethiopia had the right to submit charges.<sup>36</sup> According to Committee I, the question of UNWCC's jurisdiction over war crimes committed in Ethiopia during the Italo-Abyssinian War was "not so much a question of law as that of policy" – and politics.<sup>37</sup> Analogously, it would be political calculation to determine if the obligation to surrender any alleged war criminal had to be enforced, since para. 3 of Article 45 stated that in case of a disagreement concerning that matter, the Governments concerned must refer it to the Ambassadors in Rome of the Four Powers.

Before agreeing on the submission of a limited number of cases, the Imperial Ethiopian Legation had addressed a letter to the Secretary-General of the UNWCC, anticipating that the Ethiopian Government would tender information about war crimes committed by the Italians during the Italo-Abyssinian war. According to this letter, the Italians had been charged with: ordering the use of poison-gas, the burning of hospitals and ambulances, and the bombing of towns between October 1935 and March 1936; resorting to systematic terrorism against civilians, ending in the widespread attacks approved by the Viceroy of Italian East Africa and Governor-General of Addis Abeba, General Rodolfo Graziani, in 1937; burning villages and massacring inhabitants, including women

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<sup>34</sup> See R. Pankhurst, "Italian Fascist War Crimes in Ethiopia: A History of Their Discussion, from the League of Nations to the United Nations (1936–1949)", in *Northeast African Studies*, 1999, p. 84. The appeal pronounced in June 1935 in front of the General Assembly of the League of Nations by Emperor Selassie (who expressly denounced the use of poisonous gas in these terms: "The deadly rain that fell from the aircraft made all those whom it touched fly shrieking with pain. All those who drank the poisoned water or ate the infected food also succumbed in dreadful suffering. In tens of thousands, the victims of the Italian mustard gas fell.") is available at [http://astro.temple.edu/~rimmerma/appeal\\_to\\_the\\_league\\_of\\_nations\\_.htm](http://astro.temple.edu/~rimmerma/appeal_to_the_league_of_nations_.htm) (last visited: 29 September 2016).

<sup>35</sup> On the issue of the reaction to the Italian aggression and the consequent failure of the League of Nations, see, among others: G.W. Baer. "Sanctions and Security: The League of Nations and the Italian-Ethiopian War, 1935-1936", in *International Organization*, 1973, pp. 165-179; and C.A. Ristuccia, "1935 Sanctions Against Italy: Would Coal and Crude Oil have made a Difference?", in *European Review of Economic History*, 2000, pp. 85-110.

<sup>36</sup> The Commission held that since the Peace Treaty was the final settlement of a war, besides restoring the conditions of peace and resuming peaceful relations between the belligerents, it had the purpose of settling "all other questions outstanding between the parties" at the time of its conclusion. In this spirit, "the main concern of the other Treaty provisions regarding Ethiopia" was "the extinction of rights acquired by Italy as a result of her aggression in Ethiopia"; moreover, such provisions entailed at the same time, with retrospective effect, the "obligations and responsibilities on the part of Italy and Italian nationals toward Ethiopia" (see UNWCC Committee I, Doc. I/81, *Submission of Cases by Ethiopia: Commission's Jurisdiction over Crimes Committed in Ethiopia, Note by Dr. J. Latawski, Legal Officer (Revised)*, 13 February 1947, para. 7 (available at <http://www.legal-tools.org/en/browse/record/3b9eac/> - last visited: 29 September 2016)).

<sup>37</sup> *Idem*, para. 8.

and children, as reprisals; murdering prisoners of war and hostages; deporting and subjecting the civilian population to forced labour.<sup>38</sup>

In particular, General Graziani was accused by the Ethiopians of having ordered, in reprisal to the attempted assassination on his life on 19 February 1937, the two massacres of “Yekatit 12”, the date in the Ethiopian calendar indicating the day when indiscriminate killing and imprisonment of Ethiopians by Italian occupation forces started, and Debre Libanos, where (according to Graziani himself) between 19 and 21 May 1937, 297 monks and 129 deacons were killed by Italian colonialists.<sup>39</sup>

During one of its last meetings, Committee I examined in detail the individual cases of the most prominent Italian generals, chosen among those who had been charged by the Ethiopian authorities.<sup>40</sup> The minutes of these meetings not only provide us with an overview of the crimes committed by the Italians, but also with an in-depth assessment of the individual conducts.

In particular, on 4 March 1948, the committee discussed, among others, the cases of Marshal Pietro Badoglio (identified as F. Badoglio in the minutes), as Commander-in-Chief of the Italian Forces operating in Ethiopia; General Rodolfo Graziani, as Viceroy of Italian East Africa and Governor-General of Addis Ababa; Alessandro Lessona, Vice and Full Minister for the Colonies; General Guglielmo Nasi, for his involvement in the campaign and later as Governor of Harar; and the same General Alessandro Pirzio Biroli who had already been charged in relation to the crimes committed in the Balkans (where he had commanded the Italian 9th Army in 1941, and served as Governor of Montenegro from 1941 to 1943), as commander of the Eritrean Corps and Governor of Amhara province.

The most interesting assessments are those regarding Badoglio and Graziani. As to the former, after careful consideration members of Committee I concluded that there was *prima facie* evidence that as Commander-in-Chief, he bore responsibility for the use of poisonous gas and for the bombardment of Red Cross hospitals and Ambulances; as to the latter, a broad agreement was

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<sup>38</sup> United Nations War Crimes Commission, *Letter received by the Secretary General from the Minister, Imperial Ethiopian Legation, London A.58*, 28 October 1947 (available at <http://www.legal-tools.org/en/browse/record/3aa5ad/> – last visited: 29 September 2016).

<sup>39</sup> For an account of the events, see G. Rochat, *cit.*, pp. 82-84. The Author estimates that the victims of Yekatit 12 were between 3,000 and 6,000, and recalls that on 28 February Graziani would propose to Mussolini the destruction of the entire old city of Addis Abeba. See also G. Rochat, *Guerre italiane in Libia e in Etiopia 1921-1939*, Treviso, 1991, pp. 210 ss; and A. Del Boca, *Gli Italiani in Africa orientale, Vol. III, La perdita dell'impero*, Roma-Bari, 1982, pp. 105-106.

<sup>40</sup> Analogously to the Yugoslavs, also the Ethiopians would later reproduce the materials submitted to the UNWCC in a publication, entitled “La Civilisation de l’Italie Fasciste en Ethiopie” and edited by the “Information and Press Department of the Imperial Government of Ethiopia” (the first volume is available at <http://www.legal-tools.org/en/browse/record/3c0b0c/>, while the second at <http://www.legal-tools.org/en/browse/record/b15d2a/> – last visited: 29 September 2016).

expressed on the existence of *prima facie* evidence that he was responsible for mass murder, acts of torture, deportations, internment of civilians under inhumane conditions, pillage, wanton destruction of property and of religious buildings, deliberate bombardment of Red Cross hospitals and ambulances, and use of poisonous gas. Furthermore, during the debate, it was pointed out that in several occasions, Graziani had instructed governors or ordered his troops to destroy the Abyssinian chiefs and notables and Amharic elements, a method similar to that recognized in the territories occupied by Germany.<sup>41</sup>

Unfortunately, despite the liability of the high officers clearly emerged from official documents and orders they had signed in their official capacity (in accordance with and in execution of Mussolini policies), this would remain the only independent assessment of the crimes committed by the Italians in Ethiopia. Indeed, while General Graziani would only be charged, in late 1947, for his participation to the Republic of Salò as Minister of Defence,<sup>42</sup> Marshal Badoglio would never be charged with crimes committed during the Italo-Abyssinian War.<sup>43</sup>

## **6. The Impact of the Allies' Interferences on the UNWCC's Initiatives**

Despite the complaints of the government of Yugoslavia, a debate on the surrender of Italian war criminals wouldn't be held by the UNWCC until May 1945, when the Yugoslav representative submitted a formal motion on the matter of their apprehension, denouncing that nothing had been done since the approval, in December 1944, of the first list of Italian war criminals.<sup>44</sup>

On the following 19 June, the UK delegate communicated to the Enforcement Committee that on 16 June a telegram had been received from the Minister of Foreign Office in Caserta, informing that the Supreme Allied Commander had already appointed a Committee to deal with the tracing and apprehension of war criminals, and that this Committee had established relationships with the

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<sup>41</sup> United Nations War Crimes Commission, Committee I, *Summary Minutes of the Meeting of Committee I held on 4 March 1948 at 3 p.m.*, No. 139 (available at <http://www.legal-tools.org/en/browse/record/24a995/> – last visited: 29 September 2016).

<sup>42</sup> On 2 May 1950, General Graziani was sentenced to 19 years by the Court of Appeal of Rome. Four months later, thanks to an amnesty, he would be freed.

<sup>43</sup> In 1946 Marshal Badoglio was expelled from the Senate by the High Court of Justice, but never charged with war crimes. He died in November 1956 in his hometown, Grazzano Badoglio, which had been named after him in 1939.

<sup>44</sup> In the first five months of operation, the national authorities had transmitted to the UNWCC only 70 cases, half of which were so incomplete that the commission could not find a *prima facie* evidence of war crimes, and often described them as trivial (see A.J. Kochavi, *cit.*, p. 101 – that recalls that the U.S. national office would only be established in November 1944, and that many governments, the British and American included, had at first obstructed the collection of evidence).

national missions and Governments concerned. The motion was therefore postponed, but never discussed again.<sup>45</sup>

A second, noteworthy result was gained by the Italian government during the summer of 1945. Following a series of meetings, in July 1945 the UNWCC Chairman, Lord Wright of Durley, had informed the Italian Embassy in London that Italy had been authorized by the commission to submit claims concerning war crimes committed on its territory. Even though it didn't allow Italian representatives into the sessions of the Commission, it was welcomed by the Italian government as a diplomatic victory, since it recognized that the Italians had been the victims of war crimes, at least after 25 July 1943.<sup>46</sup> According to the Majority Report of the 2006 Parliamentary Commission, the Allies' strategy, as illustrated in a meeting held on 20 August 1945, was to support and promote the establishment in Italy of an international tribunal that would try those involved in the planning of the reprisals against Italians, analogous to the Nuremberg tribunal, and to refer the proceedings against the mid- and low-level perpetrators of the so-called *localized crimes* to the Italian military jurisdiction, to which the files were thus transferred (and where the greater part of them was later "buried").<sup>47</sup>

It is worth recalling that at the moment Italy was given the opportunity to submit claims concerning war crimes committed on its territory by the Germans, Ethiopia was still struggling to be allowed to submit charges relating to war crimes committed by Italians during the Italo-Abyssinian War. After recognizing that Ethiopia had "the right to demand extradition of any Italian «accused of having committed, ordered or abetted war crimes and crimes against peace or humanity» in Ethiopia during the 1935-1936 war",<sup>48</sup> the UNWCC would welcome the statement made by the Advocate General of Ethiopia "that the charges would be limited in number and that the accused, if surrendered, would be tried by a court which would include European judges", and agree to examine these charges at its last meetings.<sup>49</sup> Thus, having assessed ten cases brought to its attention by Ethiopia, on the following 31 March 1948 Committee I issued the last list of war criminals, which – as said – consisted of 10 Italians accused for the commission of war crimes during the Italo-Abyssinian conflict, including Badoglio.

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<sup>45</sup> *History of the United Nations War Crimes Commission and the Development of the Laws of War*, cit., pp. 350-352.

<sup>46</sup> On the issue, see *Parliamentary Commission Majority Report*, cit., pp. 40-41. At that time, the Italian Government had already established a national commission tasked with investigating those crimes (see para. 8 below).

<sup>47</sup> *Idem*, pp. 42-45.

<sup>48</sup> UNWCC Committee I, Doc. I/81, cit., para. 3.

<sup>49</sup> *History of the United Nations War Crimes Commission and the Development of the Laws of War*, cit., p. 149.



## 7. The Allies' Involvement with the Badoglio Government and the consequent Decision to cover the Italian Alleged War Criminals

After the entry into force of the short armistice, a new government, headed by Marshal Badoglio and with its seat in Brindisi, had been appointed by the King. One month later, in the afternoon of 13 October 1943, the Italian Ambassador in Madrid Paolucci de' Calboli handed a declaration of war to his German counterpart. Thus, Italy obtained the "co-belligerent" status from the Allies, convinced that the new Italian army would have contributed to the liberation of the areas occupied by Germans.

At that moment, the occupied territories of southern Italy were administrated by the Allied Military Government (AMG, which had succeeded AMGOT, the Allied Military Government of Occupied Territories). On 10 November, once status as a co-belligerent had been granted to Italy, an Allied Control Commission (ACC – later simply Allied Commission) was established, and tasked with enforcing the administrative clauses of the short armistice as well as coordinating the policies of the Italian government with those of the UN. While the frontline and the zones just behind it were administered by the AMG, those which were removed from active fighting were transferred to the ACC/AC.<sup>50</sup>

From September 1943 to February 1944, the ACC exercised authority over the Badoglio Government, closely monitoring its activities even after it was moved to Salerno.<sup>51</sup>

On 11 February 1944, at the initiative of its British members, the ACC handed back the territory including Sicily and the provinces south of Bari, Potenza and Salerno to the Italian Government, despite the fact that at that time Badoglio was still struggling to set up an effective administration.<sup>52</sup>

The ambiguous relationship with Italian government is also testified by the fact that, having been informed in November 1944 that Generals Ambrosio and Roatta were among those officers accused by Yugoslavia of the commission of war crimes, the British obtained their replacement with more

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<sup>50</sup> I. Williams, *Allies and Italians under Occupation. Sicily and Southern Italy, 1943-45*, Basingstoke, 2013, pp. 12-13.

<sup>51</sup> To the extent that the Allied Control Commission would set up its headquarters in the same building as Badoglio Government (see R. Zangrandi, *1943: 25 luglio – 8 Settembre*, Milano, 1964, p. 770). The Author recalls that while in September both Cordell Hull and Hopkins proposed to Eisenhower and Roosevelt the dismissal of the King, Badoglio and their cronies, at the end of the following January 1944, in a letter addressed to Roosevelt, Churchill advocated for Badoglio government on the basis of its pliability, to which he counterposed the unpredictability of the Partisans and the National Liberation Committee (*idem*, pp. 770 and 773).

<sup>52</sup> C.R. Harris, *Allied Military Administration of Italy 1943-1945*, 1957, p. 122. See also E. Benvenisti, *The International Law of Occupation*, Oxford, 2012, pp. 154-159, where the Author underlines (at p. 156) that in the first months Badoglio Government was "no more independent than any puppet government", and recalls (at p. 157) that however Eisenhower considered that administration important because of "its unchallenged claim to legality". See also I. Williams, *cit.*, pp. 12-13.

loyal officials – including General Taddeo Orlando, who had been accused of war crimes himself –, but didn't request their arrest.<sup>53</sup> On the contrary, the arrest, on 16 November 1944, of General Roatta, who had been charged (together by General Robotti and other high officers) by the High Commission for Sanctions against Fascism with crimes committed as Chief of the Military Intelligence Service (S.I.M.), would apparently be deplored by Churchill, who was very interested in – and worried by – the confidential information the General had had access to.<sup>54</sup>

In line with Churchill's inclination towards political expediency,<sup>55</sup> the British Foreign Office, which the War Cabinet had given the responsibility for formulating policy on war crimes-related issues, repeatedly sanctioned this “friendly” relationship with the new Italian government. In fact, despite the claims of the Yugoslav government and the fact that they had never raised any formal objection to the arrest of the listed Italian war criminals, the War Crimes Section of the Foreign Office decided to bar the British authorities from arresting any person who had collaborated with the Allies after September 1943.<sup>56</sup> The political decision was later incorporated in a directive issued on 12 July 1945 by the Combined Chiefs of Staff (CCS), that authorized the Theatre Commanders to surrender immediately to the requesting nation the individuals accused of the commission of war crimes in the territory of that nation, but excluded from its application those who had collaborated with the Allied authorities.<sup>57</sup> In the summer of 1945, at the time the first UNWCC list had finally been passed to the Italian government, the British Prime Minister Clement Attlee was approached by the Yugoslav authorities, who submitted directly to him complaints that not a single war criminal had been arrested.<sup>58</sup>

However, by that time – as the Italian authorities had pointed out during the negotiations of the Peace Treaty<sup>59</sup> – Partisans and citizens had enforced the plan formulated by Churchill in late 1943,

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<sup>53</sup> R. Zangrandi, *cit.*, p. 779. Another Author recalls that Badoglio himself “intervened vehemently and successfully to put an end” to the attempt to bring General Alessandro Pirzio Biroli to trial (E.G.H. Pedaliu, *Britain, Italy and the Origins of Cold War*, *cit.*, p. 19).

<sup>54</sup> D. Roy Palmer, *Processo ai fascisti*, Milano, 1996, pp. 140-141. As recalled in the Minority Report of the Parliamentary Commission, during the night between 4 and 5 March 1945 Roatta would evade from a military hospital and go into hiding in Spain. He would only return to Italy in 1966, where he died as a free man since his conviction had been quashed in 1948 (see *Commissione parlamentare d'inchiesta sulle cause dell'occultamento di fascicoli relativi a crimini nazifascisti* (Parliamentary Commission of Inquiry on the causes of the concealment of files concerning nazi-fascist crimes), Doc. No. 18/XXIII-bis, *Relazione di minoranza* (Minority Report), 24 January 2006, pp. 102-103). On the events surrounding the evasion, see also D. Roy Palmer, *cit.*, pp. 160-163.

<sup>55</sup> Clearly expressed in a 31 July 1943 letter, where he had written that after the liquidation of Mussolini and the fascism, he would negotiate with “any Italian authority” (see R. Zangrandi, *cit.*, p. 773). Indeed, Churchill had always been one of the strongest supporters of the attempt to disengage Italy from Germany: in December 1940, as part of a plan to induce Italians to dissociate themselves from the regime, he had declared that one man alone, Mussolini, was responsible for the decision to enter the war (Aga-Rossi, *cit.*, p. 12)

<sup>56</sup> As recalled by E.G.H. Pedaliu, *Britain and the 'Hand-over' of Italian War Criminals*, *cit.*, p. 510.

<sup>57</sup> *Idem*, p. 512.

<sup>58</sup> *Idem*, p. 513.

<sup>59</sup> See para. 3 above.

that a list of major war criminals would be prepared and endorsed by solemn United Nations decree, consisting of 50 to 100 “outlaws” whose killers would not incur any penalty or punishment.<sup>60</sup> In particular, Mussolini had been captured and executed, on 28 April 1945, together with Alessandro Pavolini and 16 Fascist hierarchs, while fleeing towards Switzerland; the same day Roberto Farinacci, the former Secretary of the Fascist Party, would suffer an identical fate.

As clearly pointed out by Pedaliu, the paradox was that “British military was at the same time expected to apprehend senior Italian officers included in the UNWCC list and to work in close relationship with the Italian armed forces in order to reorganize them along British lines”.<sup>61</sup> which at that time must have appeared irreconcilable mandates, considering that 13 of the 50 Generals listed by UNWCC were on the active list of the Italian Army. Furthermore, according to the US authorities “the best action that the USA and Britain could adopt towards the issue of Italian war criminals was to ‘stall’ and not to implement any policy decision until the Italian Peace Treaty had been firmly concluded”.<sup>62</sup> In furtherance of this policy, by October 1946 the Allied authorities in Italy were instructed by the CCS not to follow up on any Yugoslav requests, and to inform the Yugoslavs that they had to submit them to the Italian government – meaning that the provisions of the July 1945 CCS directive had to be considered *de facto* abrogated.<sup>63</sup>

Another episode demonstrates how sympathetically the Allies received the Italian complaints.

In April 1946, the Italian Prime Minister, Alcide De Gasperi, addressed a letter to Admiral Ellery Stone, Chief of the ACC, to denounce the crimes committed by the Yugoslavs against the Italians in Istria and the unfairness of the judicial system of that country, warning that an involvement of the Allies in the execution of the Yugoslav extradition requests would cause a strong reaction by the Italian public opinion, which would effect the political stability. Furthermore, having noted that the Moscow Declaration regarding Italy did not authorize such actions, De Gasperi informed his counterpart that its Government had already taken steps to investigate war crimes committed by Italians during the occupation of foreign countries. In his response, the following 2 May, Admiral

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<sup>60</sup> On Churchill’s 1943 proposal, see A.J. Kochavi, *cit.*, pp. 73-74.

<sup>61</sup> E.G. Pedaliu, *Britain and the ‘Hand-over’ of Italian War Criminals*, *cit.*, p. 515. After August 1946, the mandate of tracing and apprehending war criminals was indeed carried out by a British agency, the so-called Central Mediterranean Forces (see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, *cit.*, pp. 374-376).

<sup>62</sup> *Idem*, p. 516 (referring to the information given to Lord Halifax, the British Ambassador to the USA).

<sup>63</sup> *Idem*, p. 526.

Stone reassured the Italian PM that the Allies were “fully aware of all the implications” of the issue, and encouraged him to submit “as soon as possible” the results of the said national enquiries.<sup>64</sup>

In conclusion, in the absence of an international, independent agency and national judicial organs, until the end of 1946 the whole burden of tracing and apprehending the Italian war criminals had been borne by the *not-so-willing* military occupation authorities. Unfortunately, such machinery would only prove efficient where it had been connected with the organs in charge of civil affairs, that is in territories which remained occupied, such as Germany.<sup>65</sup>

### **7.1 The British Blessing of the non-Execution of the Arrest Warrants issued by Ethiopia**

In January 1947, short before the adoption of the Peace Treaty, the British authorities still opposed the prosecution of Italians for the crimes committed in Ethiopia.<sup>66</sup> Thus, it will come as no surprise that in the months following the adoption of the list of Italian war criminals by the UNWCC, the Ethiopian requests to Italy would meet the same destiny as the Yugoslav.

As recalled in the Majority Report of the Parliamentary Commission of Inquiry, in July 1947 Italy had informed Ethiopian authorities of the imminent start of the trial against General Graziani.

In October 1947, Ethiopia submitted to the UNWCC a final list of eight Italian high officers charged with crimes against peace, war crimes and crimes against humanity.

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<sup>64</sup> The letters are reproduced in F. Focardi, L. Klinkhammer, *cit.*, pp. 511-512. The Authors also recall that Italian authorities argued that the Moscow Declaration should have been interpreted, in the light of the new co-belligerent status of Italy, as an international agreement which amended the Long Armistice, according a “favorable treatment” to the Italian alleged war criminals – namely, the right to be judged by national authorities (see p. 501).

According to Pedaliu, by the end of 1945 the Truman administration had adopted a policy of indifference towards Belgrade, culminated with the decision to leave the local embassy without an ambassador in residence. As to Admiral Stone, he was “uncritically against surrendering any alleged Italian war criminal” to the Yugoslavs. Therefore, British efforts to hand over the Italian alleged war criminals to Yugoslavia should be seen in the light of “Britain’s «tightrope act» (...) to settle the Italian war-criminality problem” and of the fact that the reluctance of Americans and Italians to implement a policy of extraditing Italian citizens to Yugoslavia hampered their task to secure a working relationship with Tito (E.G.H. Pedaliu, *Britain, Italy and the Origins of Cold War*, *cit.*, p. 21-22 and 159)

<sup>65</sup> In this regard, it must be recalled that thousands of German war criminals have been tried in Germany, between 1945 and 1949, by international tribunals or military courts set up by the occupying countries. In fact, beyond the Nuremberg International Military Tribunal (established by the London Agreement on 8 August 1945), the trials were conducted by the military tribunals established under Control Council Law No. 10 (*Kontrollratgesetz*), issued by the Allied Control Council on 20 December 1945. In particular, according to its Article III, each occupying authority, within its Zone of Occupation, had the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and tried by a tribunal and under rules and procedure determined or designated by each Zone Commander for his respective Zone. As recalled by Kochavi (*cit.*, pp. 242-247), according to this law and in their respective zones of occupation, the United States charged 1,857 individuals (1,672 of whom would be tried by military courts and commissions), the United Kingdom 1,085, France 2,107, and the Soviet Union from 14,240 to 18,000.

<sup>66</sup> As recalled by R. Punkhurst (*cit.*, p. 120), on 29 January an official of the Foreign Office wrote that the “safest line” was for the country “to say that we consider that the UNWCC was set up to deal with war crimes arising out of the present war and that it was not contemplated that it would deal with other war crimes”. Another official, accepting this thesis, added that this represented “an additional argument for keeping the Ethiopians away from the UNWCC”.

Absent any further initiative of the international community, a few months after the adoption of the list by UNWCC, in November 1948, the Ethiopian representatives decided that a trial would be held only against the two most responsible, General Graziani and Marshal Badoglio.<sup>67</sup>

As stated above, the request for arrest and surrender of Badoglio and Graziani was based on Articles 38 and 45 of the Peace Treaty. Furthermore, the representatives of the African country granted that a hybrid tribunal, composed of a majority of international judges, would be set up to try the Accused in compliance with the principles and the procedure established by the Nuremberg International Military Tribunal.<sup>68</sup>

Since diplomatic relations between the two countries had been interrupted, Ethiopia could make no statutory demand for extraditions. Therefore, in November 1948 the Ethiopian authorities turned to the only government they perceived as sympathetic to their claims and informed the British Foreign Office. In particular, invoking Article 86, para. 1 of the Treaty of Peace, the Imperial Ethiopian Government requested the Ambassadors of the Four Powers in Rome to represent the country in the matter, and to demand the apprehension and surrender of Badoglio and Graziani to the Italian government.<sup>69</sup>

The British official position was later formulated in a letter from the British Foreign Secretary, Ernest Bevin, to the Ethiopian Legation. On 31 January 1949, he explained that the procedure was indeed governed by Article 45 of the Peace Treaty, under which the Four Ambassadors could only act if a disagreement between the Parties had arisen. Thus, Ethiopia should submit its claims to the Italian Government. Accordingly, on 6 September 1949, the Ethiopian Ambassador in London delivered an *aide-mémoire* aimed at raising the matter of the execution of the extraditions to his Italian counterpart, Tommaso Gallarati Scotti, who refused to transmit the document to the Italian government.<sup>70</sup>

A new attempt to “sensitize” the British authorities proved unsuccessful: fearing repercussions on their relations with Italy, they replied that despite the unquestionable merits of the request, at that

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<sup>67</sup> Parliamentary Commission Majority Report, *cit.*, fn. 158, p. 75.

<sup>68</sup> R. Pankhurst, *cit.*, pp. 129-130. The Author underlines that in the letter addressed to the Foreign Office, the Ethiopians had written that they had decided to bring to trial only “the persons most responsible for the policy of systematic terrorism”, Badoglio and Graziani, “as a contribution to the early re-establishment of peaceful and friendly relations” between the two countries; and that they intended to “constitute an international tribunal consisting of a majority of non-Ethiopian judges”, which would follow the principles of law and procedure “in accordance with those of the Charter of the International Military Tribunal at Nuremberg”.

<sup>69</sup> *Ibidem* – also recalling that in the letter addressed to the Foreign Office, the Ethiopians wrote that they had decided to bring to trial only “the persons most responsible for the policy of systematic terrorism”, Badoglio and Graziani, “as a contribution to the early re-establishment of peaceful and friendly relations” between the two countries; and that they intended to “constitute an international tribunal consisting of a majority of non-Ethiopian judges”, which would follow the principles of law and procedure “in accordance with those of the Charter of the International Military Tribunal at Nuremberg.”.

<sup>70</sup> *Idem*, pp. 132-133.

point it was inopportune to press the question.<sup>71</sup> Thus, also considering that a trial against Graziani was starting in Italy, the Ethiopian authorities renounced their right to try the two accused.

## **8. The Italian Commission of Inquiry: the Most Effective Tool deployed by Italian Government in the Pursuit of its Diversionary Strategy**

At the time the Italian Prime Minister, Alcide De Gasperi, informed Admiral Stone of the intention to set up an independent commission of inquiry to investigate the crimes allegedly committed by Italians in the Balkans, the Italian authorities hadn't received any UNWCC list yet. In February 1946, the Minister of War, Manlio Brosio (the future Secretary General of NATO), proposed, in a letter addressed to De Gasperi, the establishment of a commission of inquiry, with the aim of "eliminating the risk of arrests and surrenders of Italian nationals" to the requesting countries and demonstrating that the national authorities were aware of the seriousness of the matter and willing to prosecute those who would be found to have committed international crimes. According to Brosio, having considered the nature of the events it would have been called to investigate, their link with the conflict, and the fact that the individuals that it would investigate were in most cases prominent military figures, such a commission should have been created as a technical organ of the Ministry of War.<sup>72</sup>

Having received Stone's interlocutory reply, the Prime Minister decided to proceed with the establishment of the Commission of Inquiry, which was set up on 6 May 1946 by a decree adopted by the Minister of War.<sup>73</sup>

De Gasperi himself would explain the actual nature and aims of the commission in a telegram addressed to the Italian Ambassador Pietro Quaroni on the following 20 July (thus, after the Draft Peace Treaty had been published), where he wrote that having considered the unreliability of the Allies' assurances (of being "benevolent" towards Italy), the authorities had to try everything "to save whatever can be saved".<sup>74</sup>

Indeed, while advocating for an amendment of Article 38 of the Draft Peace Treaty, the Italian authorities started pressuring the Commission of Inquiry into identifying the individuals bearing

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<sup>71</sup> *Idem*, p. 134. See also Parliamentary Commission Minority Report, *cit.*, pp. 98-99.

<sup>72</sup> The letter is reproduced in F. Focardi, L. Klinkhammer, *cit.*, pp. 508-510.

<sup>73</sup> This decree, composed of a single article, also provided the composition of the Commission, under the Presidency of Senator Alessandro Casati (that would be replaced by Luigi Gasparotto). The text is reproduced at <http://www.criminidiguerra.it/DocMAE.shtml#decreto> (last visited: 29 September 2016).

<sup>74</sup> F. Focardi, L. Klinkhammer, *cit.*, p. 514.

responsibility for the gravest crimes committed in Yugoslavia. Consequently, during the summer of 1946, De Gasperi addressed a second letter to Admiral Stone, in which he anticipated that the commission had identified 40 individuals to be deferred to the military criminal justice system.<sup>75</sup> Despite this announcement, the first official statement containing the names of the alleged war criminal was only released by the Italian government on 23 October 1946. Among the 5 individuals under investigation there were prominent figures, such as General Mario Roatta (who had been nominated Commander of the Italian Second Army in January 1942, and therefore allegedly responsible for the war crimes policy in the occupied Balkans<sup>76</sup>) and General Mario Robotti (Commander of the XI Corps during the World War II Axis invasion of Yugoslavia in April 1941<sup>77</sup>). A second statement, released on 13 December 1946, identified other 8 individuals, including Francesco Giunta (the former Governor of Dalmatia) and General Alessandro Pirzio Biroli (former Governor of Montenegro).<sup>78</sup>

By May 1947, the commission had singled out 26 individuals<sup>79</sup> to be deferred to the competent military jurisdictions as the most responsible for the crimes committed in Yugoslavia (which impact

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<sup>75</sup> *Idem*, p. 518.

<sup>76</sup> As Commander of the Second Army, on 1 May 1942 Roatta had addressed to his troops an infamous circular, where he used the expression “*a head for a tooth*” to explain the kind of treatment they should reserve not only to partisans, but also to those civilians that were found in the combat zones. On the content of this circular, see G. Rochat, *cit.*, pp. 368-369; and A. Ponzio, *Shaping the New Man: Youth Training Regimes in Fascist Italy and Nazi Germany, 1944-1946*, Madison, 2015, fn. 39 (p. 292).

<sup>77</sup> Among other things, Robotti became known as the mastermind behind a note, addressed to the troops, where he complained that they didn’t kill enough (*si ammazza troppo poco*) – an expression that has been often cited by historians (see, among others, T. Ferenc, “*Si ammazza troppo poco*”. *Condannati a morte, ostaggi, passati per le armi nella provincia di Lubiana 1941-1943*, Lubiana, 1999).

<sup>78</sup> From the historical perspective, absent any assessment of the individual responsibilities, it is important to refer to the collection of documents gathered by the Commission, and in particular those stored in the so-called Fondo Luigi Gasparotto (its President during the autumn of 1946 and from December 1947 to the end). Among hundreds of pieces of evidence, some documents stand out, and in particular: an order dated 27 February 1942 and signed by General Robotti, establishing concentration camps in Slovenia for political prisoners; an order dated 25 May 1942 and signed by General Robotti, anticipating the deportation of Slovenian civilians; an edict dated 4 July 1942 and signed by General Robotti, that announced reprisals against Slovenes (including executions of the men who would be found in a “combat zone”); a phonogram dated 23 July 1942 and signed by General Robotti, recommending the killing of suspects and the interment of “all the able men” in Croatia; a memo dated 1 December 1942 and addressed to the Italian Second Army by General Roatta, recommending the internment and killing of civilians. These documents are available at <http://www.criminidiguerra.it/documenti.shtml> (last visited: 29 September 2016).

<sup>79</sup> General Mario Roatta; Ambassador Giuseppe Bastianini; General Mario Robotti; Division General Gherardo Magaldi; Lieutenant Colonel Vincenzo Serrentino (executed in 1944); the former Governor of Dalmatia, Francesco Giunta; Secretary Giuseppe Alacevich; Colonel Armando Rocchi; the former Governor of Montenegro, General Alessandro Pirzio Biroli; the former High Commissioner of the Province of Ljubljana, Emilio Grazioli; General Gastone Gambarà; General Francesco Zani; General Renato Coturri; Colonel Luigi Dal Negro; Lieutenant Colonel Gualtiero Sestilli; Major Roberto Brunelli; Major Salvatore Spitalieri; Marshal Giovanni Pais; Vice Brigadier Giuseppe Viscardi; Carabinieri Giuseppe Delogu; Commander Giuseppe Sartori; the former Prefect of Zadar, General Gaspero Barbera; the former Prefect of the Province of Carnaro and Rijeka; General Umberto Fabbri; Lieutenant Giuseppe Gaetano; and Captain Alfredo Roncoroni. The list is reproduced at <http://www.criminidiguerra.it/3ListeCriminali.shtml> (last visited: 29 September 2016); and in Parliamentary Commission Minority Report, *cit.*, fn. 45, p. 115.

was never officially assessed by the Italian government<sup>80</sup>). At that point, the only interest of the Government, as recalled by the Ministry of Foreign Affairs in a letter addressed to the Italian Embassies in Washington, London, Paris, and Moscow, was to abstain from executing the Yugoslav requests of arrest and surrender of Italian nationals.<sup>81</sup>

On the other hand, while investigating on the crimes committed by the Italians, in line with the indications received since January 1946 from the Ministry of Foreign Affairs, the Commission of Inquiry gathered evidences related to the crimes committed by Yugoslavs against the occupiers and the Italian nationals.

Thus, when urged to initiate formal investigations – and proceedings – against the individuals identified by the commission, the General Military Prosecutor, Umberto Borsari, objected that the alleged crimes had to be assessed in the light of the context and of the crimes committed by the enemy. This conclusion was praised in a note circulated in the Ministry of Foreign Affairs in June 1947, where it was underlined that it would justify the non-execution of the Yugoslav requests of surrender, and also that Italy could propose to the Allies that an identical solution – namely, the deferral of the alleged war criminals to their national jurisdictions – would apply to Germany.<sup>82</sup>

In line with its “diversionary” nature, the Commission would only submit its final report (recommending the initiation of criminal proceedings by the Italian judiciary against 34 individuals) on 30 June 1951.<sup>83</sup>

In conclusion, as noted by prominent historians such as Focardi and Klinkhammer<sup>84</sup> and in the Minority Report of the 2006 Parliamentary Commission,<sup>85</sup> the Commission of Inquiry had never been interested in identifying war criminals to be deferred to the judicial authorities. On the

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<sup>80</sup> It has been estimated that around 100,000 Yugoslavs were detained in 50 camps established by the Italian Ministry of the Interior, and that at least 2,000 died in the harshest one, Rab (on Rab island), namely 20% of the around 10,000 detainees that were imprisoned there between 1942 and 1943 (see G. Rochat, *cit.*, p. 371). According to an Italian historian, “in the Slovenian territory annexed by Italy, out of a population of 360,000, 67,230 were deported”, while in Montenegro there were at least 26,387 deportees (G. Scotti, *Bono Taliano. Gli italiani in Jugoslavia 1941-43*, Milano, 1977, p. 83). Another scholar, referring to a document signed by General Roatta on 16 December 1942, estimates that 17,000 to 19,000 internees were present at Rab Camp at that time and recalls that Roatta himself admitted that the death toll had already reached 588 (J. Walston, “*History and Memory of the Italian Concentration Camps*”, in *Historical Journal*, 1997, pp. 169-183, and in particular p. 176).

<sup>81</sup> F. Focardi, L. Klinkhammer, *cit.*, pp. 503-504, 519-521.

<sup>82</sup> *Idem*, pp. 504, 521-523.

<sup>83</sup> Moreover, the members of the commission hadn’t taken any position regarding the exception provided by Article 165 of the Italian Military Criminal Code, which conditioned the prosecutability of individuals who had committed war crimes on the territory of another State to the principle of reciprocity – and which could have later justified the termination of those proceedings (see Parliamentary Commission Majority Report, *cit.*, p. 76).

<sup>84</sup> F. Focardi, L. Klinkhammer, *cit.*, p. 505.

<sup>85</sup> Parliamentary Commission Minority Report, *cit.*, p. 132.



contrary, it had been intended and established as one of the tools that the Italian government would deploy with the aim of “buying time” (to build stronger ties with the Allies) and gathering evidences against the Yugoslavs which would later justify the non-execution of the Yugoslav government’s requests of arrest and surrender.

The final blow to the Yugoslav claims, sanctioning the triumph of the Italian diversionary strategy, was struck in 1948, when a quarrel between Tito and Stalin caused the breaking of relations between their respective countries, and deprived Yugoslavia of the last champion of its cause.<sup>86</sup>

## 9. Adding Insult to Injury: the Adoption of “Togliatti Amnesty”

In order to better understand the *affaire* of the missed prosecution of Italian war criminals, the events illustrated thus far shall be further contextualized. In particular, as the interest shown by the 2006 Parliamentary Commission demonstrates, the history of the failed *defascistization* of Italy should be taken into account, as a proof of the generalized politicization of criminal matters in the country and of their subjugation to expediency.

In the Declaration Regarding Italy adopted in Moscow on 1 November 1943, among the measures that the new government should have adopted, before the arrest and transfer of war criminals (point 7) the Allies had included the suppression of all institutions and organizations created by the Fascist regime (3), and the removal from the administration and from institutions and organizations of a public character of all Fascist or pro-Fascist elements (4).<sup>87</sup>

In furtherance of this policy, on 27 July 1944, the Italian government led by Ivanoe Bonomi adopted the Legislative Decree No. 159, by which a High Court of Justice for Sanctions Against Fascism and a High Commissioner were established.<sup>88</sup> By July 1945, the High Commission had

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<sup>86</sup> See M. Glenny, *The Balkans: 1804-1999. Nationalism, War and the Great Powers*, London, 1999, pp. 535-536 (recalling the 28 June 1948 Resolution, by which the Cominform decided to freeze all cooperation with Yugoslavia in order to bring the country to its knees and compel Tito to obey); and S.L. Woodward, *Balkan Tragedy. Chaos and Dissolution after the Cold War*, Washington, 1995, p. 25 (noting that Tito’s regime would benefit from US-orchestrated economic assistance from the International Monetary Fund, World Bank, U.S. Export-Import Bank, and foreign banks).

<sup>87</sup> “Declaration of the Four Nations on General Security”, *cit.*

<sup>88</sup> As noted by G. Melis (“*Note sull’epurazione nei ministeri, 1944-1946*”, in *Ventunesimo Secolo*, 2003, pp. 17-18), although it established the two organs and substantially enforced the Allies’ recommendations, this act represented a first step in the direction of the amnesty. In fact, it didn’t embrace the broad list of crimes contained in Regional order No. 1, adopted on 27 June 1944 by Colonel Charles Poletti (the civil affairs coordinator of AMGOT, indicated by some as “the governor of Sicily”), opting for a more lenient provision.

deferred 34,842 civil servants and sentenced 16,869 of them, especially targeting those who had held managerial positions.<sup>89</sup>

Unfortunately, in the second part of 1945 the Central Commission underwent a deep crisis, resulting in the overturning of its guiding principle. This political shift had been promoted by the Italian government, which had soon deprived the high commissioner of the power to purge the individuals who had been convicted by the commissions, and later recommended to limit recourse to provisional suspensions.<sup>90</sup> At the end of 1945, by the time the new unity government led by De Gasperi was created, “both Communists and Christian Democrats [had] opted for a general pacification”.<sup>91</sup> In February 1946, the High Commissioner was finally dissolved, and all his powers transferred to the Presidency of the Council of Ministers. According to the “Report on the activity of the High Commissioner from 1 January to 15 July 2015”, published in January 1946, having been faced with 218,159 cases, the local commissions had decided upon 17,162 of them, whilst the Central Commission had only issued 738 final decisions.<sup>92</sup>

In this climate of rediscovered *national harmony*, the amnesty granted by the Presidential Decree 22 June 1946, No. 4 – adopted 12 days after the proclamation of the Republic, chosen by 54% of Italians voters at the 2 June referendum – represents the most predictable of the “happy endings”. All jokes aside, this theory was endorsed by the majority of the members of the Parliamentary Commission set up in 2006, which attributed the responsibility for the overly broad application of that act to the judiciary.<sup>93</sup>

Actually, the so-called “Togliatti Amnesty” was a much contested act. This was signed by Palmiro Togliatti, the Minister of Justice but above all Secretary of the Italian Communist Party – to which most of the partisans belonged. By its Article 3, in fact, amnesty was granted not only to those responsible for political crimes (such as collaboration with the Germans and the Republic of Salò), but also to those who had been convicted for grave crimes, under the condition that they had not performed high managerial (civil or political) functions or held command positions within a military structure, and that they had not been held responsible for massacre, particularly brutal tortures, murder or pillage.

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<sup>89</sup> See G. Melis, *cit.*, p. 24. The Author points out that despite 58% of the accused would be targeted by some kind of sanctions, the Commissions’ decisions were characterized by excessive leniency.

<sup>90</sup> *Idem*, p. 28.

<sup>91</sup> A. Ponzio, *cit.*, fn. 16 (p. 290). This opinion is substantially endorsed by the Parliamentary Commission Majority Report (*cit.*, p. 69), which underlines that those political forces shared the intent to “re-aggregate and pacify the country”.

<sup>92</sup> See G. Melis, *cit.*, p. 42 and fn. 99 (p. 51). The statistics are also reproduced in G. Melis, *Storia dell’amministrazione italiana*, Bologna, 1996, p. 429.

<sup>93</sup> See Parliamentary Commission Majority Report, *cit.*, p. 69.

As a result of the application of the Decree, and in particular of the high standard adopted in reference to the crime of torture, the Court of Cassation would quash most of the convictions issued by the Specialized Courts which had been set up in 1944, and free hundreds of Fascists and collaborators.<sup>94</sup> Hit by bipartisan criticism and especially targeted by former partisans and victims of heinous crimes, its mastermind Togliatti had already resigned in July 1946.<sup>95</sup>

In conclusion, this sequence of events illustrates that, absent any international pressure,<sup>96</sup> and lacking energy and resolution to deal with Fascism and its legacy, between the second half of 1945 and the first half of 1946 the new democratic Italian State resolved that the best strategy was to cover up *all* of its wrongdoings.<sup>97</sup> The fact that by that time Italy had been authorized by UNWCC to submit charges in relation to crimes committed on its territory by Germans after September 1943 and to set up the Commission of Inquiry to investigate its own war crimes, whilst Ethiopia had been prevented from joining the UNWCC and Yugoslav requests had been turned down by Western powers, represented a tacit endorsement of the De Gasperi government's strategy.

## **10. Conclusion: the Missed Prosecution of Italian War Criminals as a Failure of the International Community, paving the Way to a General Amnesty and a Collective Amnesia**

The missed prosecution of the crimes committed by Italians, and especially those committed in Yugoslavia and Ethiopia, represents a failure of the international community in terms of pursuit of each of the goals to which international criminal justice has been associated.

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<sup>94</sup> On *Togliatti Amnesty*, see, among others: M. Franzinelli, *L'Amnistia Togliatti. 22 giugno 1946 Colpo di spugna sui crimini fascisti*, Milano, 2006; and D. Roy Palmer, *Italian Fascists on Trial, 1943-1948*, Chapel Hill, 1991, pp. 190 ss.

<sup>95</sup> The backlash triggered by the amnesty was so overwhelming that (until the so-called "Togliatti papers" were found) many historians have argued that Togliatti had been the victim of a plot orchestrated by De Gasperi and/or the judiciary (see M. Franzinelli, *cit.*, p. 4).

<sup>96</sup> Indeed, in one only circumstance between 1945 and 1946 the Allies exhorted Italian authorities to abide by the Moscow declaration. In August 1945, having been informed of the "laziness" of the Italian commissions, Colonel White complained to the Deputy High Commissioner on behalf of the Allied Control Commission (the episode is recalled by G. Melis, "*Note sull'epurazione nei ministeri, 1944-1946*", *cit.*, p. 41). In this spirit, it has been noted that the end of the AMG regime in Italy on 1 January 1946 and the restoration of Italian sovereignty "had ushered in a new period in the relations of Italy with the former AMG powers". In fact, "the Attlee government had achieved (...) the transition from the punitive policy of Churchill's Wartime National government to a constructive policy towards Italy". As a result, in order not to harm De Gasperi's government and thereby help the Italian communists, Labour government's policy towards Italy was shaped by "a degree of flexibility in its implementation so that the ultimate aim, namely, that of Italian political stability, was never put in jeopardy" (see E.G.H. Pedaliu, *Britain, Italy and the Origins of the Cold War*, *cit.*, p. 158).

<sup>97</sup> Which, among other things, would also mean compelling to abide by the laws those members of the judiciary which were not committed to them – and who had in many cases been spared themselves by the purge (in this sense, see M. Franzinelli, *cit.*, p. 261).

First of all, this is the story of a failure to enforce (new-born) international criminal law, advancing the rule of law and fighting impunity.

Provided that by the different statements annexed to the Moscow Declaration, the Allies had *intentionally* distinguished between Italians and Germans,<sup>98</sup> as the Italian government argued,<sup>99</sup> this discrepancy was certainly overridden by the adoption of Article 38 of the Draft Treaty and Article 45 of the Treaty of Peace with Italy. Indeed, by February 1947 Italy had undertaken an obligation to ensure the “apprehension and surrender for trial” to *any* Allied or Associated power of persons “accused of having committed, ordered, or abetted war crimes and crimes against peace or humanity”. The fact that Allied and Associated powers such as US, UK, France and Greece would later renounce to this clause shouldn’t have allowed the violation of the rights conferred upon other Associated powers’ (such as Yugoslavia and Ethiopia).

Secondly, it represents a failure to provide *any* form of justice, considering that it could have been granted also by the application of a proto-complementarity principle.

In fact, not only the duty to surrender them to foreign jurisdictions, but every attempt to bring Italian war criminals to justice was dodged by the Italian governments. Worried by the volatility of the new political equilibrium and the risk of endangering peace and security in Europe, the Great Powers relinquished their leadership role and tacitly acquiesced to every Italian initiative. Between 1945 and 1946, the Allies’ hesitations first resulted in the “softening” of the purge imposed by the Moscow Declaration, then in the acquiescence to the creation of a “mock” Commission of Inquiry, and finally in the adoption of a generalized amnesty.

The political stalemate and the said fears also resulted in another “missed Italian Nuremberg”, consisting in the renunciation to the establishment of an international tribunal, analogous to the IMT, to try those involved in the planning of the reprisals against Italians after 25 July 1943.<sup>100</sup>

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<sup>98</sup> The “Statement on Atrocities” attached to the Moscow Declaration (signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, and reproduced in *A Decade of American Foreign Policy: Basic Documents, 1941-49, cit.*) established that “[a]t the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy.”

<sup>99</sup> See para. 3 above.

<sup>100</sup> On the history of this *other* “missed Italian Nuremberg”, see M. Battini, *The Missing Italian Nuremberg. Cultural Amnesia and Postwar Politics*, Basingstoke/New York, 2007.

Lastly, it certainly is a political failure of the international community, in terms of compelling Italy to address the wrongs of the Fascist regime.

In this spirit, a first signal was launched when UNWCC was deprived of any political influence and support, and of the power to (oblige the States to) enforce the requests of arrest and surrender once it had adopted the lists of war criminals.<sup>101</sup>

A second, worrisome step was taken by authorizing Italy to submit to the Commission claims concerning war crimes committed on its territory after 8 September 1943, allowing the Italian government to convey the message that Italians had been themselves victims of war crimes, and paving the way to a “collective amnesia”, which in the end resulted in a second victimization of the victims of those crimes.<sup>102</sup>

Later, the Great Powers tolerated the diversionary strategies put in place by the Italian authorities, consisting in the establishment of a national Commission of Inquiry – which task was fundamentally the same as UNWCC’s –, and the “freezing” of the trials against the 26 individuals that the commission had identified and referred to the national judiciary. The international community would also acquiesce to the adoption of a generalized amnesty (the so-called “Togliatti Amnesty”), which in the name of national reconciliation condoned the crimes committed by former Fascist officers and collaborators.

Finally, the Allies decided to undermine all the efforts made by Yugoslavia and Ethiopia, discouraging the respective representatives from requesting the execution of the arrest warrants issued against those Italian high officers whom the UNWCC had considered the most responsible for the international crimes, including that Marshal Badoglio who had been entrusted in September 1943 with creating a first post-Fascist government, and who had signed the Armistices.

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<sup>101</sup> As noted by a leading commentator, the absence of political will to support the UNWCC “eroded its moral influence over governments to cooperate in the pursuit of alleged war criminals and to prosecute or extradite such persons” (M.C. Bassiouni, “*Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*”, in *Fordham International Law Journal*, 1994, p. 1197).

<sup>102</sup> As noted by a commentator, after the war “the European nations found themselves forced to confirm their virginal purity by inventing the myth of a Resistance representing the majority of the population; at the same time, many of the real Resistance fighters, but certainly not all, accepted this myth for political expediency in order to guarantee a minimum of social cohesion and to restore the authority of States delegitimized by the collapse of their ruling classes”. As to the communists, they “were under the illusion that they could profit from the political capital of their contribution to the Resistance” (see M. Battini, *cit.*, p. 141).

The “collective amnesia” and the myth of the “good Italian” are the subject of a vast literature. Among the others, see: F. Focardi, *Il cattivo tedesco e il bravo italiano. La rimozione delle colpe della II guerra mondiale*, Roma/Bari, 2013; R. Siebert, “*Don’t Forget: Fragments of a Negative Tradition*”, in L. Passerini (ed. by), *Memory and Totalitarianism*, Oxford, 1992, pp. 165-178; and, from an interesting perspective, based on the analysis of cinematography: S. Bogojević, “*The Myth of the Good Italian in the Italian Cinema*”, in *Mediterranean Journal of Social Sciences*, 2014, pp 675-677.

For the above-mentioned reasons, it can be concluded that the history of the missed prosecution of Italian war criminals is for sure the history of a failure of the international community, but also a shining example of *victors' justice*.

It was in fact the result of a cold-blooded decision to grant impunity to all of the Italian military commanders that a UN-backed organ, the UNWCC, had identified as the most responsible for the heinous crimes committed by the Italians between 1935 and September 1943, allowing a patent violation of international treaties (in particular, the Instrument of Surrender and the Treaty of Peace) and of the principles which would be set out in Nuremberg and Tokyo, justified by the opportunity to gain a political advantage – the Italian government's loyalty to the *new order*.