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Seeking Historical Truth: the International Commission of Inquiry into the 1932-33 Famine in Ukraine

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A.J. Hobbins and Daniel Boyer* Seeking Historical Truth: the International Commission of Inquiry into the 1932-33 Famine in Ukraine

In the 1980s the WCFU (World Congress of Free Ukrainians) undertook many initiatives to "educate" Western public opinion on the Ukrainian Famine of 1932-33, claiming that the famine was a Soviet act of genocide against the Ukrainian people. The WCFU sponsored an international commission of enquiry, composed of seven eminent international jurists, and appeared before the commission as plaintiff. The Commission dealt with a number of controversial issues in international law, including the question of whether the charge of genocide could predate the 1948 convention. The Commission deliberations are examined in detail, frequently with the use of unpublished sources from the archives of one of the commissioners, John Peters Humphrey. The Final Report (1990) lacked unanimity and created very sharp divisions among the Commission's members.

Lors des années 80, le WCFU (World Congress of Free Ukrainians) a entrepris plusieurs projets afin de conscientiser l'opinion publique internationale concernant la famine en Ukraine des années 1932-33 en soutenant que cette famine était un acte de génocide perpétré par l'URSS contre le peuple ukrainien. Le WCFU a commandité une commission internationale d'enquête constituée de sept éminents juristes internationaux. Le WCFU s'est par la suite présenté devant la commission comme requérant. La Commission s'est penchée sur toute une gamme de questions en droit international dont celle-ci: puisque le crime de génocide a été défini et interdit par la convention de 1948 est-il possible de juger sur cette base des événements antérieurs à la Convention ? Les délibérations de la Commission sont examinées en détail souvent à partir de sources inédites d'un des commissaires, John Peters Humphrey. Le rapport final de 1990 montre de profondes divisions entre les différents membres de la Commission.

* A.J. Hobbins is Associate Director of Libraries, McGill University, and literary executor of John Peters Humphrey. Daniel Boyer is the Wainwright Civil Law Librarian, Nahum Gelber Law Library, McGill University. The authors would like to thank a number of people for help received in preparing this article. Professors Jacob Sundberg and Joe Verhoeven, President and Vice-President respectively of the International Commission, kindly answered a number of questions via email, giving their perspective of the events. Professor Sundberg was also good enough to send a number of background articles and documents. Various Ukrainian organizations helped out on clarifications of fact, including Andriy Makuch, Roman Senkus and Wsevolod Isajiw of the University of Toronto, and Alexandra Szubelak of the Ukrainian World Congress. Professors Mary Ann Glendon (Harvard Law School) and Warren Dicks (Universitat Autònoma de Barcelona) read and made invaluable comments on various drafts of this manuscript. However, despite this kind assistance, it should not be inferred that any of those who have helped the authors agree with the conclusions found herein.

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I. *The Ukrainian Famine*

1. *The Diaspora*

When the Ukrainian Republic declared its sovereignty¹ on July 16, 1990, there were approximately four million Ukrainians and their descendants living abroad. This diaspora² took place at the turn of the century and in the aftermath of the two World Wars. The first wave of Ukrainians left Galicia, then part of the Austro-Hungarian Empire, in the late 19th century and some came later from Russia as a result of Tsarist persecution and the troubles of 1905. The second wave left after the Bolshevik victory in the Russian Civil War and the collapse of the independent Ukrainian republic, which had enjoyed only a brief and unstable existence, in 1921.³

1. Full independence was not declared until August 24, 1991, subject to ratification by a referendum scheduled for December 1, 1991.

2. The Ukrainian émigré community uses the term diaspora to refer to the dispersal of ethnic Ukrainians, and this is how it is used in this article. Traditionally this word is used to describe the dispersal of the Jewish people from the Babylonian Captivity to the present day. The fact that many Jews, living in the Ukraine, left at the same times as the ethnic Ukrainians, and for similar reasons, adds to the confusion. However, Jews and Ukrainians had often been opponents in the old country and had little to do with each other in the new. The use of terms such as diaspora, genocide and holocaust to describe the ethnic Ukrainian experience is undoubtedly a conscious effort to convey to the outside world the concept that they too were victims of gross human rights violations. It should be noted that while the *Oxford English Dictionary*, s.v. diaspora, online: Oxford University Press <<http://www.oed.com>> defines Diaspora as referring only to the Jewish dispersal, American dictionaries now allow the more general usage.

3. The Central Rada (Council) of the Ukraine unilaterally declared independence on November 20 1917, the same day as the Bolshevik coup in Moscow. The Bolsheviks recognized the independent Ukraine on December 3, 1917. Within a month, however, there were two Ukrainian governments – Nationalist Ukraine, centered on Kiev, and Soviet Ukraine, based at Kharkov. The independent republic was restored in November 1918, following the collapse of Germany. Lenin withdrew recognition of the republic in February 1919 and the government was forced to remove itself from Kiev. The White Russian offensive in the summer of 1919 restored the republic once more. The Red Army invaded a third time in the spring of 1920 and within a year the Ukraine had been subjugated. See R. Yakemtchouk, *L'Ukraine en Droit International* (Louvain: Centre Ukrainien d'Etudes en Belgique, 1954) at 9-15; See also R. Conquest, *Harvest of Sorrow* (Edmonton: University of Alberta Press in Association with the Canadian Institute of Ukrainian Studies, 1986) at 25-42 [hereinafter *Harvest of Sorrow*].

The situation of the people was exacerbated by the major famine of 1920-1921. Between the wars, the Ukrainian people were subjected to a number of Soviet policies aimed at denationalism and dekulakization. Stalin attempted to curb and eliminate the nationalistic tendencies of the many non-ethnic Russian peoples who made up the Soviet Union. In the Ukraine the Kulaks (or Kurkuils in Ukrainian) were a class of well-to-do peasants who owned their own land. Beginning in 1931 many of these Kulaks were deported to create the necessary climate for the collectivization of farms. The Ukraine, the granary of the Soviet Union, was also subject to grain quotas that were used for redistribution elsewhere in the country, for storage for military purposes, or for export. The population of the Ukraine was subjected to a second famine in 1932-1933. When the Germans invaded in 1941 many of the people welcomed them as liberators and joined the fight against the Soviet Union. When the tide of battle turned, these people retreated with the German army and became refugees at the close of the war. The refugees formed the third wave of the diaspora, settling in many countries, with the majority in the United States and Canada.

2. *The Famine*

For many years little was known of the famine of 1932-1933. Unlike the famine of 1920-1921, when Lenin had requested and received humanitarian foreign aid to help the people, the Soviet Union continued to export grain during the period. The Soviet government denied the existence of a famine and the western press gave conflicting reports. Many of the famine reports were dismissed, with some justification, as Nazi anti-Soviet propaganda. At this time nations were introspective, attempting in various ways to overcome their own internal hardships created by the Great Depression. Awareness of the famine was lost in the tide of greater events that culminated in the Second World War. Yet the Ukrainian émigrés never forgot the famine and the millions of their countrymen who died as a result. Tarrred to some extent as wartime collaborators with the Nazis,⁴ they perceived some justification in that alliance because of

4. In 1986 the Commission of Inquiry on War Criminals (the Deschênes Commission) found that there were alleged Ukrainian war criminals living in Canada. Jews and Ukrainians living in the Ukraine and in exile have a long history of antagonism and quite different views of the Second World War in which both groups see themselves as victims. Jews accuse Ukrainians of helping the Nazis with the final solution, while Ukrainians accuse Jews of spearheading the Bolshevik programs of denationalism and dekulakization that resulted in the 1932-33 famine. For example, Lazar Kaganovich, by 1990 the sole surviving Soviet official from the famine period accused by the Ukrainians of genocide, was a Ukrainian-born Stalinist of Jewish origin. For an excellent dispassionate analysis of these troubled times, see H. Troper & M. Weinfeld, *Old Wounds: Jews, Ukrainians and the Hunt for Nazi War Criminals in Canada* (Markham, Ont.: Penguin Books, 1988).

Soviet repression.⁵ Specifically, they considered the famine as a deliberate act of genocide by Stalin against their people.

II. *The World Congress of Free Ukrainians*

In 1967 delegates representing over two hundred Ukrainian organizations in twenty countries met to form the umbrella organization, the World Congress of Free Ukrainians (WCFU).⁶ The WCFU was a nationalist anti-Soviet organization, committed to publicizing the Ukraine's culture and recent history. By the 1980s the WCFU was involved in a number of initiatives in this regard either directly, through its subsidiaries, or through lobbying efforts and financial support. Monuments were erected, the documentary film *Harvest of Despair*⁷ was sponsored, attempts were made to get the famine included in school curricula, the Ukrainian Research Institute of Harvard University created the Famine Project in 1981 resulting in a number of scholarly publications,⁸ and the U.S. Congressional Commission on the Ukraine Famine⁹ was established. At the fourth World Congress in 1983 the WCFU, believing the evidence of "famine-genocide" was incontrovertible, took its boldest step, determining to create an international tribunal to investigate the famine. A Commission on Famine Genocide in Ukraine was established under the Executive Directorship of Simon Kalba¹⁰ to orga-

5. Many ethnic Ukrainians welcomed the invading German army as liberators in 1941 and some joined Ukrainian 14th Waffen SS Galizien Division. Conversely Jews living in the Ukraine preferred Soviet domination, where repression was general and not specifically directed at them. Troper, *supra* note 4 at 13ff.

6. The name was changed to the Ukrainian World Congress at the VI Congress, 1993, following the emergence of an independent Ukraine.

7. S. Nowytski & Y. Luhovy, Prod. and Dir. *Harvest of Despair* (Toronto: Ukrainian Famine Research Committee, 1984) [hereinafter *Harvest of Despair*].

8. The Institute sponsored such books as *Harvest of Sorrow*, *supra* note 3; O. Woropay, *The Ninth Circle: In Commemoration of the Victims of the Famine of 1933*, ed. by J.E. Mace (Cambridge: Harvard University Ukrainian Studies Fund, 1983); as well as articles such as E. Mace, "Famine and Nationalism in Soviet Ukraine" (1984) 33 *Problems in Communism* 37.

9. The US Congress created this Commission in 1984. Its duties, enumerated in the Bill establishing the Commission, H.R. 4459 & S. 2456 (1984) included the mandate to "provide the American public with a better understanding of the Soviet system by revealing the Soviet role in the Famine" and to "study and analyze the reaction by the countries of the world to such famine." The Commission's findings documented the tragedy as well as the diverse reactions of western journalists who were present, from cynical cover-up (Walter Duranty, *New York Times*) to searing denunciation (Malcom Muggeridge, *Manchester Guardian*). Following its Report to Congress, President Bush legislated funding to enable the Commission to pursue its work. In 1990 the three-volume *Investigation of the Ukrainian Famine, 1932-1933: Oral History Project of the Commission on the Ukraine Famine*, ed. by J.E. Mace & L. Herezt (Washington: U.S.G.P.O. 1990) concluded the Commission's work. While the Commission provided useful materials for historians, its detractors suggest that its creation was a political *manœuvre* of the Reagan era State Department in its cold war policy.

10. Simon (or Semen) Kalba (1911-1996) handled all the details connected with the International Commission for the WCFU.

nize this tribunal. This article will examine the work of the International Tribunal, or Commission of Inquiry as it became formally known, based largely on the papers of one of the Commissioners, John Peters Humphrey,¹¹ with a view to evaluating the effectiveness of this process of inquiry.

III. *International Commission of Criminal Inquiry*

1. *The Draft Statute for an International Commission*

There had been previous attempts to establish international commissions;¹² however, they had generally lacked credibility. In an attempt to overcome the inevitable credibility gap, the WCFU, in consultation with its counsel, decided to base the tribunal, which became known as the International Commission of Inquiry into the 1932-33 Famine in Ukraine, on the draft Statute for an International Commission of Criminal Inquiry. This legal instrument had been conceived and written by the International Law Association and was finalized during the ILA's 1982 Montreal

11. John Peters Humphrey (1905-1995) donated all of his papers to the McGill University Archives with the instruction they were to be made available to scholars. McGill University Archives (MUA) arranges its accessions by Record (RG) or Manuscript (MG), Container number and File number. The Humphrey papers devoted to the International Commission are to be found in MUA MG4127, Cont. 17, Files 354-361 [hereinafter MG4127].

12. Historical tragedies, believed to be rooted in Communist ideology, have spawned various elaborate commissions of inquiry, set up in diverse ways to serve many ends, as illustrated below:

In 1924, Prince Orloff sponsored the publication in Paris of a book by N. Sokoloff, *Enquête judiciaire sur l'assassinat de la famille Impériale Russe avec les preuves, les interrogatoires, les dépositions des témoins et des accusés et 5 plans et 83 photographies documentaires inédites* (Paris: Payot, 1924). Sokoloff was a *juge d'instruction* of the Omsk tribunal who was personally mandated in February 1919 by Admiral Kolchak to investigate the July 1918 murder of the Russian royal family in Ekaterienburg.

In 1940, the Spanish government established the *Causa General* or "Mass Lawsuit" and ratified it by the decree of June 19, 1943. The *Causa* was constituted to "prove to the world at large and to History, with a maximum of seriousness and security, the guilt of the Popular Front", because "the Communist Party, controlled from outside Spain, was in reality the arbitrator of the Popular Front policy." The General Cause, *The Red Domination in Spain* (Madrid: Afrodisio Aguado, 1946) at 8.

In 1943, the German government sent or invited three delegations to the Katyn forest in Russia to investigate the mass murder of Polish officers which had taken place there. The first delegation was composed of German nationals and included medical doctors and jurists. The second was the Internationale Kommission Gerichtsmedizinischer Sachverständiger von Europäischen Universitäten, an "International Commission" composed of representatives sent by various forensic medicine departments of Universities located either in Axis states, occupied countries, or Switzerland. It was composed of twelve doctors who concluded that the mass murder of Polish officers took place around 1940. The third delegation, assembled under the auspices of the Red Cross, was composed of Polish medical experts. See J. Mackiewicz, *Katyn – ungesühntes Verbrechen* (Zurich: Thomas Verlag, 1948).

conference.¹³ In Montreal, the ILA formally requested that the Statute be forwarded to the United Nations for submission to the Economic and Social Council as well as member states of the UN.

Professor Jacob Sundberg, who would become president of the Commission on the Ukraine famine, was present at the Montreal meeting and spoke on the draft Statute. He dismissed the Nuremberg Charter as an example of “victors’ justice” and opposed, as unmanageable, the inclusion of the Anti-Apartheid Convention in the list of offences that the Statute would investigate. Furthermore, the report on the Montreal conference stressed that the “...most important principle with respect to the choice of the offences must be the rules of *nullum crimen sine lege* and *nulla poena sine lege*.”¹⁴ This principle would entail the exclusion of all offences that under the conventions were not explicitly declared to be punishable. Under the Statute, no act would be punishable unless defined as an offence by a convention in force. The UN “outlawed” genocide 15 years after the Ukrainian famine took place. Therefore, by Sundberg’s definition, the Commission investigating the famine would not be able to make a finding of legal genocide barring some new and potentially problematic reinterpretation of the rule. Professor Georges Levasseur, another future member of the Commission, translated the draft Statute into French.

The draft Statute may have been selected as a model for the future Commission because it included offences defined in the Convention on the Prevention and Punishment of the Crime of Genocide. Although the Statute was designed to be implemented by States, calling for a permanent seat in Vienna paid for by contracting states, etc.,¹⁵ it provided a functional structure for the one-time investigation of complex historical events. By addressing fundamental problems, the Commission adumbrated the international criminal law developments of the late 20th and early 21st century.

13. International Law Association, “Draft Statute for an International Commission of Criminal Inquiry” in *Report of the Sixtieth Conference, Montreal 1982* (London: International Law Association, 1983) at 424-439 [hereinafter *ILA*].

14. *Ibid.* at 448. These Latin aphorisms amount to the same juridical concept (no punishment unless a law has been broken) and were used by the defense at the Nuremberg War Crimes Tribunal.

15. *Ibid.* Art. 12 at 427.

2. *Establishment of Commission*

a. *Commissioners*

The draft Statute called for members of the Commission to be “jurists of repute”.¹⁶ It took the WCFU several years to prepare for the Commission and it was not until 1987 that Sundberg, Levasseur and J.Y. Dautricourt (Belgium) were approached to be members. Sundberg told Kalba, when he was approached, that he considered the Commission “a nice invitation to suicide.”¹⁷ Nonetheless, he agreed to serve on the Commission because the work represented “a well-financed effort to break a taboo, tabooing being one of the more depressing phenomena” that he had met in Sweden. Sundberg was in many ways a natural choice. A well-known academic lawyer from a traditionally neutral country, Sundberg had taught jurisprudence and air law at the University of Stockholm and was associated with the Institute of Public and International Law, Stockholm. He pioneered the field of human rights advocacy in Scandinavia, and had argued a number of important cases before the European Court of Human Rights. Sundberg was perhaps an attractive choice for the WCFU because he was a long-term critic of Sweden’s socialist establishment and he had published articles critical of Marxism in relation to the law. In particular, he had suggested that Marxist regimes inevitably used genocide to eliminate the bourgeois class since the bourgeoisie cannot be reformed.¹⁸ These opinions, however, could, and ultimately did, lead to difficulties for Sundberg and, by extension, the Commission. Dautricourt also held views that might have appealed to the WCFU. He had previously expressed the opinion that for a regime to deny food, amongst other necessities, to a group, could be considered an act of genocide.¹⁹ Commission member Levasseur had retired after a long career at the universities of Lille and Paris, but continued to be an active researcher. At this time he was heavily involved in drafting the new French Penal Code. The Commission’s three members met in April 1987

16. *Ibid.* Art. 4 at 426.

17. Letter from Sundberg to Hobbins (15 March 2001).

18. See J. Sundberg, “On Marxism as a Legal Practice” (1987) 65 Wash. U.L.Q. 823 at 829 [hereinafter “Marxism”].

19. Experience provides that a state of war or a military operations régime gives authorities a convenient pretext not to provide a population or a group with what they need to subsist - food, medicines, clothing, housing . . . It will be argued that this is inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

J.Y. Dautricourt, “La prévention du genocide et ses fondements juridiques” (1969) 14:15 *Etudes internationales de psycho-sociologie criminelle* 22 at 22-23 as cited in U.N. Doc., 4 July 1978, E/CN.4/Sub.2/415 at 27.

to complete some preliminary business, which included developing a list of other prospective Commissioners. Sundberg was appointed Acting President until the full Commission was convened.

The WCFU recommended the names of potential Commissioners to Sundberg, who was also asked to make suggestions. Unaware of the antagonism between Ukrainians and Jews, he somewhat naively proposed the name of a Jewish jurist.²⁰ Kalba submitted a number of WCFU-approved c.v.'s to Sundberg, most of whom Sundberg did not know. However, Sundberg had no objection if: "...[t]hey were willing to join this 'suicide mission'" provided he was satisfied with their general standing.²¹

Dautricourt died not long after the April 1987 meeting, and his compatriot Marc Bossuyt was proposed to stand in his place. Bossuyt declined, recommending Joe Verhoeven who duly joined the Commission.²² Verhoeven had been a member of a Commission that investigated the 1915 massacres of Armenians. The remaining members of the Commission were appointed over the next few months. Those members were: Colonel G.I.A.D. (Gerald) Draper, British professor of international law at the University of Sussex and former war crimes prosecutor; John Peters Humphrey, Canadian professor of international law at McGill University and former Director of the UN Division of Human Rights; Ricardo Levene, Argentinean professor of penal law and criminology, as well as comparative criminal law at the Universities of Buenos Aires and La Plata; and Covey Oliver, American professor emeritus of international law at the University of Pennsylvania, and former Ambassador and Assistant Secretary of State for Inter-American Affairs. The Commission was created on February 14, 1988, and Sundberg was confirmed as President. These individuals represented, by and large, a most distinguished Commission and appeared to fill the criterion of "jurists of repute."

Despite the evident eminence of the jurists, one might ask whether they were selected because of views they had expressed that the Petitioner might find attractive – for example, those of Sundberg and Dautricourt listed above. Such a question is extremely difficult to answer. Humphrey, like Verhoeven, was a second choice as a Commissioner, accepting the

20. Sundberg to Hobbins, *supra* note 17. Sundberg asked British Law Commissioner Aubrey Diamond, who declined. Later, discussing this with Kalba, he ruefully noted: "I soon understood that it was not a good suggestion". Diamond was the only suggestion that Sundberg made.

21. Sundberg to Hobbins, *supra* note 17.

22. Email from Verhoeven to Hobbins (13 March 2001). Bossuyt had just been named to the UN Human Rights Commission, which he chaired in 1988.

role after Ronald St. John Macdonald had declined owing to his appointment as a judge on the European Court of Human Rights.²³ There were several possible reasons why Humphrey's views might have appeared to make him a natural choice. In his autobiography,²⁴ Humphrey noted that, in his final year at the UN, his relationship with the Russian delegation was extremely poor²⁵ and this might have led the Petitioner to the erroneous conclusion that Humphrey was anti-Soviet. Perhaps more importantly, Humphrey was of the view that the Genocide Convention had a declarative as well as a constitutive character. Such a declarative character might allow for the conclusion that the illegality of what came to be called genocide pre-existed the Convention, an interpretation of which the WCFU certainly would have approved. Humphrey had also advocated compensation for the individual victims of human rights violations.²⁶ An examination of the careers and scholarship of the other Commissioners might unearth potential reasons they were selected.²⁷ However, whatever the predisposition of Humphrey or any other Commissioner and whatever the reason any of them were selected, it cannot be concluded solely on this basis that their views would affect their impartiality as Commissioners.

Sundberg regularly mentioned to his fellow Commissioners, as he had done to Kalba, that serving on the Commission was an "invitation to suicide." Interpretations of these remarks highlighted a divergence of

23. Macdonald notes that, although he had often accepted responsibilities after Humphrey had declined them through pressure of other activities, this was the only occasion in which the roles were reversed. Conversation with Hobbins (January 2001).

24. J.P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984).

25. The Soviet delegations voted against Humphrey's election to the Subcommittee on the Prevention of Discrimination and the Protection of Minorities, and even prevented him from receiving a vote of thanks in the Human Rights Commission for his twenty years service as Director of the UN Division of Human Rights. This problem with the Soviet delegations was in connection with Humphrey's activities to create the position of a UN High Commissioner for Human Rights. See A.J. Hobbins, "Humphrey and the High Commissioner: the Genesis of the Office of the UN High Commissioner for Human Rights" (2001) 3 *Journal of the History of International Law* 38. On the other hand, although it was not generally known, Humphrey had always been a socialist and quite antagonistic toward right-wing political views. Ironically, several of Humphrey's friends and acquaintances had been alleged to be Soviet agents. See A.J. Hobbins, "Humphrey and the Old Revolution: Human Rights in the Age of Mistrust" (1995) 8 *Fontanus* 121.

26. See for example, J.P. Humphrey, Speech at Conference on the Right to Compensation, Ottawa (30 May 1989) in MG 4127/18/364.

27. Verhoeven could think of no reason why he might have been chosen other than Bossuyt's recommendation. Verhoeven, *supra* note 22. Initially he thought it might have been because he had been a member of the Permanent Peoples' Tribunal of the Lelio Basso International Foundation for the Rights and Liberation of Peoples, but later understood that had this been known it might have disqualified him, at least in the minds of some Commission members, as "a dangerous leftist".

thinking between him and the others. Those living in small countries bordering the Soviet Union have a different perspective from those, in Sundberg's words, living in "faraway, well-armed and well-protected NATO countries."²⁸ When he spoke of "suicide" and the integrity of the Commission, he was being literal.²⁹ He felt the Commission work might provoke a vicious Soviet response, possibly with a fatal outcome. He knew that the recent mysterious violent deaths of people in elevated positions in his country – the arms export inspector, Admiral Algernon, his faculty colleague, Professor Hilding Eek and Prime Minister Olof Palme – were believed to have something to do with covert foreign activity, presumably linked to Soviet activity.³⁰ The other jurists most probably thought Sundberg was referring to character, not actual, assassination, since there would be a likelihood of attacks on the reputations and credentials of the Commissioners. Verhoeven recalls:

Sundberg mentioned many times his so-called suicide [fears], but he appeared to be mostly concerned with his academic profile. At least, that was at that time my interpretation, even if during the London session he seemed to be aiming at physical security as well.

That said, he was always concerned with 'security'. For instance, he told me to ask for a special police protection, during the Brussels session. Which I did. But no special protection was given. And the session proved to be quite safe and pleasant. No soviet agents were seen!³¹

It is clear that Sundberg's fears, whether justified or not, were very real. The Commissioners may have had various motives for agreeing to serve on the Commission. Such service clearly called for a certain amount of moral courage, but for Sundberg, physical courage was also required.

b. *Mandate*

The origin of the mandate of the Commission is to be found in the Terms of Reference³² proposed by the WCFU counsel, Canadian barrister John Sopinka. The Preamble of the terms stated *inter alia*:

Whereas there is contention as to the weight of evidence that the famine was deliberately planned and carried out by the Soviet Russian government and members of the party in power at the time, and was an instance of the use of mass starvation as an instrument of genocide.

28. Email from Sundberg to Hobbins (18 March 2001).

29. Sundberg to Hobbins, *supra* note 17.

30. Letter from Sundberg to Hobbins (24 April 2001); email, *supra* note 28.

31. Email from Verhoeven to Hobbins (15 March 2001). Sundberg remembers that there were armed guards at the Brussels session; Sundberg letter, *supra* note 30. Verhoeven recalls these as private security guards, although he still feels any possible interest by the Soviet Union in the Commission was greatly over-estimated. Email from Verhoeven to Hobbins (11 May 2001).

32. Terms of Reference of the Commission (January 1988) cited in MG4127/17/354.

This was followed by a statement of the purpose of the Commission, which was to inquire into and report on:

1. the existance [sic] and extent of the famine;
2. the cause or causes of such famine;
3. the effect it had on Ukraine and its people;
4. the recommendations as to individual and/or group responsibilities for the famine.³³

The Commission³⁴ accepted the purpose statement, but reduced the Preamble to stating: "Whereas there is contention as to the evidence that there was a deliberately planned famine in the Ukraine in 1932-33."³⁵ Sundberg informed Kalba that at this preliminary meeting it "was agreed that the decision to expugn [sic] reference to the Genocide Convention from the Terms of Reference should be supported and maintained."³⁶

c. *Financing the Commission*

Since the costs of the action were to be borne by the WCFU as petitioner, a number of issues relating to potential conflict of interest arose. For this reason, a trust fund to cover the Commission's expenses based "on voluntary donations, collected world wide," was established by the Congress. The trust fund was controlled by a Finance Committee consisting of: Sundberg, as Commission President; Ian Hunter as Commission General Counsel; and Dennis Morris, a Toronto lawyer, whose firm acted as trustee.³⁷ Bearing the cost of an International Commission entails considerable financial resources. The preliminary budget for the first (Brussels) session of the Commission was \$118,000.00, excluding study

33. *Ibid.*

34. In the persons of Sundberg, Draper and Verhoeven (13 January 1988). The full Commission did not meet until the following month in Toronto.

35. International Commission of Inquiry into the 1932-33 Famine in Ukraine, *The Final Report, 1990* (Toronto: 1990) [hereinafter *Final Report*]. Terms of Reference. Exhibit D. unpagged. The *Final Report* is a composite of a number of separately pagged or unpagged sections as follows: Introductory Chapter (10 p.); Terms of Reference, Exhibit D (1 p.); Rules of Procedure, Exhibit E (3 p.); The History of the International Commission of Inquiry and Its Mandate (5 p.); The Majority Opinion (61 p.); Dissenting Opinion by Professor Georges Levasseur (5 p.); Separate Statement by Professor Covey T. Oliver (2 p.); Separate Opinion of President, Professor Jacob Sundberg (88 p.); and Separate Statement of Professor Ricardo Levene (hijo) (21 p.). Sundberg subsequently reissued the *Final Report* as Stockholm Institute of Public and International Law. *Juristförlaget*, no. 109, 1996, with the addition of an index, some additional material and a somewhat altered text. While the reissue is a much easier document to use, it should be treated with some caution because of the changes. For this reason all subsequent references to the *Final Report* in this article refer to the original edition.

36. Letter from Sundberg to Kalba (19 January 1988) in MG4127/17/358.

37. *Final Report*, *supra* note 35 at 2-3.

grants to the Commissioners totaling \$17,500.00.³⁸ In addition to the Commissioners, the witnesses, experts, General Counsel and Commission personnel all received accommodation, including meals, transportation and a *per diem*.

The *Final Report* simply noted, in regard to fees for the Commissioners, that “[I]n order to maintain the integrity of the Commission as an independent body, the Commissioners agreed to serve without remuneration.”³⁹ This position was apparently elaborated at the Organization Meeting held in Toronto on February 12 –14, 1988, as follows:

[I]t was established that the Commissioners should receive no fees from the Petitioner since such payment might compromise the integrity of the Commission. Instead it was agreed that the Commissioners should receive a *per diem* to meet expenses in the abstract and in an amount corresponding to that received by international judges. The *per diem* was thereupon fixed equivalent to what was received by the judges of the Iran-U.S. Claims Tribunal (1981).⁴⁰

While the attempts to maintain an arm’s-length relationship with the Petitioner may appear laudable, there is actually little wrong with paying a fee to the jurists from whom some dedication was expected over three years. They could scarcely be expected to work *pro bono*. Sundberg acknowledged that his categorical opposition to receiving a fee was actually based on his “Swedish high tax society background.”⁴¹ He preferred arrangements, such as *per diems*, which were not subject to taxation. The agreed reimbursements were in fact quite generous. When Humphrey was invited to join the Commission, Kalba wrote to him stating:

As far as expenses are concerned, basically our Congress pays the transportation and hotel accommodation for the commission members and their wives, and covers the cost of working luncheons in addition to a *per diem* reimbursement at the U.N. rates, as well as a study grant of U.S. \$2,500 advanced before each of the projected three sessions.⁴²

The accommodation allowance included the costs of meals. The allowance for other expenses was fixed at US \$200.00 *per diem*, although the Commissioners evidently spent longer in the city than the actual hearings. In regard to the five-day New York session, Kalba wrote to the Commissioners:

38. Preliminary Budget for Two-weeks Brussels Session (4 May 1988) in MG4127/17/357.

39. *Final Report*, *supra* note 35, Introductory Chapter at 1.

40. J. Sundberg, “History of the International Commission of Inquiry and its Mandate,” Draft (29 October 1989) at 1 in MG4127/17/354. This report is far more detailed than the document derived from it bearing the same title in the *Final Report*, *supra* note 35.

41. Sundberg, *supra* note 17.

42. Letter from Kalba to Humphrey (17 September 1987) in MG4127/17/357.

Following our agreement established in Brussels, please find enclosed an advance check for U.S. \$1,000.00, paid on behalf of the Commission to every member on account of per-diem, with the understanding that the balance of \$600.00 will be received in New York as cash payment.⁴³

Thus the Commissioners received an eight-day allowance to cover five days of hearings. The *Final Report* is quite silent on the question of the study grant of \$2,500.00 per session. Humphrey certainly received his initial study grant in November 1987 for the Brussels session to be held the following May.⁴⁴ Sundberg cannot recall receiving any study grant.⁴⁵ He considered it possible that Kalba might have offered the study grants to others as part of his recruitment process. Verhoeven does not remember receiving any further grant after the Brussels session.⁴⁶ It is probable that the initial study grant of \$2,500.00 was paid to the Commissioners, but the subsequent ones were declined after discussion at the Brussels session. While the remuneration seems quite reasonable given the work involved, it would have been wiser for specific details about remuneration to be included in the *Final Report*.

d. *General Counsel*

The position of General Counsel, as envisioned by the ILA draft statute,⁴⁷ was created "in order to bring balance to the hearings and add to the integrity of the Commission."⁴⁸ Sundberg defined the role of the General Counsel as follows:

The General Counsel was intended to counterbalance the presence of the Petitioner and its Counsel, thereby giving the proceedings adversarial rather than inquisitorial character. The General Counsel is thus to some extent an opposing party as well as an *amicus curiae* and, as a result, very much an officer *sui generis*. He is supposed to present to the Commission, with complete impartiality and independence, his reasoned submissions. He is to be heard before the Commission gives a ruling on any dispute about, or objection to the proceedings before the Commission.⁴⁹

43. Memorandum from Kalba to all Member-Commissioners (29 September 1988) in MG4127/17/355. One thousand dollars was given as an advance a month before the session.

44. Letter from Kalba to Humphrey (4 November 1987) in MG4127/17/357.

45. Sundberg to Hobbins, *supra* note 17.

46. Verhoeven, *supra* note 22. It should also be noted here that Verhoeven refused to accept any remuneration for the preparation of the *Final Report*, *supra* note 35, accepting only reimbursement of the cost of typing and translation.

47. *ILA*, *supra* note 13, Art. 22. Sundberg states that the hybrid figure of General Counsel was sketched on the model of the European Commission of Human Rights. Sundberg letter, *supra* note 30.

48. *Final Report*, *supra* note 35, Introductory Chapter, at 2.

49. Sundberg, *supra* note 40 at 2-3.

The General Counsel was a paid office. At its meeting of February 14, 1988, Professor Ian A. Hunter of the University of Western Ontario Law School⁵⁰ was retained as General Counsel at Humphrey's suggestion.⁵¹ This might have been viewed as a questionable choice in terms of the requisite "complete impartiality" because Hunter was an unabashed admirer of Malcolm Muggeridge, who was one of the Petitioner's key eye-witnesses. Indeed, eight years previously, Hunter had written a laudatory biography of the journalist in which he reached certain conclusions as to the existence and nature of the famine based on Muggeridge's observations.⁵² However, the Commissioners saw little difficulty in this relationship when Humphrey informed them of the biography.⁵³ Indeed, Sundberg considered it "a blessing that [Hunter] had such a good command of the matter that he could carry out the cross-examinations, as he did – in an excellent way."⁵⁴ Verhoeven thought little about it since, at that time, he had not heard of Muggeridge.⁵⁵

e. *Secretariat*

Sundberg proposed that the Commission have a separate Secretariat hired at the Petitioner's expense, including the offices of Press Officer, Documentation Officer, Legal Secretary and Finance Officer.⁵⁶ It was his intention, in order to distance the Commission from the Petitioner, that he select the Legal Secretary or Clerk, and that that officer hire the other members of the Secretariat.⁵⁷ However, the Petitioner effectively hired the staff and the loyalties of staff members were not always clear. The Legal Secretary was Adrian Jenkala, a British barrister of Ukrainian extraction, while the Documentation Officer was Stephen Werbowyj, also of Ukrainian heritage and now a Toronto-based immigration lawyer. Kalba contracted out the publicity work to the Pittsburgh, PA, public relations firm of Creamer, Dickson, Basford. Their account executive, Sonya H. Darragh, served as Press Officer for the Commission. Sundberg had stressed that "ultimate control of the extent and method of media

50. Hunter has since taken early retirement and now writes political, religious and legal commentary from a conservative perspective.

51. Verhoeven, *supra* note 22. Humphrey knew Hunter professionally and had invited him to speak at the Canadian Human Rights Foundation summer school in Charlottetown, P.E.I.

52. I.A. Hunter, *Malcolm Muggeridge: A Life* (Toronto: Totem Books, 1980) at 76-91. So great was Hunter's admiration for Muggeridge that he recognized the danger of himself becoming a hagiographer at 9.

53. Verhoeven, *supra* note 22.

54. Sundberg to Hobbins, *supra* note 17.

55. Verhoeven, *supra* note 22.

56. Letter from Sundberg to Kalba (19 January 1988) in MG4127/17/357.

57. Draft Terms of Reference for the Position of Clerk to the Commission in MG4127/17/354.

coverage should be in the discretion of the Commission.”⁵⁸ At the Brussels session, however, Jenkala requested, “the Commissioners have no direct contact with the Press in order to forestall any major attack on the credibility of the Commission.”⁵⁹ It is unclear why cutting off the Commissioners from the press would avoid questions of credibility. Indeed, since Kalba’s Commission on Famine Genocide in the Ukraine also had a Press Officer, Tricia Flinn, her press releases were often confused for official Commission releases. This confusion caused the Commission to come under attack at the New York session and thus created a credibility question despite Sundberg’s best efforts.

f. Audi Alteram Partem

One obvious problem facing the Commission from its inception, even if it was accepted as an independent body, was the question of how it would hear evidence from all parties. As the Petitioner, the WCFU would present all the evidence supporting its contention that the famine was man made and an act of genocide, but there were clearly differing views on this question. The use of a General Counsel alone could not fill this void. Sundberg also felt the Commission would be “crippled” without access to the documents in Soviet archives.⁶⁰ Humphrey recognized the problem of Soviet representation immediately and wrote to Kalba on December 4 1987:

I think it is especially important, from the point of view of credibility, that we have some representation from the Soviet Union, if possible, and am wondering whether some attempt to further this end, perhaps through diplomatic channels, could be made in addition to the formal notice. Have you considered the possibility of inviting a Soviet jurist to join the Commission?⁶¹

Humphrey’s question about having a Soviet Commissioner was never answered and one imagines that, if such a thought had ever occurred to the Petitioner, it was quickly discarded as being worse than Sundberg’s suggestion of a Jewish Commissioner. Sundberg, commenting on this question recently, stated: “The idea of having a Soviet Commissioner with us was an extremely dangerous idea, since such a member was likely to be able to, and indeed to sabotage the whole exercise.”⁶² Sundberg’s perspective on Soviet participation tended to be different from his fellow Commissioners, partly because of the differences in age and partly

58. Sundberg to Kalba, *supra* note 56.

59. Memorandum from Jenkala to the Members of the Commission (Undated circa 22 May 1988) in MG4127/17/354.

60. Sundberg to Hobbins, *supra* note 17.

61. Letter from Humphrey to Kalba (4 December 1987) in MG4127/17/358.

62. Sundberg to Hobbins, *supra* note 17.

because of Sundberg's more exposed academic position. He summarized the disagreement over inviting a Soviet jurist as follows:

Consequently, I was a bit more aloof to ideas and suggestions coming from my colleagues at the Commission than perhaps they realized. John Humphrey was a profile in himself. He was an old professor on the American pattern, recruited more for his achievements than for his scholarly writings. He was used to putting questions and looking sceptic, but not to do much practical work. I think his attitude to a Soviet participation is typical. He spotted the drawbacks of not having any Soviet participation, but he did not want to discuss the matter seriously with me (e.g. by putting together a pro and con memo) because that would require more work than he thought it merited in his case.⁶³

Draper certainly agreed with Humphrey's point of view, writing to him:

I do not see why some evidence might not be heard from Soviet jurists and other specialists, if that is the wish of the Commission. Indeed, this might be helpful because the Commission is concerned with Soviet law and administration governing the agriculture of the U.S.S.R. during the relevant years.⁶⁴

Oliver, who was of a like mind to Humphrey regarding inclusion of Soviet representatives, was asked to draft a more formal invitation and noted that it was "designed to encourage Soviet participation, rather than to induce rejection out of hand."⁶⁵ In addition to the Soviet Union, the invitation was addressed to the Byelorussian and Ukrainian Republics. Oliver's draft stated:

In the interests of complete impartiality and fairness, the present Commissioners earnestly solicit the selection of a colleague from soviet circles to join them; and, in any event, the full participation as counsel of the representative or representatives of any group or groups from within the Soviet Union is invited in relationship to the evidence-taking stages of the Commission's work, detailed above.

Humphrey enthusiastically supported Oliver's draft, writing:

Thank you for sending me a copy of Professor Oliver's draft of the invitation to be sent to the Soviet Union. He has done a very good job. I think however that it might be better if we were to delay the request for access to documents until after the Soviets have appointed their Commissioner – if, of course, they do.

63. Email from Sundberg to Hobbins (22 March 2001) Sundberg's assessment of the amount of work Humphrey would be willing to put in on Commission activity was probably fair. By this time Humphrey was an octogenarian and in the twilight of his career. For example, Commission documentation reported that "Prof. Humphrey regretted that for time reasons he would not be in a position to submit any scholarly paper on the genocide matter." Sundberg, *infra* note 89 at 5.

64. Letter from Draper to Humphrey (30 April 1989) in MG4127/17/357. Draper was replying to Humphrey's letter of April 24, 1989 indicating Humphrey was still trying to get Soviet involvement.

65. Letter from Oliver to Kalba (13 January 1988) in MG4127/17/358.

I also think that, as Professor Oliver suggests, the invitation should be sent to the heads of government of the Union of Soviet Socialist Republics and the Byelorussian and Ukrainian Republics all of which are members of the United Nations.⁶⁶

Sundberg's view on the issue seemed somewhat more cynical. He felt there was no chance of a positive Soviet response and he was more concerned with the public relations perspectives. He wrote to Kalba:

We were particularly concerned with the *integrity of the Commission* and the details of the types of assistance required by it and the Officers of the Commission to be appointed for that purpose.

At the start we considered that it would be necessary to invite in carefully framed terms a representative of the U.S.S.R. to participate in the work of the Commission if the U.S.S.R. wished so to act. In particular it was thought that the invitation should extend in terms to enable the Soviets to contribute to the proceedings of the Commission in a positive manner and it would be of particular value if the Soviets could furnish evidence relating to the subject of the Commission's inquiry. We paid particular attention to the framing of this invitation, fully aware that the response will probably be negative. In our view the integrity of the Commission demands such an invitation so framed and it should be published in the Final Report of the Commission as part of its transactions.⁶⁷

Kalba took Oliver's draft and redrafted it "in co-operation with Messrs. W.G. Danyliw and John Sopinka".⁶⁸ He sent the new draft to Sundberg, stating, "all the basic paragraphs from Prof. Oliver's draft are included."⁶⁹ Yet Kalba's draft was addressed only to Nikolai Ryzhkov, Prime Minister of the U.S.S.R., and did not invite the participation of a Soviet Commissioner. Access to the Soviet archives was requested and the hope that a Soviet Representative could attend the sessions of the Commissions was expressed. Interestingly, this draft defined the Commission in the following terms:

Composed of jurists of international repute, the Commission of Inquiry will act principally as a fact-finding body, within a legal framework that will exclude retroactive application to its fact-finding task of legal doctrines and parameters that did not evolve until later times. Its fact-finding work will include, of necessity, inquiries into the motives and intentions of certain persons in authority; but it will not trespass upon fundamental politico-legal principles related to the sovereignty and independence of states.⁷⁰

66. Letter from Humphrey to Kalba (19 January 1988) in MG4127/17/356.

67. Sundberg to Kalba, *supra* note 56.

68. Letter from Kalba to Sundberg (21 January 1988) in MG4127/17/358.

69. *Ibid.*

70. Draft of January 22, 1988 in MG4127/17/358.

Sundberg retained this paragraph in his official invitation changing only the last sentence to conclude: "... persons in authority at the time in question, without interfering with the sovereignty and independence of states."⁷¹ He further reduced the invitation for a Soviet Representative to simply stating the "Commissioners invite Soviet attendance in the evidence-taking stages of the Commission's work."⁷² He also omitted, perhaps wisely as they were subject to change, the dates and places of the sessions.

Humphrey was not pleased when he received a copy of this letter. It seemed to him to move far away from Oliver's intention of encouraging participation, veering towards "inducing rejection." It contained no mention of a Soviet jurist joining the Commission. Humphrey also found some of the additions troublesome. Writing to Kalba, he stated:

I was surprised on reading it to see on the second page the statement to the effect that the Commission would act 'within a framework that will exclude retroactive application to its fact finding task of any legal doctrines and parameters that did not evolve until later times'. I do not know who was responsible for this: it must have been put in during my absence. But it raises some questions. Does it mean, for example, that because the U.N. Genocide Convention came into force only in the fifties whereas the famine was in the thirties, the Commission will be precluded from finding that genocide occurred? Perhaps you will remember the discussion that took place when it was decided to include the statement in the letter.⁷³

Humphrey received no written reply to his inquiry doubtless because the changes had taken place after the Commission's discussion of the letter. It is apparent, however, that Sundberg's letter clearly informed the Soviet premier that the Commission would not answer the question of whether genocide had occurred. Humphrey felt the Commission should be free to reach such a conclusion should the evidence warrant it. The *Final Report* noted that Sundberg's letter "was not heeded except to the extent that the USSR Embassy in Ottawa contributed a few letters with references to present scholarship in the USSR."⁷⁴ Given the tenor and lack of specificity of Sundberg's letter it is not surprising there was no official response from the Soviet Union. Sundberg also decided against submitting a

71. Letter from Sundberg to Ryzhkof (13 February 1988) in MG4127/17/354. In the interpretation of this phrase, Sundberg stated: "Anybody familiar with Soviet ways will immediately understand how the Soviets would read such an empty treacherous phrase as 'it will not trespass upon fundamental politico-legal principles related to the sovereignty and independence of states.' To them, the phrase meant exactly the opposite to what it purported to say." Sundberg letter, *supra* note 30. Obviously such nuances presented difficulties to more straightforward minds like Humphrey.

72. *Ibid.*

73. Letter from Humphrey to Kalba (10 March 1988) in MG4127/17/356.

74. *Final Report*, *supra* note 35 at 2.

second invitation to Ryzhkov for the New York session because of financial difficulties.⁷⁵ In short, the invitation appeared to be made not to elicit a response, but rather to allow the *Final Report* to state that the Soviet Union declined to cooperate. Sundberg felt the situation was a difficult one and his letter was the best that he could have done in the circumstances.⁷⁶ Later in this article the actual responses of public and private individuals in the Soviet Union will be discussed.

g. Petitioner's Counsel

As noted above, the WCFU had selected as its Counsel, John Sopinka, Q.C., then a senior partner at the Toronto firm of Stikeman, Elliot. Sopinka, of Ukrainian ancestry, was a distinguished barrister and legal educator, who had represented the Ukrainian-Canadian Committee in front of the Deschênes Commission.⁷⁷ He prepared the case for the Brussels hearing and made the opening statement. On May 24, 1988, the day following the beginning of the hearing, he was elevated to the Supreme Court of Canada and thus resigned from the case. Alexandra Chyczij, a young Ukrainian-Canadian lawyer who had been helping Sopinka, continued the case. What Chyczij lacked in experience she made up for in conviction, presenting her case by all accounts with passion and eloquence. However, with Sopinka's resignation, the WCFU began the search for another high-profile counsel. In September, William Liber, Q.C., of the Toronto law firm Gardiner, Roberts, was retained to continue the case.

3. The Brussels Hearing

The first evidence-taking session of the Commission was held in Brussels May 23-27, 1988. The Commission dealt with a great mass of documentation supplied by Sopinka, and heard the evidence of eyewitnesses, as well as expert witnesses, including Robert Conquest and James Mace. Conquest, a Senior Research Fellow of Stanford University and described perhaps hyperbolically by the Petitioner as "probably the most learned scholar in Soviet government and history in the western world,"⁷⁸ had recently published a lengthy and unquestionably scholarly work on the famine.⁷⁹ While Conquest's work is considered reputable, he also had critics. The more strident of these critics pointed to his wartime back-

75. Letter from Sundberg to Kalba (8 October 1988) in MG4127/17/358. For further details of the financial difficulties, see Section III.4, *infra*.

76. Sundberg to Hobbins, *supra* note 17.

77. *Supra* note 4.

78. This description is taken from Petitioner's Counsel William Liber's Opening Statement at the New York session (31 October 1988) in MG4127/17/361.

79. Conquest, *supra* note 3.

ground as a propagandist for the Information Research Department (IRD) of the British secret service and suggested that he knowingly used fraudulent sources in his work.⁸⁰ The more scholarly of those who disagreed with his conclusions point to the fact that his sources did not, perforce, include official Soviet documents and were largely from the Ukrainian émigré community.⁸¹ Mace was a post-doctoral fellow at the Ukrainian Research Institute, Harvard University, and Executive Director of the U.S. Congressional Commission on the Ukrainian Famine. He had published scholarly works⁸² and edited collections of émigré memoirs. His findings, too, had been subject to criticism both from the left and some sections of the scholarly community.⁸³ Some scholars questioned the accuracy of both Conquest's and Mace's demographic projections.⁸⁴ Mace's conclusions differed somewhat from those of Conquest in that he projected a higher number of deaths and asserted that the famine was an

80. For example, Conquest, *supra* note 3 at 286, uses a famous photograph of an adolescent girl and her starving brother that he states was described by "a foreign journalist" and taken from the *Los Angeles Herald*, February 20, 1935. Douglas Tottle points out that the journalist in question was the highly controversial "Thomas Walker" who worked for the pro-fascist William Randolph Hearst, that Walker was never in the Ukraine in 1933, and that he later turned out to be an escaped convict named Robert Green. D. Tottle, *Fraud, Famine and Fascism: the Ukrainian Genocide Myth from Hitler to Harvard* (Toronto: Progress Books, 1987) at 11. The actual photograph, Tottle claimed, had been published in a Russian journal in the 1920s. *Ibid.* at 9. Tottle also challenges the provenance of other photographs used by Conquest, but not properly identified. Whatever the merits of the argument, Conquest would have been wise not to simply ignore it since his photo credits were quite non-specific.

81. Conquest defends the validity of using anecdotal information and émigré memoirs not only because of their sheer volume but also because of the fact that in comparisons they are mutually confirmatory. Conquest, *supra* note 3 at 9. He also wrote that "truth can thus only percolate in the form of hearsay" and that "basically the best, though not infallible, source is rumor." R. Conquest, *The Great Terror* (N.Y.: Macmillan, 1973) at 754. One critic suggested that this "astonishing" method of comparing memoirs and hearsay "would be sound only if rumors were not repeated and if memoirists did not read each other's works." J. Arch Getty, *Origins of the Great Purges: the Soviet Communist Party Reconsidered, 1933-1938* (N.Y.: Cambridge University Press, 1985) at 222, n. 12.

82. J.E. Mace, *Communism and the Dilemmas of National Liberation: National Communism in Soviet Ukraine, 1918-1933* (Cambridge, Mass.: Distributed by Harvard University Press for the Harvard Ukrainian Research Institute and the Ukrainian Academy of Arts and Sciences in the U.S., c. 1983). See also *Harvest of Sorrow*, *supra* note 3. Mace was not the prototypical scholar of Soviet history. A native Oklahoman, he had become interested in Eastern Europe as an undergraduate and had learned Russian and Ukrainian in university. He was Conquest's principal research assistant for *Harvest of Sorrow*, in part because Conquest did not know the Ukrainian language.

83. Some suggest that the US Congressional Commission on the Ukrainian famine was basically a political attack on the Soviet Union by the Reagan-era State Department. Indeed, one reason for the establishment of the International Commission was to avoid the criticism of being a tool of American foreign policy in the cold war.

84. For example B. Anderson & B. Silver, "Demographic Analysis and Population Catastrophes in the USSR" (1985) 44 *Slavic Review* 517; and "Tautologies in the Study of Excess Mortality in the USSR in the 1930s" (1986) 45 *Slavic Review* 307.

act of genocide. The positions taken by these expert witnesses cannot be viewed as untenable, although their conclusions are certainly debatable. The problem remains, however, that the Commission did not hear contrary expert testimony, although the Commission presumably could have checked the various published sources that challenged the views of Conquest and Mace.

Much of the primary documentary evidence at Brussels was based on the conflicting contemporary reports of two journalists, Walter Duranty and Malcolm Muggeridge. Duranty, Russian correspondent for the *New York Times*, reported favourably on Stalin's economic policies and denied the existence of the famine. He was so influential that his articles were said to be a factor in Roosevelt's recognition of the Soviet Union in 1933.⁸⁵ Muggeridge, a correspondent with the *Manchester Guardian*, clandestinely visited the famine area in 1933 and his reports confirming the famine were smuggled out of Russia in the diplomatic bag. In 1932 Duranty was given the Pulitzer Prize for his efforts, while Muggeridge was obliged to resign for his troubles. Posterity, however, has been rather kinder to Muggeridge than to Duranty. General Counsel Hunter has described Muggeridge as the "most compellingly readable of journalists", while he dismissed Duranty as "an unattractive, over-sexed little man, with a wooden leg" who falsified facts and who may have been favorably disposed to Stalin's regime because they allowed him to exercise his passion for necrophilia.⁸⁶ Muggeridge, in the last months of his life, was unable to make the trip to Brussels. Therefore on June 27, 1988 the Commission held a special evidence-taking session for him at his home in the presence of Commissioner Draper, Hunter and Chyczij. It was in this house that Hunter had written his biography of Muggeridge during a sabbatical leave in 1978-79;⁸⁷ so one may imagine that Hunter's cross-examination may have been less than rigorous. In its *Final Report*, the Commission accepted as accurate Muggeridge's reporting, while rejecting that of Duranty, a judgment that was almost certainly correct.⁸⁸

85. S. Taylor, *Stalin's Apologist: Walter Duranty, the New York Times's Man in Moscow* (N.Y.: Oxford University Press, 1990) at 188-190.

86. I. Hunter, "In memory of a journalist who in the moment of truth chose honesty over popularity" *Report Newsmagazine* 26 (27 March 2000) at 54, online: reprinted under "A tale of Truth and Two Journalists" http://www.infoukes.com/uccla/issues/genocide/I_gncd_032.html (last modified: July 13, 2000). Hunter had known Muggeridge since 1968 when an enduring friendship began. The allegations of necrophilia are mentioned, but neither confirmed nor denied, Hunter points out, by Duranty's biographer (*supra* note 85).

87. Book review of *Very best of Malcolm Muggeridge* by I. Hunter (2000) 8 *Catholic Insight* 36.

88. *Final Report*, *supra* note 35, Majority Opinion at 12-13.

4. *Financial Difficulties*

The financial health of the trust fund was extremely important given the significant expenses involved in supporting the Commission. Sundberg reported the balance to be US \$30,000 on March 30, 1988 (after the Organizational Meeting) and US \$44,564.91 on October 21, 1988 (before the New York meeting).⁸⁹ The amount of expenses that had already been paid from the fund at these dates is not clear. It is evident, however, that there were financial difficulties with the trust fund between these two dates. Indeed, Sundberg reported to the Commissioners that the fund “had been put in limbo ... and was not reactivated until October 21, 1988 when Mr. Morris produced a bank statement.”⁹⁰ The financial situation was so serious that the New York session appeared to be in jeopardy as late as October 8, 1988 when Sundberg wrote to Kalba about a number of problems,⁹¹ including the following: the Petitioner’s lawyer, Alexandra Chyczij, had not been paid for the evidence-taking session with Malcolm Muggeridge at Robertsbridge, Sussex on June 27, 1988; the Petitioner’s New York counsel, William Liber, was not receiving cooperation from Chyczij (as a consequence of her non-payment) and was having difficulty preparing his case; Hunter had not been fully reimbursed for his services to the Commission, and was unwilling to undertake further work until a satisfactory payment was received; and there was no money in the trust fund to allow the Finance Committee to discharge its obligations under the terms of reference. Under these circumstances, Sundberg felt the New York session might have to be postponed, and he could not, therefore, either invite Soviet witnesses or seek the good offices of the UN Secretary-General. The fact that the Petitioner was able to show a healthy balance within two weeks would indicate the financial problems were organizational rather than the result of an actual lack of funds. It should also be noted that Kalba had sent a substantial *per diem* advance to all Commission members just a week before Sundberg’s letter of concern.⁹² Even though the financial difficulties seemed more apparent than real, there were clearly negative consequences for the Commission. Witnesses, especially potentially hostile witnesses, were not invited to appear in sufficient time, and evidence was lost.

89. Memorandum by Sundberg to the Members of the International Commission of Inquiry (12 November 1988) at 2 in MG4127/17/355 [hereinafter Memo 3].

90. *Ibid.*

91. Letter from Sundberg to Kalba (8 October 1988) in MG4127/17/358.

92. Letter from Kalba to Humphrey (29 September 1988) in MG4127/17/355.

5. *New York Hearings*

The New York hearings were similar to those of Brussels. The Petitioner's Counsel, William Liber, introduced new documents, photographs, more eyewitness accounts and expert testimony, which included that of Conquest and Mace. Humphrey and Verhoeven found themselves to be of like minds on the question of genocide retroactivity. Humphrey invited Verhoeven to lecture on the subject at the 1989 Canadian Human Rights Foundation Summer School in Charlottetown, P.E.I. Verhoeven responded:

I find your suggestion to deal with the prehistory of the genocide convention most appealing. Ukraine and other nationalities which were somehow forgotten in the peace Treaties of 1919 and 1923, like Armenians and Kurds, supply an excellent basis for looking into the dawn of an international protection of human – individual or collective – rights.⁹³

It was during these hearings that Sundberg brought various responses from Soviet sources to the Commission's attention. The Soviet responses were letters from the Soviet Embassy in Ottawa and scholars in the Ukraine.

6. *Embassy Response*

Yuri Bogayevsky, First Secretary of the Soviet Embassy in Ottawa, wrote to the Commission on seeing the invitation to Ryzhkov. He did not simply give a "few references to Soviet scholarship", but wrote:

I, whose country of origin is Ukraine, one of the 15 Soviet Republics, thought it necessary to draw your attention to the following.

For many years, certain circles in Western countries, including Canada, and in particular the Ukrainian anti-Soviet nationalistic groupings, have been waging a campaign of malicious allegations and speculations around the so-called issue of 'man-made famine' in the Ukraine in 1932-1933.

Except for rare cases, most of the foreign investigators of that particular period in the Soviet history totally disregard and continue to disregard the historical facts and the real reasons of the grave food situation that had existed in many, not the Ukraine alone, areas of the Soviet Union during the noted time-period.

With this in view, I assume that the attached article by Prof. Stanislav Kulchytsky, D.Sc. (History) which, as a clear evidence of the glasnost atmosphere in our country, has appeared in the No. 2, 1988, issue of the News from Ukraine weekly newspaper (See page 7), will help you and other members of your commission make a fair and objective evaluation of our past, but, as you will see, well remembered history.

93. Letter from Verhoeven to Humphrey (22 November 1988) in MG4127/15/315.

You can be sure that the Soviet Union has quite enough scientific potential to make a fair assessment of the more than 50-year-old developments in the history of our country.

As Mr. S. Kulchytsky rightfully stated in his article, 'all attempts to single out the sufferings of the Ukrainian people at the expense of keeping back or diminishing the hardships that fell to the lot of other nations bear the imprint of the lack of conscientiousness on the part of the investigators and their obvious inclination to falsifications.'

I hope, Sir, these personal remarks will meet understanding.⁹⁴

In short, Bogayevsky stressed the fact that while the WCFU insisted upon the idea of a localized famine directed at the Ukrainian people, the famine was far more widely spread. If Bogayevsky's view were accepted, it would argue against a conclusion of genocide. In Sundberg's case, Bogayevsky's letter did not "meet understanding" but seemed more a cause of outrage. He listed the letter as one example of "a Soviet strategy to torpedo our credibility"⁹⁵ and urged the Commission to examine ways it could protect itself against such attacks. Further, he took it upon himself to write "a letter of concern to the Soviet Ambassador in Ottawa in reply to the letter of his First Secretary."⁹⁶ Sundberg also cited a letter from four Ukrainian academicians as another example of the Soviet strategy.

7. Ukrainian Academicians

In discussing participation from representatives from the Soviet Union, the *Final Report* notes:

The Commission has moreover received a letter of October 14, 1988, signed by Boris Babij (Member, Academy of Sciences, Ukrainian SSR), Ivan Kuras (Member correspondent, Academy of Sciences, Ukrainian SSR), Stanislav Kulchytsky, [Ph. D., (History)], and Volodymyr Denisov [Ph. D., (Jurisprudence)]. This letter suggests that the Commission should have predetermined its findings, but also invited 'an honest dialogue, an open discussion, and objective and comprehensive analysis.' In reply, the President of the Commission, on November 1, 1988, read a public statement rebutting the suggestion in the letter. Furthermore, since media had tended to identify press releases of the Petitioner, i.e. the World Congress, with press releases from the Commission itself, Petitioner was asked to rectify this impression, and did so in a press release that was printed in the New York City Tribune of November 8, 1988.⁹⁷

94. Letter from Bogayevsky to Sundberg (1 March 1988) in MG4127/17/358. Sundberg did not circulate this letter and its enclosures, received before the Brussels session, earlier because he did not consider it part of the Commission documentation, which could be introduced only by the Petitioner. Sundberg letter, *supra* note 30.

95. Memo 3, *supra* note 89 at 1.

96. *Ibid.* at 7.

97. *Final Report*, *supra* note 35 at 4.

Sundberg's rebuttal actually contained more highly charged language, stating that the Commission had received a letter "purporting" to be from the Ukrainian academics and that "because the Commission has not been able to check the identities of the signers – or to judge possible prejudice to them – the text is presently embargoed in the Commission's records."⁹⁸ However, a majority of the Commission recommended that some of the letter's contents be made public. This was of necessity done out of context. It should not have been difficult to check the bona fides of the authors. Yuri Bogayevsky, First Secretary of the Soviet Embassy in Ottawa, had, six months previously, sent the Commission an article by Kulchytsky (who is now a professor of history at the University of Kiev-Mohyla Academy). Ivan Kuras is also well known and, subsequently, served as Vice-Premier of Ukraine (1994-1997).

Sundberg's reaction to this letter seems unduly harsh. Part of the letter he objected to reads as follows:

As academicians, we would understand the desire of specialists in the field of international law to make their contribution to the illumination of one of the most dramatic pages in the history of our people. However, we cannot but be concerned and attentive to the fact that long before the process of inquiry is to be completed, certain members of the commission have made public statements alluding to their predisposition toward the theory of 'famine-genocide' against the Ukrainian people, and thereby, predetermining their findings.⁹⁹

The concerns raised seem legitimate given the acknowledged fact that the WCFU was releasing press notices that appeared to emanate from the Commission and that these notices did use prejudicial terms like "famine-genocide". The academicians could be forgiven for misunderstanding these ambiguous press releases. The WCFU's only corrective action, placing a clarification in the *New York City Tribune*, appears somewhat inadequate.

The *Final Report* does not directly address some of the interesting substantive issues raised by the academicians; one hopes this omission was not occasioned by annoyance and the predetermination suggestion. The academicians acknowledged that the famine took place and that Soviet academics were "compelled" to remain silent on the topic until very recently. They expressed the opinion that the tragic famine was not the result of a policy of "famine-genocide", but rather resulted from the convergence of a number of factors. The principal causes were the

98. Statement by the Chairman of the Commission of Inquiry on the 1932-33 Famine in the Ukraine in MG4127/17/354.

99. Letter from Ukrainian academicians to Sundberg (14 October 1988). Translated for the Commission in MG4127/17/358.

“forced collectivization of agriculture, the ruthless policy of grain procurement, drastic deviation from Lenin’s principles towards the peasantry and cooperatives, Stalin’s leap towards industrialization, which was accomplished at the cost of the peasantry, etc.”¹⁰⁰ The Ukrainian academicians advocated:

... an honest dialogue, an open discussion [and] an objective and comprehensive analysis. Such an approach is ever more evident in the position of many western researchers, who doubt the sincerity and good will of those who support the myth of ‘famine-genocide’ - G. [sic] A. Getty, R.W. Davis [sic],¹⁰¹ B. Anderson, B. Silver, D. Tottle, D. Coplton, and others.

The Commission heard evidence from the scholars Conquest and Mace. It seemed reasonable for the academicians to suggest that the Commission contact scholars with different opinions. Certainly Barbara A. Anderson, sociologist and demographer at the University of Michigan Population Studies Center, J. Arch Getty, professor of history at the University of California, Riverside, and Brian D. Silver, professor of political science at Michigan State University, are all respected and widely published scholars. R.W. Davies, Professor Emeritus of the Centre for Russian and East European Studies, University of Birmingham, U.K., is a hugely prolific scholar in the area of Soviet history, especially Stalin’s economic policies.¹⁰² Anderson and Silver had published articles¹⁰³ critical of Mace’s estimate of eight million deaths, suggesting there was a difference between starvation death and excess mortality. Mace’s method of calculation included many who would never have been born, their parents having died or migrated prior to their anticipated birth. All of the above-mentioned academics could have provided the Commission important scholarly testimony. Jeff Coplton, a journalist and ghostwriter, was perhaps a less useful suggested source, although his polemic article,¹⁰⁴ a popularization of Douglas Tottle’s conclusions, was given to the Commission along with a rebuttal from Conquest. Tottle was a left-wing Canadian trade unionist, who had written a monograph¹⁰⁵ challenging the authenticity and accuracy of

100. *Ibid.*

101. The spelling mistakes in the names of Getty and Davies might well have been a result of Kalba’s translation and transliteration, and not the fault of the academicians.

102. Davies might be generally recognized as more deserving of the plaudits that Liber gave Conquest as the most learned scholar on Soviet history in the western world. He is currently lead scholar on a team investigating the famine based on materials in the Soviet archives.

103. *Supra* note 84.

104. J. Coplton, “In Search of a Soviet Holocaust: a 55-year-old Famine Feeds the Right” *Village Voice* (12 January 1988).

105. Tottle, *supra* note 80 at 73. Somewhat ironically Tottle used Mace’s demographic methodology on the population of Saskatchewan between 1931 and 1941, discovering that 25% of that population were apparently victims of famine-genocide.

many of the sources used in “famine-genocide” scholarship. In particular, he showed that some frequently used materials were based on Nazi and right-wing U.S. propaganda, that the demographic methodologies of estimating deaths were flawed, and that the motion picture, *Harvest of Despair*, used many still photographs from other periods or of doubtful provenance.

Sundberg gave his view of the academicians’ letter as follows: “While this letter seems to invite ‘an honest dialogue, an open discussion, an objective and comprehensive analysis’, this invitation seems, on closer reading, to be limited to Mr. Tottle et cons.”¹⁰⁶ His ‘closer reading’ of the letter, as an invitation limited to Tottle, seems a little perverse. Sundberg later expressed the view that he felt that, in mentioning the western scholars, the academicians were making suggestions for further reading rather than suggesting expert witnesses. Indeed, he felt the academicians were suggesting that reference to the works of these scholars would render the Commission’s activities unnecessary. However, he found the suggestion of Tottle as a source “interesting” in part because his book indicated access to secret KGB materials. He doubted, however, that Tottle “would expose himself to cross-examination by a clever lawyer for the petitioner.”¹⁰⁷

8. *In Search of Tottle*

Thus, although the academicians’ letter raised the question of taking the testimony of a number of experts who held views contrary to those of Conquest and Mace, efforts were principally directed to securing Tottle’s testimony. These attempts were unsuccessful for a variety of reasons including the reluctance of Petitioner’s Counsel, William Liber, to produce a “hostile witness”, such as Tottle,¹⁰⁸ followed by the practical problems in attempting to contact Tottle encountered by the Legal Secretary of the Commission, Adrian Jenkala. At length, it was left to the General Counsel, Dr. Hunter, to invite Tottle to appear, although it was not expected that Tottle would accept the invitation.¹⁰⁹ While the Com-

106. Memo 3, *supra* note 89 at 1. Sundberg explained the abbreviation “et cons” as follows: “The little reference to ‘Mr Tottle et cons.’ should be understood as ‘Mr Tottle et consortes’ which is a mild way to suggest that Mr Tottle was not alone in his enterprise but probably enjoyed important help from people in the Soviet Union, e.g. KGB people. The basis for this is of course that Mr Tottle’s book was built on and included a documentation that could not be available to a private person without official Soviet blessing of some kind.” Email from Sundberg to Hobbins (23 April 2001).

107. Sundberg to Hobbins, *supra* note 17.

108. While most of the Commissioners felt Tottle’s evidence would be useful, Sundberg felt Tottle would never subject himself to any cross-examination.

109. Sundberg, *supra* note 89 at 2-3.

missioners wanted to hear Tottle's evidence, debatable as it may have been, Sundberg did not believe Tottle would appear. He thought little of the book, which he had perused, stating that it had "the appearance of being part of a more general anti-Conquest effort, caused by the publication of dr Conquest's book... ." ¹¹⁰ He informed the Commissioners that Tottle's publisher, Progress Books, "...is believed to be the publishing outlet of the Canadian Communist Party." ¹¹¹ While he did not state the source of this belief, it may be assumed to have been Kalba. Finally, because Tottle's book was well documented, he pointed out that in "its detail this book suggests that the author has had access to classified information at a scale indicating resort to Soviet sources." ¹¹² Unlike his fellow Commissioners, Sundberg felt that while expert testimony was useful in providing context, it was not essential because the real answers lay in the primary sources. ¹¹³ He finally dismissed the possibility of Tottle testifying, telling the Commissioners:

Moreover, the news transmitted from Canada have [sic] included no indication that Mr Tottle has responded to our invitation, or indeed that he has ever received it. In the present situation it is believed to be no need to press further for a special Tottle session. ¹¹⁴

Thus the unsuccessful and seemingly half-hearted attempts of the Commission's President, its General Counsel and the Petitioner to have Tottle or any other scholars of divergent views testify, denied potentially important testimony to the Commissioners. The General Counsel, whose explicit role was to present the Commission with all sides of an issue, must be assigned some responsibility for this problem. Inevitably, the lacuna would have a negative impact on the credibility of the *Final Report*.

9. *Post Mortems on New York*

Views of the New York session differed. Humphrey told Kalba that it "was in my opinion a useful exercise." ¹¹⁵ James Mace, on the other hand, was alarmed by what he observed and wrote Kalba a lengthy letter on the subject. ¹¹⁶ This letter is reproduced here in full since it not only expresses Mace's view of the New York session, but sheds light on other issues such

110. Memorandum 4 from Sundberg to the Members of the International Commission of Inquiry (6 July 1989) Annex 1 at 1 in MG4127/17/355 [hereinafter Memo 4].

111. *Ibid.*

112. *Ibid.*

113. Sundberg to Hobbins, *supra* note 17.

114. *Ibid.* at 2.

115. Letter from Humphrey to Kalba (8 November 1988) in MG4127/17/356.

116. Letter from Mace to Kalba (8 November 1988) in MG4127/17/357.

as the rivalries within the Ukrainian community, the independence of the Commission secretariat and the role reversal of witnesses in preparing counsel regarding their testimony. The letter reads:

It was, as always, a pleasure to see you in New York, but I fear the direction things seem to be taking gives some cause for concern. Please correct me if I am wrong, but it seems to me that things are not going well in terms of the presentation of the petitioner's case. While I am certain that Mr. William Liber is a talented barrister, his summation of the case did not seem to show him in his best light. Even after I spent five hours with him, he did not seem to understand his case particularly well, and very little he said would have helped me to understand the case were I a member of the International Commission. Alexandra Chyczyj, who replaced John Sopinka in Brussels, may not have been a high-powered Queen's Counsel, but she knew what she and the issues were about. There is often a tendency to think that, since you know you are right, everyone else will find your righteousness as obvious as you do. This is a false assumption, and, as a result, the World Congress of Free Ukrainians is now in the awkward position of losing a case in an *ersatz* court of its own making.

I have neither the standing nor the desire to unduly influence the direction of the International Commissions work, but the problem now seems an obvious one, which calls for the efforts of everyone seriously interested in the tragedy Ukrainians suffered to attempt to insure [sic] that the Commission's work be of the highest quality. Should the finding of the International Commission of Inquiry substantially contradict those of the US Commission on the Ukraine Famine, this would be a tragedy to those who have sought to document the intentionality of official policies which exacerbated the famine, to those who survived to bear witness, to the sponsoring body, and to the Ukrainian community as a whole. It would also strengthen those forces which seek to diminish the crime committed against the Ukrainian nation by Stalin in that it would allow them to juxtapose the findings of the International Commission to those of the US Commission in the hope of discrediting the latter.

I have kept to myself any reservations I had about the creation of an International Commission at a time when the work of the US Commission was already underway. It was, I felt, the business of the World Congress of Free Ukrainians and not mine. The reasons for these reservations should now be all too apparent. The prestige of the World Congress is tremendous among freedom-loving Ukrainians in the Soviet Union because it is the only body which represents all segments of the Ukrainian community in the Free World. This prestige meant that it would overshadow the American Commission in its impact among those who look to the Ukrainian diaspora for inspiration and leadership. Yet, the fact that it is the *ad hoc* creation of a Ukrainian community body meant that if it found the Ukrainians were victims of genocide, its impact would be small, because Stalin's defenders could dismiss it as a creature of the Ukrainian nationalists. If, however, it were to find that Ukrainians were not victims of genocide, its impact would be far greater for precisely this same reason. Such a creation, which promises little gain but holds the danger of

substantial losses, never seemed to me very well conceived, except in the context of the intra-community political intrigues with which we are, alas, all too familiar. Despite the best of intentions, I think it has become a pawn in those intrigues of the *Banderivtsy* versus their opponents, Bilynsky versus Flis,¹¹⁷ your Commission versus mine, while the community and our reputations will pay the cost. It may be grossly unfair, but so is life.

Old General Fylynowycz, who died not long ago in Minneapolis, half a century ago published a journal in Rumania called *Hurtiemosia!*¹¹⁸ It is time for us all to do precisely that if we are to prevent a very unfortunate situation. Please send me everything that has been presented and everything transcribed from both sessions (Brussels immediately and New York as soon as possible). Please also send me the address and phone number of Adrian Jenkala in England, since I will need to discuss with him precisely what needs to be emphasized in the Commissioners' deliberations and what needs to be explained. If there is any way, politically and financially, for you to dump Liber and retain Chyczyj, I urge you to do so. Results matter more than titles, and you need someone who is bright more than you need the letters Q.C. on a business card. This is a *crisis situation*, and saving the situation requires doing everything possible as soon as humanly possible. You must also immediately explain the situation to Mr. Ignat [sic] Bilynsky and insist that the Ukrainian Congress of America [sic] give you whatever money you need to hold a third session of the Commission in Toronto. I know Mr. Hunter wants to call Dmitry Pospelovsky,¹¹⁹ who will not be on your side, but you ought to use it to shore up your case as well *because you need it*. Think of the alternative: a commission created by the *Ukrainians themselves* finding that the famine had nothing in particular to

117. Mace is referring to a deep division in the Ukrainian-American community. The original Banderivtsy were the members of Nationalist leader Stepan Bandera's Ukrainian Insurgent Army. Bandera was assassinated by the KGB in 1959. Their opponents in the wartime Ukraine were the *Melnykivtsi*, followers of Andriy Melnyk. These groups formed as a result of a split in the Organization of Ukrainian Nationalists (OUN) in 1940. In this context, however, the Banderivtsy were the Liberation Front of the Ukrainian Congress Committee of America (UCCA), an umbrella group representing all Ukrainian-American organizations. Ihnat Bilynsky (1917-1992) (sometimes written Ignatius Bilinsky or Billinsky) was a member of the WCFU Secretariat from 1967, and General Secretary (1970-1971). He was a Chairman of the WCFU Famine Commission (1984-1990) and Chairman of the WCFU Audit Committee (1983-1988). In 1980 at the 13th Congress of the UCCA, the Ukrainian National Association (UNA) walked out and formed the Law and Order Committee. When negotiations to heal the rift broke down the dissidents formed a second umbrella organization, the Ukrainian American Coordinating Council (UACC). Dr. John O. Flis, Supreme President of the Chicago-based UNA, became first President of the UACC. Both the UACC and the UCCA attended the 1983 WCFU Congress, each attempting to be the principal umbrella organization for Ukrainian-American groups. Over the next few years all attempts to heal this rift failed. In fact, by the time of the 1988 WCFU Congress, the two organizations were joined by a third US umbrella group, the Conference of Neutral Organizations, which wished to remain aloof from the feud.

118. It is not quite clear what this title means. It appears to be a combination of *hârtie* (paper or document) and *mo'ie* (estate, land or fatherland), but this does not make a great deal of sense in the context.

119. Dmitry Pospelovsky is a history professor at the University of Western Ontario, Hunter's own university.

do with Stalin's policies towards Ukrainians, that it was merely an unintentioned and unfortunate side-effect of the ill-conceived forcible collectivization of agriculture.

The case which the World Congress of Free Ukrainians hoped to win is by no means untenable, but it can only be won if those who argue it are competent and understand it. This was not what I saw in New York.

It is evident from this letter that Mace perceived the Secretariat to be working for the Petitioner as much as for the Commission. Kalba did not share this letter with counsel, for obvious reasons, but approached Sundberg directly about holding a third evidence-taking session in Toronto.

10. *A Third Evidence-Taking Session?*

Sundberg appeared to respond favourably to the proposal for a Toronto session. He wrote to Kalba, telling him that he may consider himself, "the appropriate person to undertake the organization of this working session."¹²⁰ However he cautioned Kalba of the need to involve Hunter and Liber.¹²¹ Humphrey, while he had no objection to further sessions, was disturbed that Sundberg should proceed without any consultation. He viewed this as a mistake because "we are already too closely associated in the public mind with Canadian Ukrainians."¹²² Kalba faxed Humphrey's letter to Sundberg, who then wrote to Humphrey elaborating his own dependence on Kalba's organization:

Setting up a Third Session means of course a great deal more work and is dependant [sic] on the availability of a great deal of money. dr Kalba is still the man who really makes the organization move. Do not overestimate the possibilities of remote control from Stockholm.¹²³

Humphrey responded that he had not realized "any final decision had been taken in New York regarding the next session of the tribunal."¹²⁴ Draper supported Humphrey's views, writing "... [I]t would be advisable not to hold the final session in Canada where the Ukrain [sic] organization has its *siege*."¹²⁵ When plans to hold a Toronto meeting had been abandoned, Oliver noted,

As now we'll meet in London the worry expressed in your letter as to locale of the next sitting has shrunk. But I do wish, as Kalba will tell you, that we could, with counsel present and you presiding, DEPOSE a few people in Canada before October.¹²⁶

120. Memo 3, *supra* note 89 Sect. 6e, at 7.

121. Letter from Sundberg to Kalba (3 January 1989) in MG4127/17/358.

122. Letter from Humphrey to Kalba (4 January 1989) in MG4127/17/356.

123. Letter from Sundberg to Humphrey (12 January 1989) in MG4127/17/358.

124. Letter from Humphrey to Sundberg (1 February 1989) in MG4127/17/358.

125. Letter from Draper to Humphrey (30 April 1989) in MG4127/17/357.

126. Letter from Oliver to Humphrey (18 May 1989) in MG4127/17/357.

When Hunter, who was experiencing some professional difficulties of his own since the New York hearings,¹²⁷ became aware of Kalba's activities, including sending documentation to Sundberg, he gave the President a frank opinion of the matter, writing:

It is entirely inappropriate, in my opinion, for Dr. Kalba to be sending material to you or to the Commissioners. The World Congress of Free Ukrainians was represented at the hearings by Messrs. Sopinka and Liber, not by Dr. Kalba. All books and documents relevant to the issues before the Commission, and properly admissible in evidence, were put in as Exhibits in either Brussels or New York. These materials are ample, in my opinion, to address the outstanding issues.

I do not intend to review any 'package' of documents submitted by Dr. Kalba for three reasons: (1) they are not properly before the Commission; (2) the 'evidence taking' portion of the hearings were [sic] conducted in Brussels, England and New York; I would strenuously object to Mr. Liber attempting, *ex parte*, to contact the Commission and to seek now to put before them documents not properly introduced in evidence; Mr. Liber would not do that because, as a barrister, he is bound by a code of professional ethics. I object no less strenuously that this should be attempted by Dr. Kalba. (3) My retainer was for the conduct of the hearings. The hearings are complete. If the Commissioners wish me to be further involved in their deliberations a new retainer, arranged directly with the Commission would be required.¹²⁸

Kalba responded that he had been discussing recent Soviet publications of the famine with Sundberg and sent some translations as a sample. He stated Sundberg wanted to study the articles before deciding whether they would be used as new evidence for a separate public session or could simply be circulated by Sundberg as additional items.¹²⁹ Liber's response to Hunter included the formal request for an additional session, indicating two reasons in particular for such a session: first, to review evidence concerning the constitution of the U.S.S.R. and Ukraine during the famine; and second, to consider various articles on the famine published in the U.S.S.R. and elsewhere following completion of the hearings.¹³⁰

127. Hunter had been a panel member on an Ontario Human Rights Commission hearing, but was requested to resign in January 1989 over allegations of bias. Specifically it was stated that he had commented publicly at a 1987 Charlottetown Human Rights Conference on the case that was still before the Commission. D. Henton, "Remarks force rights commissioner out," *Toronto Star* (13 January 1989) A9. Hunter stated in his letter of resignation that he disagreed with the allegation but felt it was inappropriate to go to court over the issue. The Human Rights Conference was the annual summer school organized by Humphrey under the sponsorship of the Canadian Human Rights Foundation, where Hunter spoke on "The protection of minorities and the prevention of discrimination."

128. Letter from Hunter to Sundberg, copies to Kalba and Liber (16 March 1989) in MG4127/17/355.

129. Letter from Kalba to Hunter (5 April 1989) in MG4127/17/355.

130. Letter from Liber to Hunter (16 May 1989) in MG4127/17/355.

Hunter wrote to Sundberg strongly opposing Liber's request for much the same reasons as he had given earlier.¹³¹ However, two weeks later, Kalba discussed the one-day session with Hunter and reported to Sundberg that Hunter had agreed to the Toronto location and a supplementary fee of \$2,000.00 for his services.¹³² The matter dragged on throughout the summer with no firm decision on whether or not to hold a third session.

IV. *The Cultural Revolution*

On July 6, 1989 Sundberg sent his fellow Commissioners a lengthy memorandum.¹³³ In addition to informing them of Draper's death three days previously and giving an update on the Tottle situation, he wrote:

Professor Sundberg has been victimized by a Cultural Revolution at the University of Stockholm (see Annex 1) which has kept him very busy defending his Chair. Much of his working time has thus been consumed which otherwise would have gone into work on the Final Report. There is some suspicion that the Stockholm events are somehow connected with the ongoing work of the International Commission of Inquiry.

Annex 1¹³⁴ is a six-page account of Sundberg's difficulties at his University naming those who "masterminded" the campaign against him beginning in the spring of 1988. Some of Annex 1 was subsequently published¹³⁵ and became more broadly known as the *ius docendi* Affair.¹³⁶

At the heart of the controversy was Sundberg's disagreement with a number of established Swedish political and legal academic views, including his opposition to the legal positivism of Swedish philosopher Axel Hägerström, and his critical views on Marxism and socialism. Unlike the positivists, for example, Sundberg suggested that there were rules, such as those of the European Convention on Human Rights, that could take precedence over Swedish domestic law.¹³⁷ Further, when

131. Letter from Hunter to Sundberg (23 May 1989) in MG4127/17/355.

132. Letter from Kalba to Sundberg (8 June 1989) in MG4127/17/355.

133. Memo 4, *supra* note 110.

134. *Ibid.* Annex 1 is entitled *On the Cultural Revolution at the University of Stockholm* [hereinafter *Annex 1*].

135. J. Sundberg, "The Law of Nature, the Uppsala school and the *ius docendi* Affair" (1989) 9:1 *Vera Lex* 3. A lengthier account of the affair, including a number of the original documents, can be found in "Academic Freedom at the University of Stockholm" (1991) 29 *Minerva* 321 [hereinafter "Academic Freedom"]. This account was assembled by the journal editor, Edward Shils.

136. In addition to the Commission material in the Humphrey Archives, the authors are grateful to Mary Ann Glendon of Harvard Law School for sending her documents and comments on the *ius docendi* affair. Jacob Sundberg also kindly provided great detail of his perception of the affair.

137. Sundberg's thinking can be found in his article, "Scandinavian Unrealism: Co-report on Scandinavian Philosophy" (1986) 20:9 *Rechtstheorie* 307.

touching upon Marxism in his Jurisprudence course, Sundberg only focused on what its basic principles meant in practical legal application, an approach that ran contrary to the conventional wisdom of how Marxism should be presented in Swedish law schools. While these disagreements should have been essentially academic disputes, a crisis arose when a student, with whom there had been previous problems, complained “without any kind of specification, about having been subjected to ‘rightist-extremist’ and ‘fascist’ propaganda in my teaching and examination.” As a result of the complaints, the Board of Line,¹³⁸ dominated by Sundberg’s academic opponents, appointed a five-man working group to look into the merits of the complaint. Little came of this inquiry since the matter was beyond the competence of the Board. However, the group turned to examining Sundberg’s conduct in his course in Jurisprudence. The group’s report criticized the instruction of the course for “lack of scientific basis”, “onesidedness” and “politicizing”, based, by Sundberg’s count, on the complaints of six students out of 150. Sundberg discounted the complaints, saying that they came from students “who all have a strong leftist orientation.”¹³⁹ The group assigned to look into the complaints also focused on the question of “whether there is any necessary connection between Marxist ideology and genocide,”¹⁴⁰ a connection that had been made by Sundberg. Sundberg was concerned with the attention focussed upon his views of the connection between Marxism and genocide. He stated:

[B]ut if you connect this with the line going back to Tottle, the interest becomes intelligible. The connection between Marxist ideology and genocide is a crucial point in the considerations of the International Commission, and it is therefore a natural point of attack for those interests who would like to sabotage and impede the advance of the Commission’s reasoning on this point.

The fact that dr Victorin, by his letter of January 28, 1989, has found reason to address the members of the international scholarly community on this point certainly testifies to its importance to himself. The fact he finds it so important though, and the fact that dr Peterson via dr Gerner is so genuinely interest[ed] in how necessary the connection is between Marxist ideology and the Ukrainian famine 1932-33, would seem to suggest that there is a direct link between the attack launched on me, attempting to have me removed from teaching Jurisprudence, using dr Victorin’s favourite

138. Sundberg, *supra* note 135 at 4. Sundberg defines the Board of Line as the Law faculty’s equivalent of a Curriculum Committee.

139. *Ibid.* at 5. None of the complainants failed the course. The only student who failed the course did not complain but was, significantly, the sister of Claes Peterson, a member of the Board of Line. Email from Sundberg to Hobbins (20 March 2001).

140. *Ibid.*

line that 'a teacher who is unsuitable may be given other teaching assignments'. In the thinking permeating this Cultural Revolution at the University of Stockholm, 'unsuitability' is equivalent to raising the question of the link between Marxist ideology and genocide. So far, the Revolution is not a success: the fortress did not fall to the first attack. But should it succeed in the future, it will certainly mean a stumbling stone for the advance of the inquiry into the famine in Ukraine 1932-33. It does not seem unreasonable that this was in fact one of the purposes behind the whole campaign.¹⁴¹

Sundberg more than held his own during this struggle, and his right to teach was ultimately upheld. However, the episode clearly affected him in terms of chairing the Commission, especially by limiting the amount of time he could devote to the work of the Commission.

It can be imagined that Sundberg's communication in Annex 1, whatever the merits of his case, caused considerable consternation among his fellow Commissioners. It would seem bad enough that the President believed that there could be a conspiracy against the Commission taking the form of a personal attack in the President's home university.¹⁴² When this was compounded by the President's expressed view that genocide is a required element of Marxism, it was even more worrying given the Commission's mandate. Oliver wrote back immediately, saying:

As I have stated before I am not willing to be a party to a 1989 or 1990 legal decision on the 1931-32 [sic] Ukrainian famine situation that is textually and analytically based on 'Genocide', a term unknown to the law until the Convention of December 9, 1948, which was put forward specifically to meet a 'gap' in the customary international law of human rights.

Thus I object to the use of 'Genocide' as an acceptable legal characterization of the terrible events presented to us in evidence.

Further, I strongly believe that retrospective application of punitive (criminal) normative concepts is of itself a major violation of the human rights of those accused. Nothing in the post WW II war crimes trials goes so far as to retroactivity. And we should shun unprofessional 'sloganeering'.¹⁴³

A few weeks after this memorandum, Sundberg came to Montreal and the unsettled question of a third evidence-taking session re-emerged.

141. *Annex 1, supra* note 134.

142. Sundberg still believes there was a connection between the *ius docendi* affair and the Commission's work based on circumstantial evidence and the strong balance of probability. However, he has not to date uncovered any direct evidence and, as he wryly remarked with no great expectation it would come to pass, "nobody from the old Soviet Union has come forward and testified in the matter, at least not to my knowledge!" Sundberg to Hobbins, *supra* note 17.

143. *Memorandum 5 from Oliver via Sundberg to the Members of the International Commission of Inquiry* (17 July 1989) in MG4127/17/355.

On August 31, 1989, Kalba secured Humphrey's agreement to chair a "short" meeting in Toronto.¹⁴⁴

Simon Kalba called this morning to tell me that the session of the tribunal on the Ukrainian [famine,] which was to meet in Toronto on Wednesday and over which I was to preside, has been cancelled. It seems that Ian Hunter, the tribunal legal counsel [sic], is saying that there is enough evidence in the record to serve as a basis for a judgement. I do not agree. Most of what we now have is the testimony of people like Conquest who have been writing about the question for years. What we need is the testimony of Soviet scholars who are writing about the matter now.

Sundberg ... will in any event be in Montreal on Wednesday to attend a conference here at McGill ..., and he wants to see me.¹⁴⁵

After this meeting Humphrey reported:

I have spent a good part of the day with Sundberg and ¹⁴⁶of the Congress of Ukrainians. Sundberg is obviously in a highly emotional state and it is difficult to get him to agree with anything. If he stays on as chairman of the tribunal on the famine the result is likely to be a disaster. Danyliw says that it is because of fear and the attacks that are being made on him in Sweden as an ultra rightist.

Liber filed another Notice of Application to reopen the proceedings on September 14, 1989. Humphrey recorded his reaction to this event as follows:

The plot thickens in the matter of the inquiry into the causes of the 1932-33 famine in the Ukraine. Sundberg ... obviously does not want any more evidence brought into the record. The meeting which was to have taken place under my chairmanship in Toronto was cancelled on whose decision I do not know, possibly Sundberg's but perhaps also Ian Hunter...

This morning at any event I received a fax from Toronto containing a notice of application to reopen the proceedings. I told Sundberg, who is still here, that I was in favour of granting the application but he began putting so many different interpretations on my acceptance that I finally put it into writing; and I have now informed Liber of this¹⁴⁷ and [will] send a copy of my letter to all members of the Commission.¹⁴⁸

144. Humphrey diary entry (1 September 1989) "Diary 1989 - 1999" in MG4127/20/16 [hereinafter *Humphrey Diary*].

145. *Ibid.* (11 September 1989).

146. Humphrey left blank spaces in his diaries when he could not remember or spell the name of an individual. His intention was to insert the name later, but on occasion, as in this case, he never did. Sundberg, who considered the visit simply a courtesy call, could not remember anyone else present unless it were Danyliw. Email from Sundberg to Hobbins (23 April 2001).

147. Letter from Humphrey to Liber (15 September 1989) in MG4127/17/358.

148. *Humphrey Diary*, *supra* note 144 (15 September 1989).

Hunter remained opposed to hearing new testimony.¹⁴⁹ Since the Commission was to meet in London in November to work on the *Final Report*, Sundberg decided to defer the decision of whether to hear new testimony until this session. However, he asked the “Petitioner and General Counsel to make reservations for a *mini-hearing in Toronto* on December 14, 1989, and to make sure Dr. Krawchenko¹⁵⁰ would be prepared to appear on that date.”¹⁵¹ Thus, it was in a somewhat unsettled condition that the Commissioners met to discuss the *Final Report*.

V. *The London Session*

At the London session the Commissioners, perhaps puzzled by the concept of hearing new evidence after they had drafted the *Final Report*, decided not to hold the special evidence-taking session in Toronto. Sundberg had been under great strain throughout the previous year and his difficulties were in no small measure responsible for the delays in the preparation of the *Final Report*. Aside from the *ius docendi* dispute, he was increasingly prey to the fear of danger to the credibility, if not the integrity, of the Commissioners from leftist attacks.¹⁵² Humphrey hoped that Sundberg, given his situation, might resign the presidency, and Verhoeven urged him to consider doing so:

We had a private – tough – meeting in London (with his wife (not mine), whose presence in fact was very useful). I told him that he should resign if he felt unable to finish the job that he had accepted, it being understood that I was ready to assume my role of vice-president. But he preferred to stay in.¹⁵³

149. Letter from Oliver to Humphrey (22 September 1989) in MG4127/17/358. Kalba had told Oliver “Hunter is dead set against taking more testimony.”

150. Sundberg is referring to Bohdan Krawchenko, who is currently pro-rector of the Academy of Public Administration, Office of the President of Ukraine, Kiev. At this time he was professor of interdisciplinary studies, Department of Slavic and Eastern European Studies, and director of the Canadian Institute of Ukrainian Studies, University of Alberta. He had written, *Social Change and National Consciousness in 20th Century Ukraine* (New York: St. Martin’s Press, 1985); co-edited *Famine in Ukraine, 1932-1933* (Edmonton: Canadian Institute of Ukrainian Studies, 1986); and authored articles such as “The Great Famine of 1932-1933 in Soviet Ukraine” *Oko* (Montreal) 5:6 (July-August 1983) 10; Reprinted from: *One World* (Calgary, Alberta Teachers Assn.) 20:1 (Spring 1982). The Petitioner had announced at Brussels its intention to have Krawchenko testify at the New York hearings but he was unavailable at the time. J. Sopinka, *Opening Statement* (Toronto: Stikeman, Elliott, n.d.) at 16.

151. Memorandum 6 from Sundberg to the Members of the International Commission of Inquiry (9 October 1989) in MG4127/17/355.

152. Verhoeven, *supra* note 22.

153. *Ibid.*

Just before the meeting Humphrey had dinner with Oliver and recorded:

We are pretty much on the same wave-length about the tribunal report, apart from some difference about the meaning of the word 'genocide' – I do not think that it is necessarily limited to the definition in the 1948 Convention.¹⁵⁴

The London Session highlighted the growing rift between Sundberg and the other Commissioners. The work of drafting the report had been given to Verhoeven, who undertook this lengthy and difficult task *pro bono*.¹⁵⁵ The task was made more time-consuming by Sundberg's insistence on a detailed index because he "wished to check the accuracy of each sentence of the draft report."¹⁵⁶ The draft report and index were given to all Commissioners. The intent was to use this draft to discover points of agreement and disagreement on the various questions the Commission had to answer. Sundberg was unhappy with the Verhoeven draft and clashed with the other Commissioners, apparently led by Humphrey. In his diary entry for November 21, 1989 Humphrey wrote:

The meeting in London was no picnic. The chairman of the tribunal, Jacob Sundberg, seemed to want to sabotage the whole operation. He objected to many parts of Verhoeven's draft as being "dangerous". He also said that he personally would re-write the report; and when I moved that it be adopted subject to the right of members to submit separate comments either concurring in or dissenting from specific statements or arguments, he voted against the motion. He also had his own agenda for the London meeting but again I moved that we follow Verhoeven's draft paragraph by paragraph, which we finally did. And he said there would be another session of the tribunal in Stockholm. All this was, I think, directed to improve his damaged image in Sweden.¹⁵⁷

Sundberg had his own view of the reason for the divergence of opinion with the other Commissioners. He had originally insisted that their group:

[s]hould be a Commission of Inquiry and not a Tribunal. I think the other members of the Commission did not care too much about the issue. At that time the world was full of 'tribunals' which delivered 'judgements' in all sorts of matters, and I think my colleagues saw our exercise as being another variety of that. They were willing to allow me to pursue my legalistic thinking but I do not think they took it too seriously.¹⁵⁸

154. *Humphrey Diary, supra* note 144 (12 November 1989).

155. Sundberg and, to some extent, Humphrey were surprised Verhoeven refused any fee other than expense reimbursement for this arduous task. Verhoeven, *supra* note 22.

156. *Ibid.*

157. *Humphrey Diary, supra* note 144 (21 November 1989).

158. Sundberg to Hobbins, *supra* note 17.

Regarding the *Final Report* he wrote:

... [t]he Commission split into many separate votes. My colleagues were not overly interested in fine legal points, they wanted to get the matter over with, and they wrote accordingly. Personally, I was fascinated by the Soviet tabooing operation and by the fact the whole famine was indeed run by means of statutes and ordinances and written orders. There was little need for hearing witnesses when this documentation was at the table.¹⁵⁹

Verhoeven recalls how difficult the London session was and how the index, created with such labour, was in his view useless.

The members of the Commission, including the president, had made no use of the index when we met in London to discuss the draft. Sundberg required that I justify on the basis of the documentation each affirmation or finding contained in the draft report. He relied on his previous practice as a judge. I remember saying simply, with the tacit approval of the other members: you have the index, make use of it.¹⁶⁰

Verhoeven feels that the diplomatic skills of Oliver were extremely useful in this difficult session.¹⁶¹ No further drafting session was held at Stockholm or elsewhere. Verhoeven's draft became the majority opinion with minor modifications, while some other Commissioners prepared additional statements over the next few months.

VI. *Final Report*

The *Final Report* of the Commission unsurprisingly lacked unanimity. While the Commissioners had little difficulty answering the first three questions in their terms of reference, the last question was far thornier. They concluded that there had indeed been a famine in 1932-1933. However, by the time they reached this conclusion, the fact had already been acknowledged by the Soviet Union. Regarding the extent of the famine, they stated that it went far beyond the borders of the Ukraine and was not therefore specifically directed at the Ukrainian people. The immediate cause of the famine was determined to be the excessive compulsory grain requisitions, exacerbated by the other Soviet policies of collectivization, denationalism and dekulakization. In view of this, the famine was considered to be "man-made in the sense that its immediate origin lies in human behaviour ... and not ... in climatic conditions or in natural catastrophes."¹⁶² However, the Commission found no evidence

159. *Ibid.*

160. Verhoeven, *supra* note 22. In fact Sundberg ultimately did make good use of the index when he reissued the *Final Report*, *supra* note 35. Sundberg felt the index was essential so the *Final Report* could be quickly and easily defended should any aspect come under attack. Verhoeven compiled the index simply for the convenience of the Commissioners when drafting the document.

161. *Ibid.*

162. *Final Report*, *supra* note 35, Majority Opinion at 44.

that the famine was part of a preconceived plan to starve Ukrainians or that there was any connection between that result and the various Soviet policies that exacerbated the famine.¹⁶³ Regarding the effect of the famine the Commissioners could not make a reliable estimate of the number who perished in the Ukraine, but placed the figure at no less 4.5 million.¹⁶⁴

With respect to the fourth question, dealing with recommendations as to the group or individual responsible, the Commissioners became sharply divided. So sharp was the division that, of the six surviving Commissioners,¹⁶⁵ only Humphrey did not write a report. He endorsed the majority opinion prepared by Verhoeven.¹⁶⁶ The Commission was essentially divided on who the groups or individuals responsible were and, especially, if they had committed acts of genocide. In terms of personal responsibility, although the majority report mentioned many names of those involved, they found it impossible to make a finding against anyone other than Stalin owing to his absolute control over the Politburo.

On the question of genocide, the Commission generally agreed that in order for the events to be called genocide, it must be determined not only that the required elements of the crime were present but also whether a rule condemning genocide existed at the time of the events.¹⁶⁷ Regarding the constituent elements of genocide, it was concluded that the Ukrainians represented “a national, ethnical, racial or religious group” and that the Soviet policies had resulted in several of the acts enumerated in the Genocide Convention.¹⁶⁸ The question of whether there was “intent to destroy in whole or in part” the Ukrainian group was a far more difficult question. The Commission majority deemed it “plausible that the constituent elements of genocide were in existence at the time” of the famine.¹⁶⁹ They further argued that, although penal laws were non-retroactive, genocide would be illegal even before the term was coined

163. This conclusion was farsighted since, in the intervening decade when the Soviet archives have been opened up, “there is no conclusive evidence that Moscow deliberately caused the famine in order to punish recalcitrant peasants, especially in the Ukraine, the chief victim of the famine.” H. Kuromiya, “Communism and Terror” (2001) 36 *Journal of Contemporary History* 191 at 195.

164. *Final Report*, *supra* note 35, Majority Opinion at 50. The Commission also added 3 million victims outside the Ukraine.

165. Draper died in July 1989.

166. Sundberg erroneously stated that Levene agreed with the majority opinion. *Final Report*, *supra* note 35, Introductory Chapter at 9.

167. *Final Report*, *supra* note 35, Majority Opinion at 57.

168. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. art. 2 (entered into force 12 January 1951).

169. *Final Report*, *supra* note 35, Majority Opinion at 61.

and the Convention signed. Thus, the majority stopped short of saying that genocide took place, because the evidence was incomplete and the action undefended. However, they concluded that if genocide had occurred it would have been contrary to the provisions of international law then in force.¹⁷⁰

Oliver wrote a separate statement in which he concurred with the majority opinion in all statements of facts, but had reservations about the majority's concluding interpretations, with respect to both the fact of genocide as a legal concept and its retroactivity. He was of the opinion that intent was not present, writing to Humphrey:

Even without the 'genocide-retroactivity' problem, I am inclined to view the famine in Ukraine as part of a USSR-wide bungle as to agricultural policy, in which Stalin's role was probably that of a tyrant's tergiversations as to the management of national planning, foreign exchange, industrial development, and urban-rural relationships. His conduct may have been 'criminal', but not in a strictly Ukraine-directed way. 'Intent?'

... In the seemingly somewhat Florentine environment of our Commission, I leave to you any sharing of my highly tentative general views with Ian and our colleagues, individually or collectively.¹⁷¹

He later attempted to persuade the majority to adopt a finding of crimes against humanity rather than genocide. He wrote to Humphrey:

I'm still skittish as to our characterizing the evils in the Ukraine as legal genocide, but I'll take without quibble '... acts against humanity, including some today that would be called genocide.' But, not wishing to be thought, as Bacon said of Coke, '... a mere lawyer' I'm open to counter views.¹⁷²

When Oliver was unable to dissuade his colleagues, he prepared his Separate Statement. He was aware that his conclusion would be upsetting to the Petitioner and wrote to Kalba to explain his view and make the distinction between the layman's and the legal view of genocide.

As to 'genocide': I recognize that the non-professional use of the term makes it an alternative for 'massacre, extreme cruelty and horror,' and (more specifically) 'massive atrocity.' This is now non-legal or 'general' genocide. But for criminality there must be a *delictual norm* (*corpus delicti*). There is one, and it requires finding specific intent to commit, beyond a reasonable doubt. Specific intent can be inferred from the ordinary and normal consequences of conduct, but in the Soviet jurisprudence of the Purge Trials, Vishinsky, with Stalin behind the curtains in the courtroom, enlarged specific intent to infer criminality from governmental 'mis-action' or bad results. No respectable, free world jurist could follow where Vishinsky and Stalin had led. By coining the term 'genocide',

170. *Final Report, supra* note 35, Majority Opinion at 65.

171. Letter from Oliver to Humphrey (22 September 1989) in MG4127/17/358.

172. Letter from Oliver to Humphrey (18 May 1989) in MG4127/17/357.

Lemkin, clearly, wished a delictual norm other than ‘mass atrocity’ or ‘crimes against humanity’; i.e., a norm making racist killings a crime of specific intent. This is a serious but somewhat fragile innovation, and unless the norm is protected from cheapening by making ‘genocide’ a synonym for ‘mass atrocity’, it will be stretched beyond serious credibility, as it is right now in Romania, where, after drumhead trials and immediate execution of the Fiendish Pair, all other trials now going on are for ‘genocide’! So by such usage, should ‘genocide’ be reduced to just a synonym, or, and adjective to accentuate, ‘Atrocity’?

I say ‘No’, and I think the Rumanianization of the term should not be encouraged. Who started this usage of genocide, in the case of Ukraine? Not jurists, I’ll warrant, but public relations people and the ever-imprecise press. Not Conquest, I recall.

Well, forgive, if you can. As did Martin Luther: ‘Here I stand. I could not do otherwise.’ And I believe you personally must have known this.¹⁷³

Oliver sent a draft of his separate opinion to Humphrey who ruefully noted that it “looks as if Verhoeven and I will be the only ones to accept the latter’s text.”¹⁷⁴ In the final text of his statement Oliver ignored the retroactivity question since he found:

... the Petitioner did not come to grips with two issues fundamental to the legal *crime* of genocide, whatever its origins; viz.: (1) Specific criminal intent to destroy Ukrainian ethnicity-nationality and, (2) An exclusively Ukrainian scope of injury through central Soviet operations, Union-wide.¹⁷⁵

However, he communicated to Sundberg via Kalba that: “I should be counted as upholding the Verhoeven draft on all points and issues save the treatment of the legal crime of genocide.”¹⁷⁶ Oliver’s view on the genocide question coincided with that of the General Counsel Hunter who, in his closing submission, stated that “the evidence does not support a conclusion of genocide as defined in the convention.”¹⁷⁷

Levasseur, in his dissenting opinion, also agreed with Hunter’s view that there was no evidence to support a conclusion of genocide. In addition, he disagreed with the Commission majority regarding the declarative character of the Genocide Convention and concluded it had no retroactive application. He also agreed with the Commission on all points of fact, asserting, however, “a qualification of the facts should establish crimes against humanity, not genocide, against whosoever

173. Letter from Oliver to Kalba (15 February 1990) in MG4127/17/358.

174. Letter from Humphrey to Oliver (8 February 1990) in MG4127/5/64.

175. *Final Report*, *supra* note 35, Separate Statement of Professor Covey T. Oliver at 1.

176. Letter from Oliver to Kalba (3 March 1990) and letter from Kalba to Sundberg (8 March 1990) in MG4127/5/64.

177. *Final Report*, *supra* note 35, Dissenting Opinion of Professor Georges Levasseur at 2.

might be sent for judgment.”¹⁷⁸ The introduction to the *Final Report*¹⁷⁹ as well as a number of press releases stated erroneously that Levene was a member of the majority. In fact, he wrote a lengthy separate statement in which he not only concluded that the Genocide Convention had no retroactive application but also declined to assign individual responsibility, as other Commissioners had done in various measure. Indeed, he felt such assignation of responsibility beyond the mandate of the Commission.¹⁸⁰ On this interpretation, Humphrey wrote to Sundberg: “I have read Levene’s separate statement. Although it is much too long, often repetitive and I do not agree with his conclusion, there is nothing we can do about it.”¹⁸¹ The variance between Levene’s statement and the other Commissioners may be attributable to the fact that he only attended the Brussels session and had to rely on documentation for the rest. If Humphrey felt Levene’s statement was too long, he was in for a genuine shock when he received that of Sundberg.

Sundberg, predictably given his views in London, wrote a discursive separate opinion that was about the same length as all the other reports combined.¹⁸² He sent the opinion with a covering letter that was somewhat critical of the circumstances under which the majority report had been prepared. The letter read:

Please find enclosed my draft of the President’s separate opinion. Once it was discovered that the draft which had been the basis of the majority opinion, according to the vote taken on November 18, 1989, had been created without the author having had access to the complete documentation or even the Documentation Officer’s List of Documentary Evidence Exhibits, and in view of the absence of a collegiate discussion of basic issues and information on references, I found it necessary to start from scratch when drafting my opinion. I will accept Part I of the majority opinion, setting out the history of the Commission of Inquiry, as well as its reasoning about the number of victims. As for the rest you will find that I follow a different road than the majority.

Petitioner is very unhappy about the delay; consequently I urge you to read this right away and come back on the fax with the adjustments you may find called for in your own opinions within six days.¹⁸³

178. *Ibid.* at 5.

179. *Final Report*, *supra* note 35, Introduction at 9.

180. *Final Report*, *supra* note 35, Separate Statement of Professor Ricardo Levene (hijo) at 20-21.

181. Letter from Humphrey to Sundberg (20 February 1990) in MG4127/5/64.

182. *Final Report*, *supra* note 35, Separate Opinion of President, Professor Jacob Sundberg.

183. Letter from Sundberg to colleagues (undated, circa early February 1990) in MG4127/17/357.

The Commissioners may have been somewhat unhappy about the tone of this communication since some of the delays seemed attributable to the recurring “Cultural Revolution” at the University of Stockholm and other factors. Sundberg explained these delays to his colleagues as follows:

The fact that Professor Verhoeven found it difficult to identify what had been his source of information on many specific points in the Verhoeven Draft Opinion, when we discussed it in London, has made the checking operation more burdensome than it might have been otherwise. The fact that the deliberations proceeded without any agenda prepared in advance entailed also that many important points were never addressed and consequently have to be faced without the assistance of any collegiate discussion in the course of work on a Separate Opinion. Regrettably this is rather time consuming.

Furthermore, I am under new attacks at the University of Stockholm, in fact victimized by an offensive that is a renewal of the previous one (cf Memorandum 4, Annex 1), although the targeting has changed a little. Setting up my defenses has consumed 10 working days and delayed my work on the Separate Opinion correspondingly.

Unfortunately, the Secretariat in London has – for all practical purposes – collapsed... At the present time, moreover, there is still no *work plan* established for the final moves in the production and presentation of the Final Report. As I understand our Legal Secretary in London, Mr Adrian Jenkala, none is to be expected.¹⁸⁴

The above extract represents only a partial list of Sundberg’s many complaints and criticisms. The Commissioners do not appear to have availed themselves of the opportunity to adjust their own drafts in the light of Sundberg’s Separate Opinion.

Sundberg’s Separate Opinion began by stating that because he had served on the committee that created the ILA draft statute that the Commission took as its point of departure he felt “keenly responsible for the procedural ideas and principles underlying the notion of an International Commission of Inquiry.”¹⁸⁵ Since he took a different view on matters of procedure, he evaluated the evidence differently from his fellow Commissioners and placed emphasis on “the paper trail” of Soviet statutes, ordinances and decrees.¹⁸⁶ This was not an unreasonable approach, the only difficulty being that he was obliged to use translations

184. Memorandum 9 from Sundberg to the Members of the International Commission of Inquiry (31 January 1990) in MG4127/17/355.

185. *Ibid.* at 1

186. *Final Report*, *supra* note 35, Introductory Chapter at 7, and Separate Opinion of President at 11-13.

of these Soviet papers, provided by the Petitioner or its witnesses.¹⁸⁷ In following this trail he not only identified responsible members of the Politburo, but also concluded that the statutory intent of the Soviet decrees included the intent to kill.¹⁸⁸ Sundberg, alone among all the Commissioners, stated that genocide actually took place, saying “my findings in the past are such as to coincide with what is called genocide in the Genocide Convention.”¹⁸⁹ However, he could find there was no case against any individual because all but one was by then dead¹⁹⁰ and, in any event, it was up to the Soviet Union to prosecute such cases.¹⁹¹ In view of this, he considered the retroactivity issue to be irrelevant.

When Humphrey received Sundberg’s separate opinion, he confided to his diary:

Sundberg has sent me a copy of his president’s dissenting opinion. It includes nearly 70 pages and is made up chiefly of quotations from Conquest and Mace. He could have entered his dissent on half a page. He sent me a fax in which he says that he intends to present the report to the United Nations notwithstanding the cost involved I had already been asked to do this.¹⁹²

187. These translations were based on the Smolensk Archive at Harvard University. When special units of the German armed forces sacked the Smolensk archives of the Soviet Communist Party, archivists immediately recognized the importance of this nearly complete collection of Party records that had fallen into their hands. In early 1942 the materials were transferred to Vilnius and later to a site near Ratibor (Racibórz, Poland). In 1945 Soviet forces recaptured most of the material. Some of the more important parts of this archive had, however, been taken to Germany where they were captured by American troops. These were brought to the United States during the Cold War for evaluation by intelligence services. Harvard scholar Merle Fainsod analyzed the files. On the publication of his book *Smolensk under Soviet Rule* in 1958, the Soviet Union insisted on the return of the records while denying the archive contained original material. This request was ignored. Only at the end of the Cold War was the issue of the return of the Smolensk archive raised again; however, it quickly became tangled in broader discussions over the return of artworks and other items. See Patricia K. Grimsted, “The Odyssey of the Smolensk Archive: Plundered Communist Records” 1999: *Zeitschrift für Sozialgeschichte des 20. und 21. Jahrhunderts* 12 (1997) 71; 13 (1998) 190; and 14 (1999) 134.

188. *Final Report*, *supra* note 35, Introductory Chapter at 8, and Separate Opinion of President at 80.

189. *Final Report*, *supra* note 35, Separate Opinion of President at 87. Sundberg’s exact language is used here as it is sometimes difficult to determine precisely what he meant. In an article on the work of the Commission, Hunter provides summaries of all the individual opinions except Sundberg’s. I.A. Hunter, “Putting History on Trial: the Ukrainian Famine of 1932-33” (1990) 15 *Journal of Ukrainian Studies* 47. Perhaps Hunter also had difficulty in interpretation. Hunter published the same article under the same title with a few editorial changes in (1992) 26 *L. Soc. Gaz.* 138.

190. The sole survivor was Lazar Kaganovich, who died in 1991 at age 97. See *supra* note 4.

191. *Final Report*, *supra* note 35, Separate Opinion of President at 87.

192. *Humphrey Diary*, *supra* note 144 (28 February 1990). In fact, Secretary-General Perez de Cuellar was to give the second annual Humphrey Human Rights lecture later that spring, an occasion that could have afforded a presentation of the report directly to the top.

He communicated these views to Verhoeven, writing:

Just a note to tell you that I have read all the dissenting opinions except Levasseur's who has been, I understand, ill. Sundberg's paper is longer than your own and a good part of it simply quotes Conquest or Mace. He could have entered his dissent (which is not a very powerful one) on half a page. Our sponsors will not be too happy about the expense involved.¹⁹³

Verhoeven was evidently of a like mind, and replied:

I have also read Sundberg's statement. I must confess much perplexity. What is the actual interest of such a long paper? As you point out, his dissent could have entered in less than a page. For the rest, I just notice that he has not found any of the alleged mistakes or failures he was looking for... and I prefer our way of reporting to his. Surely, he is a strange man!¹⁹⁴

Copies of the *Final Report* were presented to the Geneva Office of the UN¹⁹⁵ and to the President of the Parliamentary Assembly of the Council of Europe. At this latter event Sundberg informed the President, Anders Björck, that:

When this idea of an inquiry was put into practice, we though[t] that we would produce a sensational report on events almost unknown to the general public. As the years went by, confessions from the Soviet side started to come in. In the end it was found out that Gorbachov himself had lived in the famine area – in the Ukrainian-populated Northern Caucasus area – during the crucial years. We do not expect any longer to be contradicted on facts. We do expect to get credit for having received and packaged the evidence available in the West. From the East of Europe, in fact, we expect confirmations rather than contradictions, and possibly some corrections on the basis of materials now available in the Soviet Union but unavailable to us when we were working.¹⁹⁶

The report was delivered seven years after the WCFU had started the process and two months before Ukraine declared its sovereignty.

VII. *Further Activities*

Sundberg was correct in that, during the three years the Commission had worked, events in the outside world had moved at a far faster pace. *Glasnost*, with its attendant acknowledgements of the history of the Stalin

193. Letter from Humphrey to Sundberg (28 February 1990) in MG4127/5/64.

194. Letter from Verhoeven to Humphrey (undated) in MG4127/5/64. Sundberg recently answered Verhoeven's question about the need for such a long report, stating: "The answer is of course that it illuminates the working of the solutions set out in the ILA's statute for an international commission of inquiry and that was one of the reasons why I embarked upon the enterprise." Sundberg letter, *supra* note 30.

195. On May 9, 1990, Sundberg had hoped to present the report to the Secretary-General, but this had proved impossible. It was presented to Jan Martenson, Under-Secretary-General for Human Rights.

196. Statement from Sundberg to the President of the Parliamentary Assembly of the Council of Europe (11 May 1990) in MG4127/17/354.

years, had come and it had gone with the collapse of the Soviet Union. Indeed, throughout this period, some of the Commissioners had wondered whether what they were doing was necessary. Before the first session of the Commission Humphrey had written to Kalba, saying: "I am beginning to think that the Russians are beginning to do the job that you want the Commission to do."¹⁹⁷ When the Soviet archives were opened to scholars, Oliver wrote to Kalba questioning whether the time was appropriate for a *Final Report*: "The Moscow announcement is most welcome. I'd be interested in Professor H[umphrey]'s opinion as to whether the Commission should wait for or try to publish before the Soviet archives are opened."¹⁹⁸ A little earlier he had communicated his prophetic, if dispirited, views to Humphrey, questioning the role of the Commission:

I will be frank to tell you that my hope is that our Commission will just, as may be said in Russian, "Pytor-out"! The Canadian and American Ukrainian Groups may have reason, before long, to focus on the restructuring of Ukrainian nationality in the USSR, further revelations from Soviet sources, and the difficulties that I, at least, find as to a Genocide Conviction by us.

The American and Canadian Ukrainian Groups went into this activity, as is well-known, for striking back at the Russians. Developments may reduce that urge.¹⁹⁹

As it became evident that there would soon be an independent Ukraine, the interest of the WCFU dimmed. A WCFU-sponsored conference – *New Research Findings: Famine in Ukraine 1932-33* – was held in Toronto, and Humphrey was invited to speak about the work of the Commission. At this meeting Humphrey after noting that he had helped draft the Genocide Convention, articulated his view on the retroactive application of genocide as a crime as follows:

It was, as already indicated, *a propos* of the crime of genocide that controversy arose in the Commission, certain members of which were of the opinion that no such thing as genocide existed until after the 1948 Convention came into force. If this is correct, it would mean, amongst other things, that only these states that have ratified the convention are bound by it. But yet, in 1946, the U.N. General Assembly had already declared that genocide is a crime under international law. Note, moreover, that the Convention in article 1 says that the contracting parties 'confirm' that genocide is a crime under international law. This can only mean that, to quote the Oxford Concise Dictionary, the convention was simply establishing something more firmly that already existed, namely, the crime of genocide.

197. Letter from Humphrey to Kalba (29 April 1988) in MG4127/17/356.

198. Letter from Oliver to Kalba (15 February 1990) in MG4127/17/358.

199. Letter from Oliver to Humphrey (22 September 1989) in MG4127/17/358.

It is true there was no convention on the subject before 1948; but conventions are not the only sources of international law which include, according to article 38 of the Statute of the World Court, custom and general principles of law recognized by civilized nations. The same provisions were enunciated in the Statute of the Permanent Court of International Justice.

General principles of law recognized by civilized nations must certainly have prohibited the conduct of which the Soviet Union was found by the Commission of Inquiry to be guilty. It was a case perhaps of norms of law existing for which there was, as yet in the thirties, no name. The elements of the crime of genocide were there whatever it might have been called.²⁰⁰

Any plans there might have been for further publicity or litigation to secure compensation were forgotten in the fallout of greater events. As Humphrey told his audience at the Toronto conference:

Our report was unfortunately overtaken by events. By the time it was published, the political scene in the Soviet Union had so changed that, with the exception perhaps of its finding in the matter of genocide, all of its findings had already been anticipated by Soviet public opinion and even governmental authority. There was, it is now admitted, a famine in the Ukraine in the thirties, it was man made and its victims included millions of people.²⁰¹

Humphrey seemed to be the only one interested in the issue of compensation. Sundberg could recall no talk of compensation for the victims:

The declaration of Ukraine's independence took away all interest in penetrating into the country's tragic history which was exactly what the Final report had been doing ('putting history on trial'). The Ukrainians in the diaspora seemed to be pouring money into the independent Ukraine, rather than getting compensation money out of the disintegrating Soviet Union.²⁰²

Verhoeven agreed, writing:

I do not know what were the intentions [regarding compensation] of the WCFU, even if, clearly, the collapse of the Soviet Union totally modified the perspectives, whatever they might have been for the future.

...

200. J.P. Humphrey, "New Research Findings: Famine in Ukraine 1932-33" (Ukrainian Canadian Research and Documentation Centre, Toronto, 28 September 1990) in MG4127/18/363 (Speeches, 1990-1994) [hereinafter "Toronto Speech"]. Although the Conference Program Chairman, Wsevolod Isajiw, had told Humphrey that he hoped the conference proceeding would be published (Isajiw to Humphrey (24 October 1990) in MG4127/17/355), these plans did not come to fruition. However, Isajiw plans to have this speech published in a volume of essays commemorating the 70th anniversary of the famine. E-mail from Isajiw to Hobbins (23 February 2001).

201. "Toronto Speech", *ibid.*

202. Letter from Sundberg to Hobbins (5 March 2001) at 4.

The issue of compensation was raised by John [Humphrey] when we later met in PEI where the summer program on human rights was organized. John was involved at the time in a case concerning war victims.²⁰³ It was no surprise that the issue of compensation of the victims of the Ukrainian ‘genocide’ was incidentally evoked. But I have not heard that the point was ever raised by the WCFU.²⁰⁴

Thus, on the question of compensation, Humphrey seems to have been entirely alone, and the matter does not appear to have been pursued.

Three years after the Commission’s work was completed, Kalba wrote to Humphrey for the last time drawing attention to Hunter’s article.²⁰⁵ Kalba termed the article an “excellent analysis made from the legal point of view” and drew attention to the unanimous conclusions of the Commission, including the fact that at least 7.5 million people died as a result of the famine. A decade later, Hunter himself had almost doubled this number, writing about the “man-made famine that starved to death more than 14 million people (according to an International Commission of Jurists which examined this tragedy in 1988-1990).”²⁰⁶ Kalba concluded the letter, writing:

Also, Prof. Hunter came up with a valid proposition that this International Commission of seven prominent international jurists, in its independent and non-governmental status, could serve as a model to settle other historical and contemporary controversies by judicial inquiry.²⁰⁷

Thus Kalba, who had put so much effort into the Commission as a tribute to his father,²⁰⁸ seemed happy with the *Final Report*. The majority of Commissioners did not reach the conclusion desired by the Petitioner, that the famine was an act of genocide, nor ultimately did the Commission

203. Humphrey was actually involved in two separate endeavours in this area, seeking compensation for the Canadian Hong Kong Veterans and the Korean Comfort Women, both of which groups had been victims of human rights violations by the Japanese forces in the Second World War. These actions were successfully concluded in 1998, three years after Humphrey’s death.

204. Verhoeven, *supra* note 22.

205. Hunter, *supra* note 189. This was the second publication in the Law Society of Upper Canada Gazette. Humphrey had already received an offprint of the earlier publication from Hunter.

206. Hunter, *supra* note 86. The suggestion that the International Commission determined the figure of 14 million may not be Hunter’s. The parenthetical observation occurred in a Ukrainian Canadian Civil Liberties Association reprint of the article under the title of “A tale of Truth and Two journalists”, *supra* note 86. It seems unlikely that Hunter would have used the confusing phrase International Commission of Jurists and the phrase does not appear in other reprints of the article.

207. Letter from Kalba to Humphrey (20 February 1993). Actually Hunter concluded with the somewhat more accurate “... by quasi-judicial inquiry.”

208. Kalba’s father had been killed when Russian forces annexed the Polish Ukraine. E-mail from Sundberg to Hobbins (23 April 2001).

serve any anticipated end. However, the Commission did establish important facts about the existence, nature, and extent of the famine.

Conclusions

The International Commission performed a number of useful functions. It established a precedent and could, as Hunter suggested, serve as a model for future commissions that could learn from both the strong and weak points of the process. From a historical perspective, the Commission publicized a major catastrophe, the existence of which had been denied for decades. Even though it was impossible for the Commission, under the circumstances, to ascertain historical truth, it placed in the public record much sworn and cross-examined testimony of value to the historian.²⁰⁹ The expert testimony that took so much of the Commission's time is of secondary importance, since it has largely been published in the scholarly literature. The Commission also raised important legal issues surrounding the interpretation of customary international law, although it failed to reach any degree of unanimity in its conclusions. It also demonstrated to a very large degree that eminent jurists could maintain distance and impartiality, even when empanelled by a partisan organization for a highly political purpose.

There also appeared to be significant flaws in the process. The failure to involve Soviet participation or hear contrary evidence goes to the heart of questions concerning the nature of the Commission. It raises the issue of whether the Commission was an independent fact-finding inquiry, as implied in the *Final Report*, or, in Mace's words, an ersatz court of the WCFU's own making. When first invited to join the tribunal, some Commissioners, evidently, thought it was intended to be the former. However, as time passed, it became more apparent that this was a forlorn hope. Sundberg considered such hopes naïve from the very start since the Commission was entirely dependent on the WCFU for funding and really could hear only evidence that the Petitioner wished to present. The one attempt to secure the testimony of a hostile witness, Tottle, was undertaken with the apparent intent to discredit him, and even that attempt was half-hearted. The Commission's methodology cannot, therefore, be considered an open inquiry in search of truth, but rather a process capable

209. The Commission placed the original records, including 1,500 pages of testimony, in the Nobel Institute of Norway. Identical sets of the archives may be found in the National Archives of Canada (Ottawa), the Ukrainian Canadian Research and Documentation Centre (Toronto), the Library of Congress (Washington, D.C.), the Institute of Ukrainian Studies, Harvard University (Cambridge, MA), the Archives of Stockholm University, the Catholic University of Louvain, the Simon Petliura Ukrainian Library (Paris), the Ukrainian Free University (Munich), and the V. Vernadsky Central Academic Library (Kiev). WCFU news release (September 1991) in MG4127/17/359.

of testing such evidence as was put before it. One should remember that the Commission was not a formal legal body with any powers of compelling testimony or ordaining punishment. It had no judicial standing. It was more of an academic body, using judicial procedures. A decade later, Verhoeven, evaluating the Commission on which he served, wrote:

After all, the Commission was no more than a kind of 'tribunal d'opinion', whose effective means to discover truth remained poor, especially in a context where the support of the WCFU, as such challenging the independence of the commissioners, was essential. I still think however that, by and large, the work done by the Commission is satisfactory, at a time when the cold war excluded any cooperation with or any assistance from the Soviet authorities.²¹⁰

The seeming confusion over the nature and role of the Commission was only one element in the growing gulf between Sundberg, as President, and some of the other Commissioners. It is left to the reader to determine the extent to which Sundberg's difficulties may have hindered, delayed or otherwise adversely affected the Commission's work. There seems no question that the *ius docendi* affair distracted Sundberg, and caused both delays and tensions in the Commission. At one point, some of the Commissioners wondered whether Sundberg could continue as President under the circumstances. Sundberg was to prove more resilient than might be expected, but the situation created major problems in the production of a report. The Commission's perceived objectivity was not helped by the apparent predisposition of its General Counsel. In researching Muggeridge's life, Hunter had in a sense already answered the questions in the Commission's mandate concerning the existence and extent of the famine. This would seem inconsistent for someone who was supposed to demonstrate "complete impartiality and independence," especially one who was intended to counter balance the Petitioner's counsel and give the proceedings an adversarial aspect. However, none of the Commissioners appeared to think that this was a significant point.

Thus, for a variety of reasons, the Commissioners did not hear some of the evidence that they had wished. Some clearly wanted to hear from experts other than Conquest and Mace, especially those engaging in research in the Ukraine at the time the Commission was meeting. This was less of a concern to Sundberg who, while finding testimony contextually interesting, relied on the documentary evidence presented by the Petitioner from the Smolensk archive. Since the evidence heard was somewhat one-sided, the Commission was certainly unwise to conclude

210. E-mail from Verhoeven to Hobbins (13 February 2001).

that at least 7.5 million people died as a result of the famine.²¹¹ While history may prove the Commission correct, or even conservative, once all the questions surrounding starvation death versus excess mortality, reliable sources, etc. have been settled, there was clearly insufficient evidence at the time to reach any firm conclusion. However, most of the Commission's other unanimous conclusions seem sound.

The Commission certainly did some important work despite the obvious flaws in the process. The *Final Report* was not the disaster Humphrey had feared, despite Sundberg's decision to remain as President. It provided useful primary materials for historians and food for thought for international lawyers. One reason for this success, is that it was evident that the Commissioners were well aware of the problems, and did what they could to minimize the potential negative effects. Whether the International Commission could serve as a model for investigating other historical and contemporary controversies, as Hunter suggests, is a rather harder question to answer. Certainly, the process seems to require a wealthy and committed petitioner, willing to undertake a significant risk. There are also clear difficulties in establishing an independent and credible tribunal when the cost is borne by the Petitioner. There are perhaps less expensive, but equally credible, ways of engaging in historical research or stimulating legal discussion. One hopes the WCFU, which took the risk, felt the result was worth the effort in this case.

211. *Final Report*, *supra* note 35, Majority Opinion at 19-20. The Commissioners all accepted this conclusion of at least 4.5 million victims in the Ukraine, "something which no one disputes". This was added to an estimate of 3 million starvation deaths elsewhere in the Soviet Union. Perhaps they should have noted that no one who gave evidence or whose work was presented to the Commission disputed a minimum of 4.5 million. Clearly there are scholars who disputed the figure and the Ukrainian academicians made the Commission aware of some of their names. In this section the Commission also showed that statistical analysis, or possibly proofreading, was not its strength. On adding 9.9% to 11.3% they stated that the Ukrainian population declined versus Byelorussia by 20.2%. A slight computational error of 1% may seem small, but when dealing with a population of over 30 million, it is 300,000 people.