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C.59  
6 October 1944

UNITED NATIONS WAR CRIMES COMMISSION

SUGGESTIONS TO ACCOMPANY THE RECOMMENDATION FOR THE  
ESTABLISHMENT OF MIXED MILITARY TRIBUNALS

The Commission realizes that if Inter-Allied Tribunals are set up by the Supreme Allied Military Commanders, the composition, power and procedure of such Tribunals must be prescribed in the orders to be issued by them.

The following suggestions are submitted by the Commission because it believes that, if adopted, they would help to carry out the policy of the Allied Nations.

1. The judges of the Inter-Allied Tribunals should be nationals of the United Nations, possessing adequate qualifications.
2. Each Tribunal should have mixed personnel, and, when qualified personnel is available and can be detailed without injury to the respective military services, representation should be afforded to the United Nations of which they are nationals in such proportion as may be advisable.
3. Each Tribunal should have jurisdiction to try any enemy national who is charged with having committed an offence in violation of the laws and customs of war, subject, however, to the conditions contained in the recommendation of the Commission (Commission Document C.52(1), 22 September 1944). The law to be applied by the Tribunals will be the laws of war, i.e., the international law to be found in treaties, in custom, and in the unwritten law of war.
4. For the trial of cases each Tribunal should consist of not less than five members.
5. The rules of procedure should be consistent with practices which are usual in civilised countries and should be framed by the Appointing Authority.
6. The prosecution of offenders before the Tribunals should in general be left to the individual United Nations concerned, but in cases where the latter cannot conveniently undertake the prosecution, the Convening authority may be requested by such nation to provide a suitable officer to prosecute upon the conditions recommended by the Commission in Doc. C.52(1).
7. The Tribunals should have power to oblige persons to give evidence and to produce documents; and also to obtain evidence from other sources.
8. Trial before an enemy court should not bar proceedings before an Inter-Allied Tribunal, but any penalty imposed by an enemy court in respect of the same offence should be taken into account by the Tribunal.
9. With regard to the question of "superior orders" the Commission desires to draw attention to what it has said in Doc. C.58.

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C.60  
6 October 1944

UNITED NATIONS WAR CRIMES COMMISSION

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DRAFT CONVENTION FOR THE ESTABLISHMENT OF A

UNITED NATIONS WAR CRIMES COURT

and

RECOMMENDATION FOR THE ESTABLISHMENT BY SUPREME

MILITARY COMMANDERS OF MIXED MILITARY TRIBUNALS

FOR THE TRIAL OF WAR CRIMINALS

Letter from the Chairman of the Commission to the  
Rt. Hon. Anthony Eden, His Britannic Majesty's  
Principal Secretary of State for Foreign Affairs  
in the United Kingdom.

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6 October 1944

Sir,

I have the honour to transmit to you herewith the text of a draft Convention which has been prepared by this Commission for the establishment of a United Nations War Crimes Court, together with an explanatory memorandum, (C.50(1) and C.58).

There are also included the text of a recommendation for the establishment by supreme military commanders of mixed Military Tribunals for the trial of War Criminals, together with suggestions to accompany the recommendation (C.52(1) and C.59).

In transmitting these documents I am asked to inform you that the Commission unanimously expressed the hope that you would be so good as to take the necessary steps to convene in the near future a diplomatic conference to consider, and if thought fit to conclude, a convention for the establishment of a United Nations War Crimes Court.

I have the honour to be

etc.

(Sgd.) Cecil J.B. HURST

Chairman.

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M.35.

UNITED NATIONS WAR CRIMES COMMISSION

Minutes of the Thirty-fifth Meeting  
held on

10th October 1944

Chairman: Sir Cecil HURST - United Kingdom

There were also present

Mr. PELL - United States of America  
accompanied by Lt. Col. HODGSON  
Lord WRIGHT - Australia  
accompanied by Mr. OLDHAM  
M. de BAER - Belgium  
Mr. WUNSZ KING - China  
Dr. ECER - Czechoslovakia  
M. STAVROPOULOS - Greece  
Mr. DUTT - India  
Dr. de MOOR - Netherlands  
accompanied by M. Van Den BERGH  
Mr. BURDEKIN - New Zealand  
Mr. COLBAN - Norway  
accompanied by Mr. Edward HAMBRO  
Dr. GLASER - Poland  
accompanied by Dr. CYPRIAN  
M. ZIVKOVIC - Yugoslavia

MINUTES OF THE 33rd and 34th MEETINGS

The revised Minutes of the 33rd meeting were adopted.

Several members having asked for amendments to be made in their observations in the Minutes of the 34th meeting, it was agreed that approval of the Minutes should be left over till next week.

CHUNGKING SUB-COMMISSION

The CHAIRMAN informed the Commission that the Polish Government had appointed a representative on the Sub-Commission at Chungking.

Mr. WUNSZ KING said that preparations had been made for that Sub-Commission to meet at an early date. <sup>A. (have) send 5/10/44</sup> So far the Governments of Belgium, Luxembourg, France, India, U.S.A., Czechoslovakia and Poland (in order of date) had appointed representatives. He hoped that other Governments whose nationals had suffered, /directly

directly or indirectly, from Japanese war crimes would soon appoint representatives, who would be cordially welcomed.

The CHAIRMAN believed that he had already mentioned the British Government's intention to be represented. The name of their delegate would shortly be announced. He asked the Commission to agree to his dispatching a message of good-will from the Commission in time for the inaugural meeting of the Sub-Commission.

Dr. de MOOR said that the Government of the Netherlands East Indies would soon announce the name of its representative. The delay was due to that Government being temporarily located in Australia.

#### BOOK PRESENTED BY M. BLUM

The CHAIRMAN said that M. Blum, their former colleague, had sent the Commission three copies of a book in Russian by Professor Trainin, "The Criminal Responsibility of the Hitlerites", with a request that one copy might be given to Dr. Eöer - the only member who knew Russian. The other copies would be at the Commission's disposal. He hoped that Dr. Eöer would bring any points of interest to the notice of the Commission.

#### MEETINGS OF THE COMMISSION

The CHAIRMAN asked the Commission to consider whether it would be possible to meet in future on Mondays instead of Tuesdays, as Lord Schuster was prevented, by his Parliamentary duties, from attending on Tuesdays.

#### REPORTS OF COMMITTEE CHAIRMEN

M. de BAER said that Committee I was continuing its classification of cases and had now only one more country to deal with.

The Chairmen of Committees II and III had nothing to report.

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REPORT OF COMMITTEE III ON WHETHER THE PREPARATION AND  
LAUNCHING OF THE PRESENT WAR CAN BE CONSIDERED AS A  
"WAR CRIME" (Doc. C.55).

The CHAIRMAN observed that Dr. Eöer had submitted a Minority Report, which had been circulated (Docs. C.56 and C.56(a)), and asked him to comment on it.

Dr. Eöer made the following statement:

"First of all, I should like to draw your attention to the practical consequences of our decision on this question. Ambassador Colban once expressed fear that our Commission tended to become a 'faculté de droit'. The discussion on the question as to whether the preparation and launching of the present war is or is not a legal thing or a crime would seem to be only of theoretical value, and thus rather within the sphere of a 'faculté de droit' than of the United Nations War Crimes Commission. I am convinced that for a death-sentence upon Hitler, Himmler and other German and Axis arch-criminals the decision whether the preparation and launching of the present war is or is not a crime, is not of exclusive importance. They have committed, or ordered to be committed, plenty of other crimes which are absolutely sufficient to expose them to a death sentence. However, the value of the suggested conclusions and, if they are adopted, of our decision, is of great practical importance in the following respects:-

"(a) They will help us and the United Nations Governments immeasurably in attaining the right solutions in all cases of German or Axis crimes which are instruments of the general criminal policy of the Axis leaders. I refer to the words of Sir Cecil Hurst used in the Progress Report. He said 'Many of the brutalities which have been committed by the enemy cannot be understood if they are regarded as mere criminal acts of individuals or groups of individuals such as have occurred in previous wars. Some, of course, have this character but they are not the most characteristic. The special feature which has marked and rendered so horrible the struggle of the Axis powers for world domination has been the constant recurrence in pursuance of a policy which was dictated by Berlin of crimes of well-marked types, each calculated to secure a particular object or objects and deliberately ordered or encouraged for that purpose'. Sir Cecil gives some examples of this criminal policy and continues - 'the Commission feels that the policy of systematic punishment of war crimes which the United Nations have adopted, may fail of its purpose and even produce a revulsion of popular feeling in certain countries, if this essential fact which is the chief reason for the policy, is not brought home to the public'.

"I have nothing to add to this perfect description of the criminal intention and criminal means which characterise the present war. I draw the conclusion that the present war must be denounced because of this criminal intention and because of the criminal means used for the execution of the criminal policy which was the fundamental crime.

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"If we examine all Axis crimes under this aspect, i.e. either as preparatory acts of a criminal plan or as means of execution of such a criminal plan, we will avoid the failure feared by Sir Cecil, and that foreseen by Lord Birkenhead at the meeting of the Imperial War Cabinet on November 28th 1918, after the first world war. Lord Birkenhead advocated an indictment charging the Kaiser with responsibility for the invasion of Belgium and for all the consequent criminal acts which took place. Lord Birkenhead obviously had in mind the criminal responsibility of the Kaiser. In his speech he asked: 'How then, I ask, are we to justify impunity? Under what pretext and with what degree of consistency are we to try smaller criminals?' You all know what happened. The master criminal was not tried; his subordinates logically escaped punishment.

"(b) If we accept the fundamental point of view that the preparation and launching of the present total war are crimes because the whole policy which is the background of the present war is a criminal one, we will better understand such crimes as the extermination of foreign races, and we shall be able to put these crimes into the right light. That is, we shall be able to judge them according to their real substance, i.e. not as simple 'violations of laws and customs of war' but as instruments of a general criminal policy and as part of a criminal war.

"Let me demonstrate this idea by one example which is of tragic urgency - that of the general devastation prepared by the Nazis in the Netherlands. You all know the statement of the Netherlands Prime Minister, who revealed the devilish plan which the Nazis have in view. I ask you, is this plan really nothing more than 'violations of laws and customs of war'? If we admit that the aggression against the Netherlands in 1940 was not a crime, we must take the consequences. If the invasion of the Netherlands was not a crime, or even if it was a legal thing as may appear from the paper of Professor McNair, page 4, then the general devastation prepared by the Germans in the Netherlands is in principle a legitimate measure permitted by international law. I quote Oppenheim about general devastation, page 323, vol. 2 of his book, 6th edition: 'But the fact that a general devastation can be lawful must be admitted. It is, for instance, lawful in case of a levy en masse on already occupied territory, when self-preservation obliges a belligerent to resort to the most severe measures. It is also lawful when, after the defeat of his main forces and occupation of his territory, an enemy disperses his remaining forces into small bands which carry on guerilla tactics and receive food and information, so that there is no hope of ending the war except by a general devastation which cuts off supplies of every kind from the guerilla bands. But it must be specially observed that general devastation is only justified by imperative necessity, and by the fact that there is no better and less severe way open to a belligerent'.

"If we admit that the invasion of the Netherlands was a legal proceeding, a charge could only be made against the German High Command, or perhaps only against the German Commander in the Netherlands, and only on the ground that by carrying out general devastation they exceeded the limits of military necessity. The whole trial would be reduced

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to the secondary - although important - question of the degree, extent, or intensity of the general devastation: but the devastation in itself would be assumed, according to international law, to have been legitimate.

"Would that be just? I think not. We cannot allow the Germans to abuse international law. In my opinion we must refuse the Germans the plea of military necessity, because they were not forced to invade the Netherlands. They had no right to attack the country, and consequently they cannot plead a necessity which, in fact, was no necessity on their part, but a situation deliberately created by them. The invasion was a crime; and consequently the invader cannot, according to the general principles of law, acquire any right on the basis of his crime. A burglar trapped in a house cannot set it on fire, and then plead necessity. The supreme court of my country established in a judgment a rule that nobody can plead necessity who voluntarily or intentionally put himself in such a situation.

"To the arguments contained in my minority report and its supplement, I should like to add a further three:

"a) The report suggests the condemnation of aggressive war in the Peace Treaty. The authors of the report follow the example of 1919 but with one important restriction. The 1919 Commission advised the Peace Conference to set up a special organ - it appears from the discussion at the time that it had in mind some kind of political tribunal - to 'deal as they deserved' with the authors of the war. This was recommended in 1919, before the Covenant, the Geneva Protocol, Briand-Kellogg Pact and the present total war. The report accepted by Committee III is, in this respect, more lenient towards the Nazi leaders than the report of 1919 towards the Kaiser. The modest progress in international law since 1919 is neglected in the report and, moreover, the suggestions are more restricted than in 1919. I do not think that we should go further back than our predecessor in 1919. It would be a 'marche en arriere'.

"b) To punish the preparation of war was the purpose of two conventions adopted in 1937 by the League of Nations. It is true that both conventions deal with a particular kind of preparatory act, the so-called terroristic act. Further it is true that both conventions were not ratified. But we could use both conventions as a means of interpretation of the legal conviction of the League of Nations. From this point of view, there is no doubt that the League of Nations expressed in both conventions the same fundamental legal conviction as was expressed in the Geneva Protocol, namely, that the preparation and launching of aggressive war are international crimes. Therefore, we must interpret all instruments of international law signed since 1919 in this sense and cannot adhere to the text only.

"c) In my report and its supplement I gave you a list of men who are supporting the opinion that aggressive war is an illegitimate act or even a crime. I am obliged to add to this list the members of the London International Assembly.

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The first Commission of the L.I.A. dealt with the question 'if the waging of an aggressive war is or is not a crime'. Mr. Latcy (Great Britain), Dr. Benes and myself were appointed 'rapporteurs'. The Commission discussed at several meetings these problems and reached a decision on November 12th 1943. The Chairman, M. de Baer, prepared a draft resolution in which it was stated:

'IT IS RECOMMENDED:

1. That in designing the practical steps which are to ensure punishment the Commission for the investigation of war crimes shall consider as war crimes:

'a) the waging of an aggressive war and all other acts of aggression (referred to in Marshal Stalin's Declaration of November 6th 1943);

'b) war crimes proper, the list of which is attached hereto (N.B. this is the list of December 1942);

'c) all crimes committed either within an Axis country or outside such country for the extermination of a race, nation or political party referred to in the United Nations Declaration of December 17th 1942);

'd) the necessity to apprehend any war criminals or 'quislings' whose surrender is demanded wherever they may be.

2. That the United Nations use in their documents the expression - war crimes - in its wider sense as it is understood by public opinion and in statements made by the leaders of the United Nations; i.e. crimes committed in the preparation, waging and support of the second world war and its purpose of world domination by the Axis Powers.'

"Nine members were present, representing Belgium, Czechoslovakia, France, Great Britain, Norway and Poland. The resolution was voted, I believe, unanimously.

"It was approved by the London International Assembly on August 23rd 1944.

"I have already mentioned Lord Birkonhard, who held the opinion that the invasion of Belgium in 1914 was a crime on the part of the Kaiser, to be punished by a Court.

"I should like to sum up the opinions in the following manner:

"(a) Aggressive war is a legal thing. This is the opinion of Professor McNair.

"(b) Aggressive war is an illegal thing. This is the opinion of the men quoted in my reports.

"(c) Aggressive war, either in general or in its present form of total war, is a crime. This is the opinion about it of men quoted in my report.

"You will certainly understand the distinction - an illegal thing need not be criminal although a criminal thing is always illegal. An illegal thing in international law is similar to the civil wrong or to the civil tort of our domestic law. This civil tort has no criminal consequences.

"In conclusion I should like to stress:

"(a) I admit that we are facing a difficult problem, in view of the numerous gaps in international law but the whole war is an indefinite series of difficult problems. The economists, politicians and technicians have all been forced by the war to solve difficult problems by courageous decisions. I think that the lawyers should join them. I understand that it is not easy. We are all, to some extent, prisoners of our legal education.

"(b) I remember that at the time when I was studying at the University of Vienna in 1911, one of my teachers in criminal law (I don't know if it was Lammach or Stöckl), warned us of the danger of becoming prisoners of narrow legalistic rules and conceptions. He told us 'do not admit in your practice as judges, barristers or officials that law kills justice'. I remember again and again this warning, because the old law, which did not foresee the Nazi criminality, might be an instrument of injustice towards the victims of the Nazis. This law could really kill justice if it were interpreted in a narrow sense. On the other hand, if we take the courageous decision, I can imagine the tremendous impression on public opinion at the time when this decision would be allowed to be published.

"(c) I have no personal ambition to see my suggestions accepted, but as a member of this Commission, I have an ambition to see that the Commission should appear in the eyes of public opinion as leader in matters of justice as far as Axis crimes are concerned."

Lord Wright said that he supported in principle Dr. Eder's Minority Report. He thought that the preparation for and launching of the present totalitarian war constituted a war crime and should be treated by the Commission as such.

The Majority Report correctly described it as a grave outrage against the elementary principles of international law. That is an apt description of a crime. It is indeed the most serious of war crimes. Unless international law fastens criminal responsibility on individuals for war crimes, it is not possible to postulate guilt under international law (which is what both military courts and the proposed Inter-allied Court would enforce) on the part of the actual perpetrators of the atrocities, who have executed the cruelties, the mass murders, the terrorism, the mass deportations, the acts of wanton

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and revengeful destruction and devastation which were all carried out in pursuance of the settled and declared policy of Hitler and his associates, the authors and originators of the whole nefarious scheme.

Lord Wright did not think it necessary to repeat the weighty pronouncements quoted by Dr. Eder on international law all agreeing that the launching of such a war was a crime under international law.

The contrary view is that there can be no crime under international law unless it is possible to cite a *lex lata*, that is unless you can refer to a specific section of a valid and binding code, constituting the crime and accompanied by the express sanction of a defined punishment.

Lord Wright cannot accept this narrow meaning of the nature of law. He is accustomed to finding law in the developing principles of the Common law. For instance in English Law there is no specific statutory provision making murder a crime. The same is true of piracy *juro gentium*. In international law there is no specific code, indeed there has never been any competent legislature. The *jus gentium* is to be extracted from a number of sources, which has been described by this Commission or its Committees.

The mass of expert opinion of instructed writers on international law which Dr. Eder has quoted, constitutes satisfactory evidence of a general consensus of authoritative opinion as to the principle that launching a war like the present is a crime; this corresponds to what the moral sense of humanity demands. Thus the most essential source of international law is established.

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So is another source, to be discovered in solemn international treaties, conventions and the like: in particular besides the Convention of the League of Nations and the Geneva Protocol, there is the Pact of Paris or the Briand Kellogg Pact, which is categorical on this point as Dr. Eder has shown. What dissentient voices there are, do not outweigh the general consensus of the civilized world.

The absence of lex lata would no doubt prevent a man being convicted and punished for something the culpability of which might fairly be regarded as doubtful, the criminality of Hitler and his associates in launching the present total war for which he has been preparing for years, the aggressive purpose and character of which he had proclaimed, cannot be contested. There was no need of an express code nor was there need of an express sanction, unless international law has no teeth. All that was needed was an appropriate tribunal, capable of doing justice when the facts were proved before it. Any other conclusion would shock the moral sense of mankind. It cannot be said that international law in this context only concerned itself with matters between Sovereign States.

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Mr. WUNSZ KING agreed that the question was of great importance. With all his admiration for Professor McNair's legal opinion, and for the opinion so ably expressed in Doc. C.55, he was inclined to think that Conclusion No. I in Doc. C.55, while sound in theory, was too narrow and legalistic and lagged far behind the movement of enlightened public opinion which regarded these acts as illegal, and considered that the political and military leaders responsible should be tried and punished.

Was it not, he asked, within the competence of this Commission to bring this matter to the attention of the Governments so that the question might be settled on the political level? Perhaps, in due course, another attempt would be made to codify International Law, and some ruling might then be given to the effect that acts for the preparation and launching of wars of aggression were illegal, and that their authors should be punished.

As things were, the law - as such - seemed unable to get away from its own limitations, and tended - as Dr. Eder truly said - to kill justice. True, there was the third Conclusion, but he questioned the value of a mere "formal condemnation" in the peace treaties, unless accompanied by an expressed determination to take penal sanctions against the crime of war - at any rate in the future. He was not moving any proposal, but he felt strongly that unless the authors of German and Japanese wars of aggression were duly punished, the efforts to punish the war criminals would have no deterrent effect, and that if another war were to break out these atrocities would be renewed on a vaster scale and perhaps in a more outrageous manner. In his view the war crimes - as such - were less horrible than the crime of war itself, as that is the source of all war crimes. He therefore associated himself with Dr. Eder's Minority Report which had been so ably supported by Lord Wright, in the hope and conviction that it would become a majority view or the universal opinion of mankind.

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M. ZIVKOVIC said that in order to determine whether the majority opinion in Committee III was right or wrong, one needed to examine its foundation. This was that the preparation and launching of war were, legale, not war crimes. The situation was one familiar to lawyers. Although International Law did not say precisely whether aggressive war was a crime, there were elements which pointed to the conclusion that it was a crime.

Was it necessary that International Law should contain clauses as precise as those of national laws? No. Because International Law was in its infancy, in a stage of growth. In the absence of any precise clause it was possible to agree with either opinion. There was no legal argument to prove either of them right or wrong. They were in the position of a judge who had to create a rule of law where no sufficiently precise rule existed. They must look to the future, and consider whether it was a desirable political aim to make aggressive war a crime.

Again, if they were free to declare war a crime - as he believed - a distinction must be drawn between aggressive and defensive wars; the notion "self-defence" must be introduced just as in domestic law.

In his opinion, the problem is within the scope of the United Nations Commission in that sense that the Commission should first take up a definite attitude as regards the solution, and then, in the case of the majority considering aggressive war a crime, prepare and send to the Governments a draft convention on the matter. If the opposite view prevails, the Commission should send to the Governments both the majority and the minority opinion.

His standpoint was that of Dr. Eder and the members who supported him so that he would like to see aggressive war declared a crime both by the Commission and the Governments.

Mr. COLBAN said there could be no doubt that it was contrary to International law and morality to launch a war of aggression. In considering the question of criminal responsibility, evidence was however needed concerning the criminal intentions and acts of each person

who should be prosecuted and punished. Such intention and acts are disclosed in the course of the war, and the Commission's task was to place on their lists the persons whom they considered guilty of acts against the laws and customs of war. Under the procedure already adopted by the Commission all the persons really responsible for launching the present war could be included in the Commission's lists of war criminals because of acts committed by them during the war. He, therefore, thought that there would be no practical difference between the results obtained if the Commission adhered to their present line of procedure or if they adopted the line suggested in Dr. Eder's report.

Under the present procedure it should be possible to put Hitler on the list for giving such instructions concerning the war as resulted in horrors. The question therefore was perhaps not so difficult as it might seem.

Dr. de MOOR moved that in view of the importance of the subject, the discussion should be closed at 5 p.m. and adjourned to the next meeting.

M. de BAER agreed with this proposal.

The question they were now considering was whether the launching of an aggressive war was a crime. Everyone desired that the authors of the war should be punished, but that was a different matter. The question was: how should they be punished? The possible ways were:

(a) By judicial procedure. As a judge he would prefer that method. But it pre-supposed that the offence had been previously described and that the penalty and the form of court had been provided for. It might be argued that, by custom, aggressive war could be considered as a crime, but that was not the case.

(b) By a political decision; that needed no conditions. There was the precedent of Napoleon.

Perhaps Dr. Eder saw a contradiction between his attitude two years ago and now; the explanation was that, at that time, it still could be

hoped and he had wished that the Governments should introduce into the positive laws a clause laying down that aggressive war (and subsequent occupation of an invaded country) was a crime. An aggressor could then have been punished under that clause.

It was now too late for this; moreover ideas had changed, there was now much opposition to a judicial trial of the aggressors and there seemed to be a wish to impose punishment by a political decision. This had to be taken into account, but it was desirable, when imposing punishment upon them, to remember not only that they had launched the war, but also their criminal policy of extermination. In order that minor criminals should not suffer a penalty higher than theirs it was hoped that their penalty would be death.

As regards whether the question of punishment of aggressors was within the scope of work of the Commission, he felt that it was. It would be detrimental to the reputation of the Commission if it did not examine it.

Mr. PELL said he was not a lawyer, and would therefore not discuss the legal aspect of the problem. He hoped that the views of the members - especially those of Lord Wright - would be published in extenso in the Minutes, and that - at the next meeting - members who had not yet spoken would put their views in writing and circulate them as documents of the Commission, a method which was practised in the American Congress.

The CHAIRMAN said that Dr. de Moor had moved the adjournment of the discussion till the next meeting. A draft of the speeches of members who had taken part in the debate would be sent to them for correction before being embodied in the Minutes.

He agreed with Mr. Pell as to the importance of the debate, but he observed that the subject which had been referred back to the Commission for further consideration was not whether the launching of aggressive war was a crime, but, as stated in the passages quoted from Doc. C.20 in the first para. of Doc. C.55, whether the crimes of preparing and launching aggressive war were within the scope of the Commission's work.

The discussion would be adjourned and continued at the next meeting.

*NCPA*

SECRET

M.36.

UNITED NATIONS WAR CRIMES COMMISSION

Minutes of Thirty-sixth Meeting

held on

17th October 1944

Chairman: Mr. PELL - United States of America  
accompanied by Lt. Col. COWLES

There were also present:

Mr. OLDHAM	- Australia
M. de BAER	- Belgium
Mr. WUNSZ KING	- China
Dr. ECER	- Czechoslovakia
M. GROS	- France
M. STAVROPOULOS	- Greece
Sir David MEEK	- India
accompanied by Mr. DUTT	
Dr. de MOOR	- Netherlands
Mr. BURDEKIN	- New Zealand
Mr. COLBAN	- Norway
accompanied by Mr. Edward HAMBRO	
Dr. CYPRIAN	- Poland
M. ZIVKOVIC	- Yugoslavia

MINUTES OF 34th MEETING

It was agreed that a statement submitted by Lt. Col. Cowles in regard to Lt. Col. Hodgson's remarks, as alluded to by M. de Baer in the corrected version of the latter's observations, should be added to the record of the 34th meeting;

And that as M. de Baer's statement had now been given in full, Mr. Dutt's remarks on page 5 should be inserted, to the effect that provision had been made for this matter, but the clause had been struck out on Lord Schuster's proposal.

The CHAIRMAN said that a complete revised text of the Minutes would be submitted for final approval.

MINUTES OF 35th MEETING

It was agreed to insert the words "as the record showed" after the word "representatives", in Mr. Wunsz King's remarks on page 1.

/ REPORT

REPORT OF CHAIRMAN OF COMMITTEE I

M. de BAER informed the Commission that Committee I had now reviewed all the cases which had been placed on its lists up to date.

Mr. COLBAN asked whether the Commission proposed to decide on the individual cases or - as appeared to him more practical - to adopt Committee I's recommendations as a whole.

The CHAIRMAN thought the Commission would probably prefer the latter course.

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REPORT OF COMMITTEE III ON WHETHER THE PREPARATION  
AND LAUNCHING OF THE PRESENT WAR CAN BE CONSIDERED  
AS A "WAR CRIME" (Doc. C.55, C.56 & C.56(a))  
(continued)

M. ZIVKOVIC said:

"I shall not so much try to find an answer to the problem which is being discussed at the present meeting of this Commission, as I shall try to locate the problem to which an answer has to be found.

"I feel that a very important aspect of the problem should be borne in mind. Namely, in order to know whether the opinion of the majority in Committee III, according to which an aggressive war is lege lata not a war crime, is right or wrong, we should first of all find the basis on which this opinion has been founded. What is this basis? It is that de lege lata we miss a legal provision qualifying expressly the preparation and launching of war as a crime. Thus, within the scope of international law, we are faced with a position which is very familiar to all lawyers. We are faced with the position that international law does not say with a sufficient degree of precision whether war is a crime or not. What we can find are more, I would say many more, elements that lead to the conclusion that it is a crime, as Dr. Eder has impressed on us in his minority report. But, let us admit that this, however, is not yet an answer to the problem. What then can be the answer?

"I shall try to reply by another question. To apply international law, as a lex lata, do we need provisions similar in precision as in national law? The answer is "No", because international law is still only in its infancy, becoming degree by degree what we want it to become, as was the case yesterday and as it will be tomorrow.

"In this respect, I shall try to demonstrate that, in the absence of precise provisions, there are no legal obstacles whatsoever to the adoption of either conclusion. I desire to insist on this point. There is, legally speaking, exactly nothing which prevents us from adopting either opinion, for the very simple reason that we are in the position of the judge who has to create a legal regula, the law being either silent or not sufficiently precise enough on the matter.

"That is the position; and from this point of view no legal argumentation could possibly prove, in the last resort, that either opinion is lege lata right or wrong.

"Let us come back to this remarkable phenomenon that we have in the absence of positive legal provision. What then is taking place? It occurs that consciously or unconsciously, the lawyer, let us say the judge, is trying to find an answer in the lex lata. He is even very often sincerely convinced that the lex lata contains the answer he is seeking to give, and that all he has to do is to discover the meaning of the law he wants to apply. He is thus treading on the very delicate and sandy ground of legal interpretation. In many cases, he will easily succeed in finding the appropriate answer, but in many other cases, the gap in the law will be so great, so complete, that he will be obliged to construct an entire theory in order to found his answer on the positive law. And here we reach what is remarkable in the phenomenon. By doing so, the lawyer will, in fact, create a new provision which does not actually exist in the positive law, but which he will be able, by means of very ingenious juridical constructions, to present as directly deriving from the legal text, i.e. as being directly the application of the lex lata, which he is supposed to have merely interpreted.

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"It is most important that we be fully conscious that this is the position we are facing in trying to find an answer to the question as to whether the preparation and launching of an aggressive war is a crime or not.

"Now, since this is what really occurs in legal interpretation, generally speaking, this means that, if there is nothing in the present international law that qualifies war as a crime, and that provides for determined punishment and legal proceedings in the matter, there is also nothing in the international lex lata that precludes war being interpreted as a crime entailing punishment when prepared and launched with aggressive intention. On the contrary, it gives definite and very serious grounds for interpretation in favour of such a conclusion. This has been particularly well illustrated by Dr. Eder in his analysis of the Briand-Kellogg Pact and the Geneva Protocol, to mention only two examples.

"However, I know that the main objection to the views I have expressed will be that in criminal matters there can be no interpretation per analogiam, and further, no legal possibility of interpreting provisions that have not already been expressly worded in the law, according to the traditional principle : nullum crimen, nulla poena sine lege.

"Well, this seems to be a serious objection; but I think I can prove that, in fact, it is not so. Why? If, in view of the principle nullum crimen, nulla poena sine lege, there can be no analogy between civil and penal law as regards the rules of legal interpretation, neither can there be an analogy between national and international law. We should realise clearly, in the first place, that there is no proper international law as there is a national law; and secondly, that there is, in a much lesser degree, an international criminal law. International law as a whole, as I have already said, is still in its infancy; and as regards international criminal law, it has not yet been born. That is a position we should not forget even for a second, because it leads us to the fundamental conclusion that to think on the lines of national law, and more especially on the lines of national criminal law, in questions that relate to international law, and more especially to international criminal law, is neither an unavoidable necessity nor even a correct process of legal thinking. That is why the evocation of the lex lata, in the opinion expressed in the majority report of Committee III, as a legal basis for the view which the majority has expressed, does not represent a real legal justification for this view. That is, also, why the absence of a provision defining war as a crime and providing for determined punishment and rules of procedure does not represent a real objection to the opposite view expressed in the minority report of Dr. Eder either. We are simply within the scope of an entirely new legal system which, although it has some similarity to, is not truly analogous with national law, and which, therefore, has to be treated, if not with entirely different methods, then at least with methods of its own.

"That is fundamental, and that is a truth which derives from the real processes that generations have faced in the creation and application of international law and, what is more, a process which we in this Commission have already extensively applied.

"I want to remind you of the Draft Convention for the Establishment of an United Nations Joint Court. Article 1 of the Draft Convention defines both war criminals and war crimes, and lays down the principle of the establishment of the appropriate court. Article 20 provides for the punishment that shall be imposed upon the criminals. Other Articles contain details in connection with the establishment and rules of procedure of the court. What is important is that all this has been done without regard to the fundamental principle of national penal law that there can be no crime and no punishment without the existence of a law which precedes the commission of the acts that

are to be punished. But this is not all. The law itself that has to be applied, whether explicit, or I should immediately call it a rule, justifies a variety of principles of national criminal law has been stated. According to Article 18 of the Draft Convention, the law to be applied not only need not exist in the text of the law, I mean in the written law, but its provisions, its "regulas" derive from such judicially vague spheres as the "laws of humanity and the dictates of the public conscience". And this is the lex lata of the war crimes, i.e. in criminal matters, in penal law. Can any similarity be found between this international criminal law in being and the national criminal law? And does not this lex lata not only make possible, but compel the judges to "interpret" their lex lata as I have previously described, by in reality creating and introducing new provisions. I think that there can be no better demonstration of the views I have expressed above.

"Thus, the opinion I expressed that we are at liberty to adopt either legal opinion as regarding war as a crime, without respect to the methods applied in national law, appears to be entirely justified when confronted with the true methods of dealing with the law, in general, and with international law, in particular.

"Well, to come to a final conclusion, this means that, as has always been the case at the stage when legal provisions are being created or interpreted for a certain purpose, we have to go back to the political aims we have in view for the future. In other words, as to whether we really do want, or do not want, to make war a crime.

"It is only from this aspect that the problem unfolds itself, and it does so in a great many sub-problems which I do not intend to discuss. I shall only point out one of them. We shall have for instance, certainly to make a distinction between the aggressive and the defensive, or preventive war, a question in the minds of international conferences of the past. So have, in other words, therefore, to introduce the law of self-defence, similar to that which has been introduced in national criminal law. This is obviously an important question, since we all know that by declaring war a crime, we would not have at the same time prevented it from occurring. So as regards the acts to be undertaken in order to prevent or repress war as a crime, a clear distinction should be made and in this respect we shall have to consider one of the most conspicuous issues in criminal law: The issue of the intentional element in the criminal act.

"I, personally, am inclined to agree with the views expressed by Dr. Eder, Lord Wright and the Chinese Ambassador. That is why I hope that the Commission will carefully study this tremendously important problem and will forward its legal advice to the Governments which will have to decide upon the matter. I should, in any case, suggest that if two or more different views are expressed, the Commission should also communicate the opinion of the minority."

Mr. BURROUGHS A. H.

"Unlike most of my colleagues who have spoken on this subject, I am not a lawyer - and I am an expert on the national Law. Perhaps, however, it is well that I should say a few words on the question as it appears to a lawyer, and chiefly as I am sure that the great majority of the people in our respective countries look to us to deal with these problems rather than to the specialists from a purely legalistic point of view. I should like to say as I have said before that dealing with war as a crime is not a matter of cold logic or of brutality, but with the human element, with the element of humanity, with the element of violence and the element of policy. It is really dealing with a view to the maintenance of peace and order, and as well as in

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In degree, one can without exaggeration claim that the record of war crimes committed by the Germans and equally by their Eastern counterparts the Japanese, constitute something unique in the blood-stained annals of history. Surely, therefore, it is not logical or reasonable to assume that it is necessary to pay too much regard to precedent, or to reject any proposal on the ground that there is no precedent for it. The old proverb says "Desperate ills need desperate remedies", and it seems to me that the unprecedented evils inevitably arising from the essentially criminal policy adopted from the outset by the enemy Governments, call for the creation of new precedents in dealing with and punishing the authors of those policies.

"Our Chairman has reminded us that the question we are asked to decide at present is merely whether the crimes committed for the purpose of preparing or launching the war are within the scope of the Commission's work. It seems to me that the deliberate planning - not merely of an aggressive war but for the conducting of that war in accordance with a settled policy of utter ruthlessness and the ignoring of the most elementary principles of humanity - constitutes a war crime of the first magnitude - much more serious and reprehensible than any single war crime (however brutal) committed by an individual combatant engaged in the carrying out of such a policy. If this be admitted, I think the question before us is unmistakably answered; for if the preparing and launching of the war - this war - not some merely theoretical aggressive war, is a war crime, then surely it falls within the scope of the work of the War Crimes Commission?"

"While I have no definite instructions from my Government on this particular point, I think the following cabled report of a statement recently made in the House of Representatives by the Prime Minister of New Zealand, sufficiently indicates my Government's views on the general attitude which should be adopted towards the master war criminals :

'The question of the punishment of war criminals was raised in the New Zealand Parliament by a member who asked for the Government's attitude in view of the abolition of the death penalty in New Zealand. Mr. Peter Fraser, Prime Minister, said the Government would do everything possible to see that they were properly and adequately punished. They were infinitely worse than the ordinary murderer. With people responsible for such a holocaust, directly responsible for the deaths of millions and the untold suffering for millions of others, he did not know if a Court of Justice should be established for them at all; the quicker they got rid of them in the most expeditious way the better'.

"Even if it stood alone, Mr. Chairman, the statement I have just read would, I think, justify me in assuming that my Government would not merely regard as a masterpiece of under-statement the suggestion in the majority report that the acts and outrages perpetrated by the responsible leaders of the Axis Powers in preparing and launching this war, are of such gravity that they should be made the subject of a formal condemnation in the peace treaties, but that they would wish me to whole-heartedly support the views so ably put forward by Dr. Eder in the reports he has circulated and in his powerful and most convincing speech at our last meeting. By all means let there be a formal condemnation recorded in the peace treaties, but I think there can be no doubt that the peoples of the United Nations look to this Commission to adopt a very much more vigorous policy than the recording of a formal condemnation, and failure to recommend much more energetic and decisive steps for dealing with those responsible for the preparation of the war, would be regarded by the mass of the peoples of the United Nations as justification for the strong criticisms launched recently in various quarters in respect of the work of our Commission.

Dr. CYPRIAN said :

"The statement of Committee III (Doc. C.55), that

"The crimes committed for the purpose of preparing or launching the war, irrespective of the territory where these crimes have been committed are considered as war crimes cannot be discussed as a whole, but must be split into three separate items, as the conclusions concerning each of them will be different.

"These questions are the following:

- 1) Whether it is within the scope of the Commission to comment upon the real meaning of the "war crime" in abstracto,
- 2) Whether the preparing of the war is a war crime,
- 3) Whether the launching of the war is a war crime.

"Ad 1) It seems to me that although we must be careful not to become a quasi-academic body discussing the purely theoretical questions of international law, there are some principles of law to be applied in our practical work of preparing lists of war-criminals together with the necessary evidence, and working out the organisation and procedure of courts to try them.

"It happens so that the question, who is a war criminal can be settled only after answering the preliminary question whether certain action is or is not a war crime. We cannot avoid then going into that matter, and as long as we limit our discussion to the extent necessary to decide in concrete cases, we remain within the scope for which this Commission was established.

"Therefore, we must decide whether we shall consider certain acts committed before the outbreak of the war as war crimes or not; but we ought to restrict that question to the concrete cases, without endeavouring to set up any general definition.

"Ad 2) The question whether preparing the war is or is not a war crime was touched by Committee III in Doc. C.55, the answer being limited to the special case of issuing orders which in case of war would result in the breach of laws and customs of war.

"These orders can be considered as a sort of preparatory action or incitement to crime and I think we have to discuss the question whether they might be considered as war crimes.

"But there is some danger that when once the rule that war crimes begin with the outbreak of the war itself is broken we may be led on too far, where there are no clear limits at which to stop.

"In total war the definition of "preparing the war" is very large, as everything in the country can be organized with the purpose of being used for the total war.

"The modern war of aggression is based largely upon the development of industry, the amassing of necessary stocks of food and fuel, the adjusting of communications to the needs of war, even upon the education of the youth with the purpose of making them tough and war-minded.

"All these activities are subordinated to our only purpose: the war of aggression; and the responsibility for all that is no longer limited to the General Staff and Government,

"Scientists and professors working with the aim of preparing the war are responsible for it in the same degree as industrialists building huge factories capable of producing aeroplanes and tanks. Even the financiers providing the capital necessary for developing heavy industry could, in some cases, be considered as responsible for preparing the war,

"The above considerations seem to me to be sufficient reason for discussing whether it would be advisable to limit the activities of the Commission to the crimes committed since the moment of the outbreak of war, or to extend the work of the Commission any further,

"Ad 3) Even if I am not sure whether the preparation of the war is a war crime, I fully agree with the minority report of Dr. Eder (Doc. C.56 and C.56(a)), so far as he considers the launching of an aggressive war as a war crime.

"Nobody can deny that the sudden unprovoked attack launched by Hitler against Poland or Norway cannot be called a righteous war in the meaning of "an institution of international law",

"I do not want to go into that theoretical matter; Dr. Eder was quite right in basing his views on the Briand-Kellog Pact. The interpretation of that Pact, given by Briand himself as well as by Stimson, can be considered as sufficient, especially if backed by all the authors cited by Dr. Eder.

"Germany signed that Pact and broke it by launching aggressive war without being provoked by even the slightest act endangering the security of that country,

"Having regard to all these considerations, I do not see any difficulty, either legal or practical, in accepting the thesis that anybody who took part in the decision of launching the war of aggression committed a war crime.

"This thesis does not lead us to too far reaching consequences in practice, since those responsible will be only some of the "arch-criminals" who were in a position to decide whether the war should be launched or not.

"In the same time this thesis will fulfil the postulates of justice, as it aims at punishing those criminals, who are the principal authors of the war and all the crimes committed afterwards as a consequence of launching it.

"Therefore, I would like to draw the following conclusions :

- 1) It is within the scope of the Commission to discuss the question, whether preparing and launching the war is or is not a war crime,
- 2) Whether the preparation of the war can or cannot be regarded as a war crime remains to be considered.
- 3) Launching a war of aggression is a war crime."

M. de BAER observed that, if the Commission decided that aggressive war was a war crime, offenders must be tried by judicial process, which would take some months; whereas, if it was held to be a political act, punishment could be imposed with far less delay.

Sir David MEEK observed that this question was of very great importance. Some members would, he believed, need time to consult their Governments, and he therefore proposed an adjournment of the debate for three or four weeks.

Mr. OLDHAM shared the opinion of Sir David Meek, more especially in the case of Governments situated at a great distance from the seat of the Commission.

M. STAVROPOULOS also supported Sir David Meek's proposal. His own Government had just returned to Athens, and was at the moment occupied with matters of greater urgency than the decision of this question.

Dr. de MOOR said:

"As the only member present responsible for Report III/9 (and Doc. C.55) I am glad of this opportunity of answering some of the chief objections which have been raised against the point of view expressed in these reports. There is the more reason for this, because Professor McNair is not here to take up the challenge himself.

"I will begin by saying that I am much pleased that our report has given an opportunity to Dr. Eder to make his important Minority Report, and the opportunity for us to hear the so interesting speeches of himself, Lord Wright, Ambassador King, Ambassador Colban and M. Zivkovic.

"Before discussing the main points, in order to avoid all misunderstanding, I wish to emphasize and make quite clear what really are the points in debate. For I fear that, at present, Dr. Eder and the Reporters are a little at cross purposes.

"In the first place, we all agree without exception that the acts of those who were responsible for launching and waging this war are amongst the most horrible on record. As a Dutchman I have every reason to feel strongly on this particular subject, in view of the terrible happenings in our country. Surely the Germans have sufficiently shown this intention of wanting to destroy the whole territory of our country, apart from their massacres and mass-murders.

"Secondly, we all without exception wish to see these acts punished with the utmost severity.

"Thirdly, I think that we all agree that the persons who are responsible for the launching and waging of this war will in any case be punished, because every one of them is guilty of one of those acts which we unanimously understand to be war crimes. I think that Dr. Eéer could not easily name a single person who is responsible for the primary act of launching and waging this war who is not at the same time responsible for one of the recognised war crimes, for which the penalty is death.

"Fourthly, we have to keep in mind that the question which occupies our attention now is:

"a) whether the launching and waging of total and aggressive war 'in se' is a crime in the criminological sense, namely a punishable crime; or,

"b) whether such a war is only in so far a crime as it is an accumulation of war crimes.

"For instance, if we take the theoretical case of some man who is indicted first for a number of war crimes, and the last count alleges the launching and waging of a total and aggressive war, would it be possible for a judge, after having found the accused guilty of the first war crimes or having acquitted him thereof, to sentence him to death on the last count?

"Dr. Eéer answers the question sub a) in the affirmative and says:

1) total war 'in se' is a crime, even if aggressive war is not a crime;

11) aggressive war 'in se' is also a crime.

"I venture to answer the questions as follows:

1) total war is not in itself a crime, but only as an accumulation of recognised war crimes;

11) aggressive war is terrible and illegal, but unhappily has not until now been recognised as a punishable crime in international law.

"It ought to be declared a crime; and in my opinion it is the duty of the United Nations War Crimes Commission emphatically to draw the attention of the United Nations Governments to this gap.

"An instrument which, by international convention, declares aggressive war a crime and stipulates its punishment, (and up to the present such an instrument is not in being), would be of much greater importance for humanity than a platonic declaration by our Commission, that in its opinion aggressive war is already a crime.

"Let us consider both points more closely.

"Dr. Eéer says 'total war is a crime' because its authors do not accept the rules of international law and warfare; and because it has, as its avowed purpose, the subjugation and extermination of whole nations and races and as such it practises mass-enslavement and mass-murders.

...that the latter are crimes.

When we think of the various wars according to present  
conceptions, we are inclined to say 'in so', or whether the non-  
...the crime of war is the crime. I think  
...in fact, more or less  
...History gives  
...in which the  
...after having been paraded in a  
...were not much  
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...against aggressive war  
...to be made.

The wars of the 17th century in the Netherlands,  
...and to the Hussite war in Bohemia,  
...to so many colonial wars.

Only during the 18th century (a period of particular  
...It was during  
...addressed the following  
...argument: 'Messieurs les  
...'

During the end of the 19th and the beginning of the 20th  
...for banning war and  
...in the Hague and the Geneva  
...only

...it us only a mitigation  
...condemnation and abolition  
...is only a crime in a  
...it is an accumulation of war  
...crimes.

Art. 1. The High Contracting Parties...

The question whether the prohibition and banning of the  
...resolves itself  
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...of the Pact

The High Contracting Parties solemnly  
...their respective peoples, that  
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...it as an instrument  
...with one another.  
...Parties agree that  
...all disputes or conflicts,  
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...of the Kellogg-Briand  
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...responsibility

It goes without saying that the latter are crimes.

"The point is, however, whether according to present international law war is a crime 'in so', or whether the non-observance of the rules of warfare is the crime. I think the latter is the case. Wars, in fact, were or less always been waged in the name of total war. History gives us plenty of examples, such as the Trojan war, in which the vanquished were made slaves after having been paraded in a victory march. The wars of the Middle Ages were not much better, and certainly not the religious wars, which brought Grotius to make his first accusations against aggressive war in his 'De Jure Belli ac Pacis'.

"The same applies to the 30 years' war in the Netherlands, when whole towns were razed, and to the Hussite war in Bohemia, and, last but not least, to so many colonial wars.

"Only during the 18th century (a period of particular chivalry) was there a small improvement. It was during this period that a French Commander addressed the following historical words to his English opponents: 'Messieurs les Anglais, tirez les premiers'.

"Only the end of the 19th and the beginning of the 20th century brought us real regulations for humanising war and preventing massacres - culminating in the Hague and the Geneva Conventions.

"International law has hitherto brought us only a mitigation and a limitation of total war, not a condemnation and abolition of war in general. And total war is only a crime in a criminological sense in as far as it is an accumulation of war crimes."

It. Col. GUTHRIE, 14:

"The question whether the preparation and launching of the present war can be considered as a 'war crime' resolves itself into a question of the legal implications of the Kellogg-Briand Pact signed 27 August 1928. Articles 1 and 2 of the Pact provide as follows:

"Article 1. The High Contracting Parties solemnly declare, in the name of their respective peoples, that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

"Article 2. The High Contracting Parties agree that the settlement of all disputes or conflicts, of whatever nature or whatever origin they may be, which may arise between them, shall henceforth be sought only by peaceful means."

"Whether or not a violation of the pact and law making the preparation and launching of the present war a crime, can be considered as such, the legal implications of the Kellogg-Briand Pact must be determined by the interpretation of the terms of the Pact. In order to do so, inquiry must first be made as to the responsibility

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whether according to present time 'in se', or whether the non-fare is the crime. I think has, in fact, more or less of total war. History gives us the Roman wars, in which the after having been paraded in a the Middle Ages were not much religious wars, which brought accusations against aggressive war is'.

the Spanish war in the Netherlands, and to the Hussite war in Bohemia, so many colonial wars.

century (a period of particular improvement. It was during Alexander addressed the following English opponent: 'Messieurs les

th and the beginning of the 20th relations for humanising war and dating in the Hague and the Geneva

hitherto brought us only a mitigation war, not a condemnation and abolition tal war is only a crime in a far as it is an accumulation of war

the preparation and launching of the red as a 'war crime' resolves itself al implications of the Kellogg-Briand . Articles 1 and 2 of the Pact

High Contracting Parties solemnly of their respective peoples, that to war for the solution of inter- s, and renounce it as an instrument a their relations with one another. High Contracting Parties agree that lution of all disputes or conflicts, r whatever origin they may be, which all never be sought except by pacific

le of international law making the of a war a 'war crime', came into into force of the Kellogg-Briand interpretation of the terms of the h interpretation, state responsibility

for the breach of the treaty and individual criminal responsibility must be carefully distinguished. In any interpretation of a treaty the fundamental proposition must distinctly be borne in mind that the consent of States cannot be presumed. This proposition was clearly set forth by the Permanent Court of International Justice in the case of France v. Turkey (the Lotus case) and is the most fundamental principle of international law. The question of interpretation of the Pact, therefore, resolves itself into whether or not, within the terms of the Pact, it can be presumed that the States parties thereto consented to the proposition that thereafter the preparation and launching of a war would be considered as a war crime. Under Article 1 the High Contracting Parties declared that they condemned recourse to war for the solution of international controversies, and that they renounced it as an instrument of national policy in their ~~relations~~ <sup>relations</sup> with one another. There is no statement here having reference to individual criminal responsibility of persons responsible for a breach of this Article. No such intent can properly be presumed. The same is true of Article 2. In Article 2 the parties simply agreed to settle all international disputes by pacific means. It shows an intent that, if it is violated, <sup>only</sup> ~~any~~ State responsibility would ensue. But there is no evidence of an intent to create individual criminal responsibility.

"There is no question that a State which, in going to war, violates the Kellogg-Briand Pact is internationally responsible; but there is no engagement of the Parties to the Kellogg-Briand Pact that criminal responsibility shall attach to those individuals who are responsible for the preparation and launching of a war. Accordingly, the preparation and launching of the present war cannot, under existing law, be considered a 'war crime'."

Mr. ZIVKOVIC said he was fully aware of all the political implications connected with the possible conclusion that aggressive war is a crime, and never intended to prejudice the issue, although he expressed his personal opinion. He was only interested in making clear that it was not international law that made it impossible to treat aggressive war as a crime. From the purely legal point of view, the Briand-Kellogg Pact gave as much grounds for considering aggressive war as a crime, as the Hague Regulations gave grounds for considering the violation of their provisions as war crimes, even before a proper law (here a convention) was enacted concerning the matter. The Hague Regulations did not define the prohibited acts as crimes, neither did they provide for determined penal sanctions; and yet this was not an obstacle to considering

and dealing with those violations, as crimes entailing punishment. This, at the same time, meant a definite departure from the traditional principle that there could be no crime and no punishment without a law (here a convention) that not only expressly provided for the crimes and punishments but at the same time preceded the commission of these crimes.

Since this very legal attitude made possible the present policy affecting war crimes, an opposite legal attitude could not be admitted as regards aggressive war as an illegal act. The step to be made from the agreed point that aggressive war was a violation of a treaty to the disputable point that it could be a crime would be exactly the same as the step that had already been made in declaring violations of the Hague Regulations crimes that entail determined punishments.

That is why he thought that Committee III should not have referred to the international lex lata, this being in contradiction to what has been done in respect of war crimes. The whole problem therefore, should be considered and answered from a different aspect, i.e. from the political aspect, and then legal arguments would come by themselves.

M. GROS said:

"I was not at the last meeting, but have carefully studied the views expressed. I wish to support what Colonel Cowles has said, for it is a perfectly correct statement of International Law as it exists in 1944. Let us be clear as to the points in debate.

"First, it is asked whether the preparation of aggressive war is a violation of International Law. We should reply in the affirmative.

"Secondly, it is asked whether such an act constitutes a war crime. Opinions differ. I must answer in the negative.

"There are two different chapters in International Law:  
1. the launching of the war;  
2. the conduct of the war.

"Referring to 1, the violation of the Pact of Paris is undoubtedly a violation of International Law, but those responsible for it are not automatically war criminals.

"Referring to 2, the violation of the rules of warfare is war crime.

"We must, therefore, distinguish between two questions: (1) The preparation and launching of a war; and (2) The directing of a war.

"As regards the former, I think we might modify the wording of the Committee's draft so as to strengthen it, and to show that even in the present state of positive law, we regard the preparation of aggressive war as a crime, though it is not a war crime.

"There is no one who wishes that the arch-criminals should escape punishment. The only question is how they are to be punished.

"A war crime is a violation of the laws of war, and such acts will be punished by a 'Treaty' Court, or by military courts, or, again, by a political decision, according to the suggestions the War Crimes Commission has already made.

"The only question is, therefore, as regards those German officials who are not on one of our lists as war criminals, whether it is desirable to place them on a list for the violation of international law, in general, which they committed in preparing and launching an aggressive war.

"Finally, Mr. Burdekin has urged us to be 'realistic'. If so, we should support Sir David Meek's proposal to consult our Governments, for though we may discuss these matters, it is the Governments who will have the final say. And also, I would advise my colleagues to read a recent book, the 'Trial of Mussolini' in regard to the question of aggression, also some of the debates in the League of Nations between 1924 and 1934 as the definition of 'aggression'; for one needs a definition for anything that is a 'crime'.

"In conclusion, I agree with Colonel Cowles who has emphasised the need of punishing the preparation and launching of a war, though not on the same grounds as those on which war crimes are punished."

Colonel COWLES said that M. Gros had touched on a point not hitherto discussed: To avoid debate as to time let us say that, as of 1914, war was not illegal. Even so, theretofore there were illegal wars: for instance, most civil wars were illegal under the constitutions of the countries. Nevertheless, when civil wars were prosecuted on a large scale and the parties were recognised as belligerents, the relations between them have usually been governed by the "laws of war". The notion that, because a war is illegal, therefore every act committed in the war is illegal is a non sequitur. The "laws and customs" of war were evolved quite independently of the question whether a war itself was legal.

Mr. COLBAN, referring to the proposal that the debate be adjourned to allow members to consult their Governments, said that it would be necessary to send the full Minutes to the Governments, and the latter might be perplexed by the arguments and feel that the Commission ought to decide the question themselves and make recommendations to the Governments. It would be better if a compact majority in favour of one view or the other could be established in the Commission.

Sir David MEEK said he was not intending simply to "pass the buck" to his Government, but to give the latter a line and ask their consent to it.

Mr. OLDHAM expressed the same view. The Governments would receive a full report and the opinions of their respective representatives, and would be able to make up their minds on that basis.

Mr. WUNSZ KING said he had nothing to add to what he had said at the last meeting. The general consensus of opinion, as he gathered from the speeches made, was that the acts of preparing for and launching of a war of aggression are crimes, but the Commission differed as to the method of punishing the responsible leaders, i.e., whether they should be punished on a judicial or political basis. He wondered why it was so difficult to declare that such acts are punishable crimes, seeing that there had been no difficulty for the Commission to create a precedent in the form of a convention for the trial and punishment of war criminals. The problem should be approached from the realistic and not legalistic angle. However, as he said he would like to have this question settled on a political level, he could agree to Sir David Meek's proposal of referring back to the Governments for consultation and definite instructions, and postponing discussion for the time being.

M. STAVROPOULOS said:

"There is no doubt that aggressive war is considered by public conscience as a crime. However, considering that public conscience by itself is not accepted as one of the sources of International Law, the problem for us is whether the crime of war is a crime de lege lata. Some progress towards that end has been made and many opinions have been expressed to the effect that the end was achieved. Nevertheless in my opinion, though aggressive war is undoubtedly an illegal act, a violation of International Law punishable by political means, the fact remains that there is no lex lata proclaiming it to be a crime, judicially punishable. It is to be regretted that international public conscience failed to compel the Governments to go so far as to proclaim it such a crime.

"Therefore, since there is no such lex lata it seems difficult to reconcile the judicial punishment of aggressive war with the well-established and fundamental principle 'nullum crimen nulla poena sine lege'. May I recall that the principle of no crime without law does not derive from the Roman Law. On the contrary, it is one of the more progressive and humanitarian gains of modern times. In fact the theory was evolved as it is known to you by philosophers of the 18th century who saw the necessity of putting an end to the administration of criminal justice. They contended that the judge ought to have no right to impose a punishment which was not determined previously by law. The doctrine was incorporated in the proclamation of the rights of man, and subsequently was adopted by most countries. It may be interesting to mention at this point that the principle was also accepted by Germany until the Nazis came to power, when by a decree of 1935 it was repudiated for reasons of Nazi convenience.

"In view of the preceeding considerations it appears to me that any infringement of the principle will not be to the advantage of the punishment of war crimes. On the other hand no one needs to feel anxious about the practical results as it is obvious that the guilty will face justice for having personally instigated, ordered and directed the monstrous crimes of this war.

"In conclusion I find myself substantially in agreement with the report of Committee III. At the same time, however, I should like to see it drawn up in more forcible terms."

Dr. de MOOR suggested that, if the question was referred back to the Governments, it should be made clear to them that all the members desired that those who had prepared this war should be punished.

In regard to whether aggressive war in itself is a punishable crime, Dr. de Moor said:



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Mr. PELL observed that it would be difficult for him  
as Chairman to draw up such a letter to the Governments which  
would have to represent a compromise between the extreme points  
of view on either side.

Sir David MEEK and Mr. COLBAN considered that any accompanying  
letters should be drawn up by the individual members.

Dr. ECER said:

"As regards consultation with the Governments, I do not  
see that this procedure would be a useful one. Some  
Governments would probably answer 'We are expecting your  
opinion. Why have we set up the United Nations War Crimes  
Commission? This Commission should be our legal adviser in  
matters of war crimes'. Secondly, I would remind you that  
in regard to crimes committed because of race, nationality,  
religious or political belief, we took this course of con-  
sultation and we sent a letter to Mr. Eden on May 30th 1944.  
Up to date we have had no reply from him and the whole question  
is in suspense. However, I will accommodate myself to the  
desire of the majority in this respect and agree to the  
consultation in a reasonably short time

"As to the competence of the Commission, I think that the  
problem is within the scope of the Commission. We cannot  
maintain a narrow interpretation of our terms of reference.  
The Moscow Declaration promised the punishment of crimes  
committed in Italy and Denmark. Committed I agreed to deal  
with both categories of crimes, although they are obviously  
not 'violations of law and customs of war'.

"As to the practical importance of the question, I disagree  
with Dr. de Moor that my suggestions are only of theoretical  
value. If we accept the opinion that the invasion of our  
countries was not illegal, or not a crime, then we must take  
the consequences. A series of acts committed by the  
invader are covered by international law, if the initial act,  
i.e. the aggression, is a legal one. But it is not a legal  
act. Sheldon Glueck, Professor of criminal law and  
criminology at the Harvard Law School, is right when he  
remarks in his paper 'Law to be applied in Trial of War  
Offenders', presented in December 1943 to the London Inter-  
national Assembly: 'One school of thought holds that by  
violating the Kellogg Pact, which outlaws war as an instrument  
of national policy, the warfare of the Axis powers is  
entirely illegal. Hence, every act of their military -  
whether within or without the laws and customs of war - is  
altogether without legal justification or excuse'.

"Lex lata:- Such a lex lata as H. de Baer has in mind,  
i.e. provision of a continental penal code describing the  
actus reus establishing the necessary kind of mens rea and  
providing penalty, does not exist in international law.  
For instance, Article 46 of the Hague Regulations says simply,  
'family honour and rights, individual life and private  
property, as well as religious conviction and worship must  
be respected; nothing more. Is it lex lata in the sense

of a Continental Criminal Code? Obviously not. Or Article 47 of the same Regulations, 'pillage is expressly forbidden', nothing more. Is it lex lata in the above-mentioned sense? Obviously not, and yet it is sufficient to punish the war criminals with the help of national criminal law, of course. If Article 47 of the Hague Regulations simply forbidding pillage is sufficient legal basis for punishment, the Briand-Kellogg Pact forbidding the aggressive war which is nothing but a series of crimes, must be sufficient legal basis for punishment of the authors of the aggressive war. But, as I stressed, we have another legal basis. The present total war is the collective name for an indefinite series of acts which are plainly crimes according to the criminal law of the invaded countries. As the Moscow Declaration laid down as the basis for the punishment of the Nazi criminals the law of the liberated countries, it is obvious that this legal basis should be used for our purpose. Thus, we will have a combined legal basis: the criminal law of the invaded countries and international law (Briand-Kellogg Pact, various pacts of non-aggression and general principles of international law). I admit that this basis is not as perfect as, for instance, an international criminal code would be, but this combined legal basis, even if we regard it as an emergency basis, is sufficient for the punishment of the political and military leaders of the Axis states who prepared and launched this war. We must keep in mind that we are facing a very concrete aggressive war, i.e. Hitler's and his allies' total war. We all agree that the authors of this war must be punished. In connection with this point, I should like to say that the Russian experts on international and criminal law strongly support the opinion that the preparation and launching of this war are crimes for which the authors must bear penal responsibility.

"Common consent:- International law does not need law giving authority. The most important source of international law is custom. The basis of a customary law is the common consent, i.e. consent of the majority of the family of nations. Such rules recognised as legal rules by the majority of nations are rules of general international law, but in addition there are some rules of international law recognised as legal rules by practically all members of the family of nations. Such rules constitute the universal international law.

"Oppenheim indicates as an example of such universal rule, the rule established in the Briand-Kellogg Pact, which forbids aggressive war. Violation of this rule is obviously, in my opinion, a crime.

"It seems to me that the supporters of Committee III's report on the one side, and the supporters of my Minority Report on the other side, are like two fencers who are fighting each other, but each of them being on a different floor. The one is fighting on the first floor and the other on the second floor. I suggested that we should regard the preparation and launching of the present war as a crime but not as a 'war crime' in strictu sensu, i.e. violation of laws and customs of war'. My opponents are fighting against something I never suggested, and so we are fighting on different floors. But the common ground could be found: all members agree that the preparation and launching of the present total war should be punished. This opinion implies the criminal character of the preparation and launching of the present total war. I think that this is our common ground.

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"The great precedent: The representative of New Zealand was right in saying that the United Nations must create precedent if necessary. If the present war should not be an occasion for us to create, if necessary, the great historical precedent, what other occasion would make it necessary? I think that we must create this great precedent now, and not wait for the next war which, I hope, will not come. Preparation and launching of the present war must be punished as a crime against peace. This punishment would not only be an act of moral retribution but as well, a serious warning for the future. If there are gaps in law, it is our duty to fill them. I agree with Lord Wright: 'any other conclusion would shock the moral sense of mankind'."

M. de BAER suggested that in referring the question back to the Governments it should be made clear to the latter that the Commission was unanimous in desiring that the arch-criminals should be punished, whatever method was adopted for doing so; and further, that the leaders should not be punished with less severity than the subordinates.

After a discussion on the time to be allowed for reference to the Governments, Mr. PEIL asked if the Commission were agreed to adjourn the debate for six weeks from that day, after which it would be resumed and a vote taken.

This was agreed to without opposition

*Corrected by B. H. W. S.  
Oct 31/44*

SECRET

M.37

UNITED NATIONS WAR CRIMES COMMISSION

Minutes of thirty-seventh Meeting

held on

October 31st, 1944

Chairman: Sir Cecil HURST - United Kingdom  
accompanied by Lord SCHUSTER

There were also present

Mr. PELL	- United States of America
accompanied by	Lt.-Col. COWLES
Lord WRIGHT	- Australia
accompanied by	Mr. OLDHAM
M. de BAER	- Belgium
Mr. WUNSZ KING	- China
Dr. ECER	- Czechoslovakia
M. GROS	- France
M. STAVROPOULOS	- Greece
Mr. DUTT	- India
Dr. de MOOR	- Netherlands
Mr. BURDEKIN	- New Zealand
Mr. COLBAN	- Norway
accompanied by	Mr. Edward HAMBRO
Dr. CYPRIAN	- Poland
M. ZIVKOVIC	- Yugoslavia.

MINUTES OF 34TH AND 36TH MEETINGS

The Minutes of the 34th meeting with the amendments already circulated were adopted.

The Minutes of the 36th meeting were adopted, subject to the correction of two typographical errors in Col. Cowles' remarks on 2, namely : P.12, line 16, the word "rules" should be "relations", line 23, "any" should be "only".

34TH OF MINUTES

The CHAIRMAN reminded the Commission that Rule 12 of the Commission's Rules which deals with its Minutes, provides for a record of conclusions, not of individual statements of Members. The Commission was, of course, free to change its Rules, but if elaborate Minutes - such as those of the 36th meeting - were to become usual, increases of staff would be necessary. He observed, moreover, that if the statements of Members were recorded in full, it might be less easy for standpoints to be modified as a result of the interchange of opinions; and also

that leakages might be more apt to occur when Minutes were of great length.

Mr. PELL agreed with the Chairman, in principle, but observed that the 36th Meeting was an exceptional case, as Members wished that the record of the debate should be referred back to the Governments, for instructions.

Mr. COLBAN agreed that the 36th Meeting was an exceptional case; owing to the divergence of views it had been necessary to refer the issues to the Governments, but he hoped that the method adopted on that occasion would not be repeated.

The CHAIRMAN noted that the Commission agreed to maintain Rule 12, the Minutes of the 36th Meeting being regarded as an exceptional case.

#### APPOINTMENT OF A TYPIST-CLERK

The CHAIRMAN informed the Commission that the Finance Committee had approved the appointment of a typist-clerk.

#### REQUEST TO PHOTOGRAPH THE COMMITTEE ROOM

The CHAIRMAN informed the Commission that the "Picture Post" newspaper had asked leave to photograph the Committee room; the request required the Lord Chancellor's approval.

After a discussion it was agreed that the Chairman should inform the Lord Chancellor that it was hoped that the request would not be granted.

#### THE CHUNGKING SUB-COMMISSION

The CHAIRMAN, referring to Mr. Wunsz King's observations at the previous meeting, said that the British Government had now communicated to the Chinese Government the name of their Ambassador in Chungking, as their representative on the Commission, and that of Mr. Kitson as his assistant. It was to be hoped, therefore, that an early date might be fixed for the inaugural meeting, to which the Commission had already authorised him to send a message of goodwill.

COMPOSITION OF COMMITTEE I.

THE CHAIRMAN said that there was a vacancy in Committee I; if the Chairman of that Committee agreed, he proposed that Lord Wright should be invited to fill the vacancy, with Mr. Oldham as substitute when he himself was unable to attend.

LORD WRIGHT said he would be glad to serve on the Committee, and felt that Mr. Oldham would be a very efficient substitute.

MR. OLDHAM having expressed his willingness to act as substitute the proposal was agreed to.

REPORT OF COMMITTEE I

M. de BAER, Chairman of the Committee, said that the Committee had continued to review the cases - of which he gave the figures - the work was now up to date.

MR. COLBANT said he was authorised to state that he could accept Committee I's recommendation in regard to the list, subject to his right to raise the question at a Plenary meeting if any Norwegian cases were rejected by Committee I.

M. de BAER observed that this condition applied to all the

REPORT BY COMMITTEE I ON THE TREATMENT OF QUISLINGS (Doc. C.61)

M. de BAER presented the report.

MR. WUNZ KING referred to "Quislings" of dual nationality. case of a Chinese "quisling" having dual nationality derived from his parents on the one hand and from his birth-place on the other he assumed that the Chinese court could claim exclusive jurisdiction.

M. de BAER agreed.

MR. BURDEKIN proposed, in the last para. above the Conclusion line 3 from the end, to insert the word "any" after "that". This was agreed to.

MR. COLBANT asked that the word "quisling" should be placed in quotation marks wherever it occurred. He understood "political quisling" to mean a man who had violated the criminal code of his country, but not the laws of war. He suggested that the Conclusion

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or at any rate para. 1 - might be omitted, as they merely repeated  
 what had already been made clear in the body of the document.  
 If they were to be retained he proposed that para. 2 should read  
 (in line 3):

"Surrender of any person of its own nationality  
 whom it wishes to put on trial for co-operation  
 with the enemy".

Lord WRIGHT suggested saying "treasonable co-operation". He  
 would prefer that the term "quisling" should disappear.

The CHAIRMAN observed that some Governments might not wish  
 at that moment to commit themselves on the question how far certain  
 persons who had worked for the enemy were guilty of treason in the  
 technical sense.

It was suggested that instead of a reference to treason a  
 phrase such as "contrary to the security of the state" should be  
 employed.

Finally it was proposed that the amendment should be made in the  
 5th line of page 2, where it would give an explanation of "political  
 quisling" which would apply to the rest of the report.

The CHAIRMAN said that in view of the amendments proposed, the  
 raft could not be regarded as adopted, but that as the principles  
 hich the paper embodied had not encountered any objection, he would  
 egard it accepted in principle and would circulate a new draft  
 aking account of the suggested amendments.

# BOOK BY PROFESSOR TRAININ ON THE CRIMINAL RESPONSIBILITY OF HITLERITES PRESENTED BY M. BLUM.

Dr. ECER at the request of the CHAIRMAN made an analysis of the  
 ok which was in Russian. It was agreed that a text of this analysis  
 ould be circulated to Members.

# TE OF MEETINGS

The CHAIRMAN said the next meeting would be on Tuesday, November  
 h. He asked Members to reflect, in the meantime, on the  
 ssibility of holding the Plenary meetings after ~~that~~ date on  
 nesdays, as Lord Schuster was prevented by his other duties from  
 tending on Tuesdays.

*Cecil R. Hunt*  
 Nov 7/4

or at any rate para. 1 - might be omitted, as they merely repeated what had already been made clear in the body of the document.

If they were to be retained he proposed that para. 2 should read (in line 3):

"Surrender of any person of its own nationality whom it wishes to put on trial for co-operation with the enemy".

Lord WRIGHT suggested saying "treasonable co-operation". He would prefer that the term "quisling" should disappear.

The CHAIRMAN observed that some Governments might not wish at that moment to commit themselves on the question how far certain persons who had worked for the enemy were guilty of treason in the technical sense.

It was suggested that instead of a reference to treason a phrase such as "contrary to the security of the state" should be employed.

Finally it was proposed that the amendment should be made in the 5th line of page 2, where it would give an explanation of "political quisling" which would apply to the rest of the report.

The CHAIRMAN said that in view of the amendments proposed, the draft could not be regarded as adopted, but that as the principles which the paper embodied had not encountered any objection, he would regard it accepted in principle and would circulate a new draft taking account of the suggested amendments.

BOOK BY PROFESSOR TRAININ ON THE CRIMINAL RESPONSIBILITY OF HITLERITES  
PRESENTED BY M. BLUM.

Dr. ECER at the request of the CHAIRMAN made an analysis of the book which was in Russian. It was agreed that a text of this analysis should be circulated to Members.

DATE OF MEETINGS

The CHAIRMAN said the next meeting would be on Tuesday, November 7th. He asked Members to reflect, in the meantime, on the possibility of holding the Plenary meetings after that date on Wednesdays, as Lord Schuster was prevented by his other duties from attending on Tuesdays.

*Cecil R. Hunt*  
Nov 7/44

SECRET

C.61(1)  
6th November 1944

UNITED NATIONS WAR CRIMES COMMISSION

Report by Committee I  
on the  
TREATMENT OF "QUISLINGS".

It has always been the understanding that each of the United Nations represented in the Commission would deal with its own "quislings" and that in consequence the Commission need not concern itself with individual nationals of the Allied Nations who have collaborated with the enemy.

The purpose underlying this principle is clear. There was no wish that the United Nations as a body should interfere as between one of their number and its own citizens, but it is a question whether, if the principle is pushed too far, the Commission may not prejudice one of the major purposes with which it was set up, viz., the meting out of justice to all war criminals.

Members of the Axis minorities in Europe - German, Hungarian and Bulgarian - have in many cases participated in the commission of war crimes in the countries where they were resident (e.g. Poland or Yugoslavia). The same will be true of the Far East (Burma, Philippines, etc.).

When fighting ceases it may well be that these individuals will take refuge in enemy territory and that it is there that they will be found if they are to be apprehended and sent back to the countries where their crimes have been committed.

In order to give full effect to the policy adopted by the United Nations for the punishment of war crimes, a distinction would seem to be necessary between what may be termed "political quislings", and the "quislings" who have participated in the commission of war crimes of the type with which this Commission is particularly concerned. By the term "political quislings" is meant men whom the state of which they are nationals wishes to put on trial for an offence against the security of the state or for collaboration with the enemy.

Where a war crime has been committed by a member of a racial minority there may be uncertainty as to what the man's nationality is. Information with regard to his war crimes may have been derived from sources which would not have exact information on the point of nationality, and furthermore the individual may have been given enemy nationality in view of or during the war in circumstances which, consistently with international practice, justify the Allied power in ignoring the change of nationality.

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In all cases where what is charged is the commission of an act which if committed by an enemy would constitute a violation of the laws of war it would therefore seem expedient for the Commission to disregard the nationality point and treat the individual accused as a war criminal within its sphere of action and not as a "quisling".

The wording of the draft Mutual Surrender Convention which the Commission has recommended the Governments to adopt does not appear to conflict with the above proposal.

There remains the question of the "political quislings" defined above.

Many of these individuals will probably seek an asylum in enemy territory and it is there that they will have to be apprehended if the Allied nation concerned wishes to put them on trial. If they are regarded as entirely outside the field of action of the Commission, the individual United Nation concerned will not get the benefit of such arrangements as the Commission may be able to secure for the discovery, apprehension and delivery of persons who are to be put on trial for offenses connected with the war.

Except through the operation of such machinery as the Commission may be able to secure it is difficult to see how satisfaction can be given to the Government of an Allied state not participating in the occupation of enemy territory in respect to justice its nationals who have collaborated with the enemy or have committed offences against the security of the state. It would therefore seem right that any one of the United Nations should be entitled to invoke the aid of the Commission in securing the apprehension and surrender of any such person.

SECRET

M. 38  
Revised Text

UNITED NATIONS WAR CRIMES COMMISSION

Minutes of Thirty-eighth Meeting

held on

7th November 1944

Chairman: Sir Cecil HURST - United Kingdom

There were also present

Mr. PELL	- United States of America
accompanied by Lieut. WOLFF	
Lord WRIGHT	- Australia
accompanied by Mr. OLDHAM and Col. CRISP	
M. de BAER	- Belgium
Dr. WELLINGTON KOO	- China
accompanied by Dr. LIANG	
Dr. ECER	- Czechoslovakia
M. GROS	- France
M. STAVROPOULOS	- Greece
Dr. de MOOR	- Netherlands
accompanied by M. Van Den BERGH	
Mr. BURDEKIN	- New Zealand
M. COLBAN	- Norway
accompanied by Mr. Edward HAMBRO	
Dr. CYPRIAN	- Poland
M. ZIVKOVIC	- Yugoslavia

MINUTES OF LAST MEETING

These Minutes were approved and signed.

INAUGURATION OF THE FAR EASTERN AND PACIFIC  
SUB-COMMISSION

Dr. WELLINGTON KOO said that the Sub-Commission had held an informal meeting in October, and would shortly hold its inaugural meeting. The time had therefore come when the Chairman could appropriately send the message of good-will which the Commission had authorised him to send to the Sub-Commission, and which the latter would be gratified to receive.

The CHAIRMAN said he would take this course.

REPORT BY CHAIRMAN OF COMMITTEE I

The CHAIRMAN of Committee I stated that Committee I was about to commence work on the final lists (A Lists) of Italian, Bulgarian and Hungarian war criminals. In reply to a question, he said reports on the persons who might be considered arch-

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investigation was not enough. The proposal for an Investigation Branch of the Commission was intended to meet the difficulty. It would involve a large organisation and heavy expense, but if the object was part of the High policy of the Allied Nations, the cost and trouble might be justified. He did not (nor did his colleague, Mr. Oldham, who ably drew up the scheme) belittle the services of the National Offices.

He realised that some of the nations might object to having in their countries an investigation agency from outside and though the investigation was in pursuance of their Common policy might refuse to consent. That objection might be met by devising some scheme under the supervision of the Commission to achieve their purpose, without any appearance of infringing their separate sovereignty.

He called attention to certain features of the scheme and moved that, subject to such practical amendments as might be deemed necessary, the proposal should be forwarded to all the member Governments in such a manner as to come to the attention of those high authorities who had pledged themselves to the punishment of war criminals.

M. GROS, while fully in agreement with its purposes, did not consider that the Australian proposal could lead to practical results. The National Offices of the invaded countries did not deserve the criticism levelled against them. The liberation of those countries was still very far from complete. So long as they were fighting to expel the enemy and means of communication between them and London were scanty and necessarily reserved for urgent matters, it could not be expected that full evidence of war crimes could be systematically compiled and presented. The French Government had just publicly announced that it had established a special department, the "Service des crimes de guerres ennemis", to assist the War Crimes Commission and to perform the

work for which Australia proposed to establish the new institution<sup>(1)</sup>  
The collection of evidence ought to be done by the National Offices,  
not merely because no external organisation could collect it but  
also because it was their duty to prepare the cases for trial before  
the national courts as provided in the Moscow Declaration.

Mr. PELL agreed with Lord Wright that so far the Commission  
had only been able to list for trial a very small proportion of the  
persons guilty of war crimes, though the work done was not as  
unimportant as the mere figures might suggest. He approved the  
objects of the Australian proposal.

Mr. COLBAN said that the National Offices were there to help  
the Commission - were in a sense "emanations" of it - and had not  
done their work badly. The Australian delegate could surely not  
suppose that after over four years of torture the Norwegian people  
would allow its Government to be slack in punishing war crimes.  
There would be plenty of evidence when the country was free.

Dr. ECER agreed with the leading ideas and general purpose of  
Lord Wright's statement and Mr. Oldham's paper. They were, in  
his opinion, as follows:-

a) The punishment of men responsible for this war and its horrors  
was a common task of the United Nations exactly in the same sense  
as the military victory, the problem of feeding Europe, and future  
security.

b) Thus, the War Crimes Commission should be made an effective  
instrument of this common retributive action and the central body  
of the United Nations for the whole problem. It was what public  
opinion expected.

c) Up to now, the Commission had not been either technically or  
functionally equipped for this task. The terms of reference were  
narrow, but even for the work on the lines of the narrow terms of  
reference the Commission had no adequate technical equipment.

1) A press article dated 1 November, 1944, describing the new  
institution's functions was handed by M. Gros to the Secretary-  
General and has been circulated to Committee II (Doc. II/34)

The purpose of the paper was to adapt the Commission to its great task and to give it the necessary competence and organisation.

So far he entirely agreed. On the other hand, the Commission itself, even if re-organised on the lines suggested by Lord Wright and Mr. Oldham, would be unable to carry out its task without the collaboration of various national services of the United Nations, such as the police, public prosecutors and criminal courts.

The Commission must keep in mind the following facts:-

a) A certain number of cases would not pass through the channels of the Commission.

b) A great number of criminals would escape to Germany.

The function of the Commission in respect to these cases could not be limited to the establishing of lists. The Commission must investigate in Germany. For this purpose it needed an Investigation Branch such as suggested by Lord Wright and Mr Oldham.

c) Finally, there would be cases of an international character, crimes committed without any particular geographical location. In respect of these cases the function of the Commission would probably be very near to the function of "parquet international".

For all these reasons Dr. Eéer supported the suggestions of Lord Wright and Mr. Oldham although he wished them to be modified so far as collaboration with national Governments was concerned.

Dr. de MOOR said that the Commission would be very glad to have the proposals of Lord Wright and Mr. Oldham because they showed that there were still quantities of work for the Commission to do. Although the proposal to set up international agencies within the national territories of the nations which were represented on the Commission would not be easily realized in the form indicated in the proposal, some international help for the national offices would be perhaps useful, especially as regarded securing uniformity of action by the national offices

and mutual contact between them and with the international Commission in London. Good work could perhaps be done on this basis. However, the main work of investigation of the facts had to be done by the national offices, helped by the national police and magistrates, who were the best equipped for this work. For the identification of the criminals themselves, for hunting them down and arresting them, the setting up of some international agency or agencies could be of the greatest importance. Up till now the Commission had rather neglected and underestimated this part of its task. It was true that tracking down and arresting war criminals in occupied enemy territory would be the work of Shaef, but it was not certain that Shaef disposed of an organisation which was quite equal to this extremely difficult task. Therefore the responsibility of the United Nations War Crimes Commission was also involved here and it would perhaps be a very good solution to study the proposals of Lord Wright and Mr. Oldham in this light. The proposals should, therefore, be sent to Committee II for further discussion.

M. STAVROPOULOS said that the occupation of Greece had hitherto prevented more than two cases being submitted to the Commission. A National Office was now being established and the Commission would soon be flooded with evidence. Groups of strangers travelling with interpreters could achieve no results which could not be better obtained by the National Offices.

Mr. ZIVKOVIC said it was beyond all doubt that the present position was unsatisfactory, and that the Commission had its own responsibility in the collecting of evidence against war criminals, especially arch-criminals. He pointed out, however, the difficulties of obtaining a large amount of evidence before the liberation of the countries where war crimes were committed. So, for example, a National Office had existed for more than a year in Yugoslavia, but evidence which this office had collected could not be brought from Yugoslavia to London.

He agreed with Lord Wright's proposal that the Commission should have its own machinery for the collection of evidence, but he did not think that the idea of having agencies in Allied countries was acceptable. Instead of agencies, the Commission could have liaison officers with the National Offices in various countries. This would be acceptable and the same results would be attained. He suggested that, before a decision was taken, the proposal should be examined in Committee II.

Dr. CYPRIAN welcomed the Australian proposal as it endeavoured to speed up the work of the Commission and to prevent the possible criticism arising from the fact that there is a discrepancy between the amount of work done by the Commission and the number of criminals put on the list; it was not the fault of the Commission of course, but the blame for it could be thrown upon it. The Australian proposal should be discussed and taken into consideration, although not in the form in which it stood. It would be hardly possible for the agents of the Commission to investigate in the territories of the United Nations except by special request of the Government concerned, and even then they could only investigate individual specified cases, such as concentration camps or camps for displaced persons. These agents could work only with the assistance of the authorities of the Governments concerned; otherwise they would not be likely to discover evidence which the national authorities could not discover. But there was a field of activity for such agents in Germany, where they could co-operate with the authorities of Schaef, collecting evidence among the foreign workers whom the Germans had carried off. It must be borne in mind that in Germany there were more than twelve millions of them and that they knew a lot about the war crimes and about war criminals looking for a hiding place in Germany. This sort of work, if done by the agents of the Commission, could help the Commission to get hold of thousands of war criminals.

The CHAIRMAN then suggested that the Australian proposal should be referred to Committee II. It was decided to do so after further discussion at the Commission's next meeting.

Mr. OLDHAM said that the Australian proposal was put forward as a constructive attempt to remedy what was believed to be an unsatisfactory situation in regard to the gathering of information concerning war crimes. The majority of the members who had so far spoken appeared to support the proposal in principle though not necessarily in detail. He welcomed suggestions such as those put forward by Dr. de Moor.

He thought that a solution could be worked out in Committee II after each member had spoken in open Commission and he supported the recommendation of the Chinese Ambassador in this regard so that Committee II would have the benefit of the views of all members. He emphasised that the Australian members were interested less in how a solution was arrived at than in obtaining a solution. What they did feel very strongly about was that something far-reaching must be done so that the Commission could carry out its task of obtaining particulars in a manner commensurate with the responsibility which the Governments had placed on it.

DAY OF MEETING OF THE COMMISSION

The Commission decided to meet henceforth on Wednesdays at the usual hour of 3 p.m.

*Carl B. Hurst*

SECRET

C.62  
6 November 1944

UNITED NATIONS WAR CRIMES COMMISSION

PROPOSAL BY LORD WRIGHT (AUSTRALIA) FOR  
A MODIFICATION OF THE SYSTEM NOW IN USE FOR THE  
COLLECTION OF EVIDENCE IN RESPECT OF WAR CRIMES

The Apprehension of War Criminals

Chief Object - to apprehend every available war criminal.

Specific Object - United Nations War Crimes Commission to obtain particulars of every war crime in order to supply Military Authorities with details to enable them to take every war criminal into custody.

Suggestions for accomplishment of the specific object

- (1) There is waiting to be gathered an enormous amount of information concerning war crimes and war criminals in such places as:-
- (a) Offices of the National Governments;
  - (b) Offices of the various Service Departments with their offshoots (e.g. in the case of the British War Office:- the Prisoners of War Department, the Historical Section, etc.);
  - (c) The British Foreign Office and its offshoots (e.g. P.I.D.);
  - (d) The U.S. State Department, War Department etc. (e.g. War Department Intelligence Agencies);
  - (e) Uncollected information in liberated territories;
  - (f) Uncollected information in unliberated territories;
  - (g) SHAEF-1;
  - (h) The Extraordinary State Commission of the U.S.S.R.
- (2) Experience has shown that the gathering of this information should be carried out not by the National Offices, but by the Commission itself, as originally charged.
- (3) The task of organising the collection of particulars concerning war crimes and war criminals should be entrusted by the Commission to an officer, who should be either a service man or civilian, but who should possess imagination, drive and initiative.

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He should be answerable to the Commission but should be given a large measure of independence in carrying out his duties. The branch of which this officer would be in charge might be called "The Investigation Branch of the United Nations War Crimes Commission".

The Commission's main object in relation to the Branch would be to see that appropriate progress is being made in obtaining particulars of the thousands upon thousands of cases of war crimes committed.

(4) A small committee of the Commission should be established to consider the progress being made by the Investigating Branch but it should not attempt to supervise the Branch unduly.

(5) The principal headquarters of the Investigating Branch should be in London. As regards the other countries, in the countries which have been invaded, the headquarters should wherever possible, be situated at the capitals of such countries.

So far as gathering the information at present in London, the Investigation Branch should comb the records of the various Governments.

A man with drive and initiative should be in charge of the headquarters of the Agencies of the Investigation Branch at various capitals.

As a tentative recommendation of the practical steps to be taken, it is suggested that in each country under the investigation, in charge of the Agency at the capital, one or more travelling investigatory groups be sent from town to town on circuit. These groups should be preceded in each particular town by an advance agent who would be responsible for notifying the inhabitants of that town through the press, radio, or other modes of publicity of the fact that, say a week hence, a travelling group would arrive and be available at the Town Hall or other similar public building, and that this group would welcome any information concerning war crimes which any inhabitant might bring before it. It should be made very clear that the group's purpose would be to obtain particulars of war crimes and not to hold trials. The advance agent should also designate the most responsible and respected citizen of particular communities as a key-man to act as the intermediary between the travelling group and the community during the intervening week and possibly for a period during the sessions in the town of the travelling group. The key-men would differ from place to place. In some cases, e.g. where the army is still in charge, he would be an officer, in others a representative of the F.F.I. or an underground army, in others the Mayor and in others the trusted leading inhabitant (not necessarily holding any official position) during the time of Axis occupation.

In charge of the travelling group should be a man of forceful character, with sufficient legal knowledge, but not possessing above all initiative and great keenness. He should be imbued with a strong sense of the international duty of obtaining particulars concerning all war crimes, and no considerations of local prestige or favouritism should hinder the information from coming in.

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the Commission but should be given in carrying out his duties. The person who would be in charge might be called the United Nations War Crimes

object in relation to the Branch. Progress is being made in obtaining information upon thousands of cases of war

of the Commission should be established by the Investigating Branch to supervise the Branch unduly.

quarters of the Investigating Branch. Regarding the other countries, including those which have been invaded, the headquarters should be established at the capitals of such countries.

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initiative should be in charge of the Investigation Branch at the

recommendation of the practical steps that in each country under the investigation, one or more travelling groups should be sent from town to town on circuit, preceded in each particular town by a person who would be responsible for notifying the public through the press, radio, or other means of the fact that, say a week hence, a group will arrive and be available at the local public building, and that this information concerning war crimes will be made available before it. It should be made a primary purpose would be to obtain partial information to hold trials. The advance agent should be the most responsible and respected person in the community as a key-man to act as a liaison possibly for a period during the stay of the travelling group. The group should move from place to place. In some cases, if still in charge, he would be a representative of the F.F.I. or other organization. In others, the Mayor, and in others the local official (not necessarily holding an official position) of Axis occupation.

The travelling group should be a man of high sufficient legal knowledge, but with initiative and great keenness. He should have a sense of the international duty concerning all war crimes, and should not be influenced by local prestige or favouritism should be from coming in.

If residents in a particular area are not satisfied with their local key-man they should have the right to appeal to headquarters at the capital of the country with a view to a new key-man being appointed.

(6) It appears that SHAEF and the other Supreme Commands are willing to apprehend war criminals but they ask that they be supplied with all available information including particulars identifying the accused, such as home address, personal description, age, photograph, etc. These data should be prepared by the Investigation Branch of the Commission through exhaustive contacts with such Agencies as are mentioned in paragraph 1.

(7) The United Nations War Crimes Commission has had imposed on it the duty that it "will investigate war crimes committed against nationals of the United Nations recording the testimony available, and the Commission will report from time to time to the Governments of these nations cases in which such crimes appear to have been committed, naming and identifying wherever possible persons responsible".

In other words, the Commission has been specifically charged by the Governments with the particular duty of obtaining all possible data which the military authorities will need in order to apprehend the war criminals. Unless it is satisfied that this work is being carried out by some other authority, it cannot abdicate its responsibilities of obtaining particulars of war crimes.

(8) The victims of these war crimes number hundreds of thousands but so far only a few hundred dossiers have been prepared and the total number of persons whom the Commission has declared should be taken into custody is probably not more than a thousand.

(9) The Commission has from time to time complained that this failure was due to the fact that the National Offices had not been sending in more than a very few cases.

The Chairman (Sir C. Hurst) has more than once drawn attention to this situation. So also has the Chairman of Committee I (General de Baer).

E.G. As far back as the 25th April General de Baer, in Document C.14 emphasised the small number of cases which the National Offices were sending his Committee, and he said inter alia "The great obstacle is the difficulty of obtaining circumstantial evidence from abroad".

This difficulty no longer obtains in regard to Belgium and France, which have been liberated, but we have not yet seen an influx of cases commensurate with the number of war crimes committed in those countries.

Further on in C.14 General de Baer said, "However, as the punishment of crime is the concern of the United Nations as a whole, it may be proper for us, if the National Offices fail to send us these cases, to examine whether the Commission should not itself assume this part of the work."

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On the 1st May 1946, General de Baer, as Chairman of the Commission on the part of the United Kingdom, said that "the National Offices, and possibly the Commission itself, should seek evidence against leading criminals in orders and decrees signed by them prescribing and practicing which were war crimes. Such evidence could be sought in newspapers, official journals, etc. Ought the Commission itself to undertake such research as well as the National Offices?" The Commission agreed to this being

On the 3rd May General de Baer, as Chairman of the Commission, reported to the Commission that "he wished to ask that the Commission would urge their National Offices to trace the Commission cases of war crimes which did not involve violation of their national criminal law. They appeared to be avoiding doing this and it was important to find out how such cases were being dealt with in order to set up an international criminal court." General de Baer's proposal was adopted by the Commission.

On the 1st August the Chairman once again emphasized the number of cases which the National Offices were sending to Committee I and requested members to draw their Government's attention to the matter.

(10) On the 1st August the Chairman of the Commission and the Committee II have since from time to time emphasized (e.g.) that this extension of the Commission's work would involve the Commission's staff.

On the 3rd May the Chairman said "he would see if he arranged for any additional staff which might be necessary for the Commission, in collaboration with the National Offices undertake this work ..."

As a result of the above resolution, the Chairman at the next meeting of the Commission on May 16th the services of Lt. Col. Wade had been secured in order to meet the need for a third staff resulting from the Commission's decision to collaborate actively with the National Offices in seeking certain kinds of evidence against leading war criminals and to give general assistance to the Secretary-General.

The present staff, in fact, consists of the Secretary-General, Lt. Col. Wade, Miss Pittendrigh and four Secretaries.

Although this striking inadequacy of staff has also been stressed by members of the Commission no adequate steps have been taken to meet it.

(11) From time to time articles and letters have appeared in the more responsible United Kingdom newspapers concerning the Commission's work and the progress being made by the Commission. Similar articles have also appeared in the United States Press, but, however, it is not known of any means of knowing the conditions under which the Commission labours due to the difficulties in its restricted terms of reference.



CZECH CASES TO BE CONSIDERED BY COMMITTEE I

Note by the Chief Clerk.

Charge No.

389/Cz/a/6

Submitted on 22nd November, 1944, after List No.1 was closed. On the intervention of Dr. Ráur in the Commission the List was requested to include the persons named in the Charge, with the exception of Hess and Guertner. The item "Members of the Standgericht", which was classified "C", remains to be dealt with.

392 - - 7

Submitted on 29 th November, 1944. The persons named are the same as in the above case and it was decided to list them all, with the exception of Hess and Guertner and the substitution of Himmler for Hess.

399 - - 8

Submitted on 6th and 15th December, 1944. It was decided to place all the accused persons on "A", except where the conclusions of Lord Wright's committee will bring in elements which will cause some of them to be taken off, with the exception of Nos. 45-51 which have been withdrawn, and subject to the addition of the names of Glueck, Liebenowich, Maier and Lelling.

423 - - 9

Submitted on 13th December, 1944. Provisionally classified. subject to above.

424 - - 10

432 - - 11

433 - - 12

463 - - 13

464 - - 14

465 - - 15

Not yet considered.

None of the names in respect of the above Charges have appeared in the published Lists, with the exception of those in Charge 389/Cz/a/6.

*F. J. Pittendrigh*

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1944.

On 13th December 1944, Committee I considered  
Charge No. 399/Cz/G/S.

It was decided to place all the accused  
persons on list A, except where the conclusions  
of Lord Wright's Committee will bring in elements  
which will cause some of them to be taken off,  
with the exception of Nos 445-51 which have been  
withdrawn and subject to the addition of the  
names of Glueck, Liebenhans, and Hauser + Golling.

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According to which a broadcast from Algiers had stated that evidence of the crimes in question was being collected by an Allied Department. He referred to the opposition offered by Greece and Yugoslavia when the question of the Commission's dealing with war crimes against Italians had been raised, but he felt this opposition could not be allowed to stand in the way any longer.

Mr. LAMBERT said he would ascertain the origin of the broadcast, and Colonel HODGSON promised to make enquiries regarding the conversations in Washington.

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Mr. LAMBERT said he would ascertain the origin of the broadcast, and Colonel HODGSON promised to make enquiries regarding the conversations in Washington.

204

8.44

208

st 1944.

Dear Sir,

In accordance with the decision adopted by Committee I on September 26th, I beg to inform you that a charge has been submitted to the Commission which concerns one or more of your nationals.

The charge relates to:

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This notice is sent to you in case your Government desires to take any action.

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18.44

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1st 1944.

206

**Resolution adopted by Committee I, Sept. 27th 1944.**

In cases where a charge against a war criminal laid before the Commission is found to concern nationals of a Government other than that submitting the charge, notice should be given to such Government in order that it may have an opportunity of considering what action, if any, it desires to take. Such notice should be given to the National Office of the Government concerned, if there is any such National Office in London, or, if not, to the member of the Commission appointed by that Government.

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Mr. LAMBERT said he would ascertain the origin of the broadcast, and Colonel HODGSON promised to make enquiries regarding the conversations in Washington.

*Copy sent to Mr Lambert on 5.9.44 by Mr. Chairman's letter of 31.8.44  
to Mr Eden regarding Italian war crimes*

VERY SECRET

*Corrected copy*

208

28 August 1944.

UNITED NATIONS WAR CRIMES COMMISSION

NOTES OF INTERVIEW BETWEEN COMMITTEE I  
AND MR. LAMBERT OF THE WAR OFFICE

War crimes against Italians

After introducing Mr. Lambert to the members of the Committee, Sir Cecil HURST raised the question of war crimes committed by the Germans in Italy against the civilian population. He said that if evidence of such crimes was being collected by the military authorities in Italy, none of it was reaching the United Kingdom National Office (Treasury Solicitor and Mr. Kent). Six weeks ago Sir W. Malkin had told him that conversations had taken place in Washington with a view to the United States and United Kingdom Governments bringing crimes against Italian civilians before the Commission, but so far he did not know what had been the result of these conversations.

Mr. LAMBERT said the British military authorities in Italy were not interested in war crimes against Italian civilians. They had no organisation for bringing them to the notice of the National Office. They assumed that whatever was to be done about them would be done by the Italians themselves through the authorities responsible for the civil government.

Sir Cecil HURST produced a cutting from the "Daily Sketch" according to which a broadcast from Algiers had stated that evidence of the crimes in question was being collected by an Allied Department. He referred to the opposition offered by Greece and Yugoslavia when the question of the Commission's dealing with war crimes against Italians had been raised, but he felt this opposition could not be allowed to stand in the way any longer.

Mr. LAMBERT said he would ascertain the origin of the broadcast, and Colonel HODGSON promised to make enquiries regarding the conversations in Washington.

Obtaining of evidence from enemy prisoners of war

Sir Cecil HURST referred to the desire of the French to be able to question German prisoners of war about war crimes before they were sent across the Atlantic, as was the present practice.

Mr. LAMBERT said that to search among the prisoners of war for persons accused of war crimes whose names and whose ranks and units were alike unknown was like hunting for a hundred needles in fifty haystacks.

Sir Cecil HURST said that to discover some way of allowing the French to interrogate the prisoners would diminish the Commission's responsibility.

Mr. LAMBERT felt the practical difficulties were enormous as the prisoners were normally sent away two or three days after their capture.

M. de BAER thought facilities might be given after the prisoners reached Canada or the United States.

Dr. de MOOR suggested the compilation of an alphabetical list of all the prisoners, with particulars about them. The French and other United Nations could have the right to inspect this list for the purpose of identifying war criminals.

Mr. LAMBERT was prepared to take the matter up, but urged restriction of the investigations to cases of serious crime. Otherwise the channels of information would be choked and cease to function.

Sir Cecil HURST, Colonel HODGSON and Dr. de MOOR agreed that before creating facilities one must be sure they would be used for serious purposes.

Mr. LAMBERT confessed himself puzzled as to what organisation and what sort of staff would be satisfactory. There were no inter-allied indexes of prisoners-of-war, and for the United Nations to exchange lists would be a tremendous task.

M. de BAER proposed an inter-allied body of "juges d'instruction", and Dr. ECER thought the work should be centralised. Dr. de MOOR suggested that each Government should pay for each search for which it asked.

Mr. LAMBERT described how information was obtained in the United Kingdom from British prisoners-of-war who escaped or were repatriated. The common case was that the crime was reported by the Protecting Power but no witnesses of its commission were available. But the "homme de confiance" of the camp was known and also names of other witnesses. This information went to the National Office and at the same time in the British prisoners-of-war index each name was marked. On arrival in the United Kingdom each witness was interrogated and the results went to the National Office. Furthermore, every British prisoner-of-war who reached the United Kingdom, whether or not he was alleged to have witnessed a war crime, was asked if he had seen one, indications being given him as to what a war crime was; and if he said he had, he was asked to fill up a simple questionnaire. Not all British prisoners-of-war, however, would come to the United Kingdom.

Prisoners-of-war in transit

Sir Cecil HURST brought up the question of prisoners-of-war in transit. Massacres and other war crimes had been committed against them, but the evidence of the identity of the perpetrators was unsatisfactory. Several such crimes had been committed by the Italian forces and only the posts occupied by the suspected persons could be given.

Mr. LAMBERT thought the Italian Government's records in Rome were the only possible source of information. The Control Commission in Rome should be approached through the Foreign Office in order to obtain access to them. Before action was taken he would try to discover if the records were in the exclusive control of the Allied military authorities so that the application would have to be made to the latter.

Establishment of an Agency (War Crimes Office) at the Commander-in-Chief's Headquarters.

M. de BAER reminded the meeting of the Commission's recommendation on the above subject and the text (Doc. C.30 of 15 June, 1944) was handed to Mr. Lambert.

Mr. LAMBERT said there was certainly a use for such an institution as regards past war crimes. As regards future crimes he understood SHAEF to have set up a "Court of Enquiry". On being questioned, he said he did not know whether this Court was not intended to deal solely with crimes committed in the course of operations.

Sir Cecil HURST said that from a conversation with Brigadier-General John Foster he had learnt that the scheme for the Agency was not making progress. <sup>Brigadier</sup> General Foster has recommended steps to interest <sup>Brigadier</sup> Sir Andrew Clark, <sup>who was planning the level</sup> of the Control Commission for Germany, in the Agency, that it might be made part, not of SHAEF, whose rôle in the occupation of Germany would be temporary, but of the permanent machinery for governing Germany. Sir Cecil had seen <sup>Brigadier Clark</sup> ~~Sir Andrew~~ who had ~~liked the~~ <sup>idea and promised full co-operation. to do what he could</sup> ~~to help~~.

Mr. LAMBERT wished to say a word of warning. At the planning stage, and on paper, the idea of attaching the Agency to the department to which he belonged, which dealt with breaking up the Nazi machinery, might please <sup>Brigadier</sup> Sir Andrew Clark, but the department's main task was so colossal and would require so much man-power that the Agency might be squeezed out of the plan unless precautions were taken. It would be important: (1) To make it clear that the number of clues to be followed up and individuals to be identified was not infinite. If possible a definite number should be indicated. (2) It would also be desirable to indicate the size of the staff which would be required. The smaller it was the easier it would be to get the Agency set up.

Dr. ECER urged that the small Powers, who were those principally concerned, must have an adequate Agency at their disposal or the enterprise would fail and the Allied statesmen become ridiculous. Immediate action was required.

Mr. LAMBERT pointed out that the enquiries must be made, like ordinary police enquiries, with discretion and by properly trained persons. Otherwise the criminals would escape. The members of Committee I agreed.

~~(At this point I was out of the room for a short time)~~

Colonel HODGSON thought the Combined Chiefs-of-Staff should be approached through the Governments, and Mr. LAMBERT considered this the proper course.

~~(At this point I was again absent)~~

Reverting to the size of the Agency, Sir Cecil HURST thought it could be small if its functions were restricted to <sup>helping</sup> ~~putting~~ agents deputed by particular United Nations to make enquiries on their behalf, <sup>as, for instance, by putting them in</sup> ~~in~~ touch with the appropriate agencies of the military Government of Germany.

H. Mykura Wood  
30. VII. 44

SECRETC.11.  
6 April 1944UNITED NATIONS WAR CRIMES COMMISSION

NOTE OF MEETING OF COMMITTEE I AND OTHER MEMBERS OF THE COMMISSION, ON 5 April, 1944, TO HEAR A STATEMENT BY LIEUTENANT COLONEL WILLIAM CLARK ON INVESTIGATION OF WAR CRIMES IN THE FIELD.

In the absence through illness of M. de Baer, Chairman of Committee I, Sir Cecil Hurst presided.

Colonel Clark, of the United States Army, and a member of the Judge Advocate's Department in the North African field of operations, described the manner in which evidence against a German officer responsible for the killing of a number of Italian civilians (men, women and children), had been taken, with a view to its use in a subsequent trial of the officer for a war crime.

General instructions laying down a procedure for such perpetuation of testimony had been issued by the Chief of the General Staff in Washington. Colonel Clark had been appointed a Commissioner, for the purpose of these instructions, by General Devers, Chief of the General Staff in North Africa. They provided that the Commissioner should be assisted by two officers with legal qualifications, one to act as "military counsel" and examine the witnesses, and the other to protect the interests of the person against whom evidence was sought. The presence of the latter during the taking of the evidence was necessary. The evidence was taken under oath. Evidence from German non-commissioned officers and men had been taken in Algiers. The Commissioner had then proceeded to the scene of the execution of the victims, which was in Italy, and examined local witnesses.

In reply to a question, Colonel Clark said that an attempt to issue common instructions for the United States and British forces had failed owing to a technicality; under United States military law a single Commissioner could administer an oath, whereas under British military law this required a body of three members.

An exchange of views followed as to the extent to which the different United Nations were provided with adequate procedure for perpetuating testimony in a form which would make it admissible at the trial of war criminals. It appeared that while the position was not exactly the same for all the United Nations on the Continent of Europe, all those which were represented had methods which could be applied, but were hampered by having to operate on foreign territory.

Summing up the results, Sir Cecil Hurst thought two lines of advance should be explored. The first would be that of the conclusion of agreements between the United Kingdom and particular United Nations' governments operating in London, with a view to giving the latter any necessary additional powers of action. Three points arose:-

(a) The desirability and possibility of giving each United Nation power to compel witnesses to attend and give evidence on oath before a competent authority.

(b) Ought the competent authority to have all the powers given to a "juge d'instruction" by the law of the particular United Nation?

(c) The need to ensure the admissibility of the evidence so obtained before the court which tries the case - a matter primarily to be dealt with by the legislation of each United Nation.

The second line of advance to be explored would be that of clarifying and rendering more supple the system of perpetuation of testimony by military commissions or courts of enquiry, e.g. in such matters as the administration of oaths and the limitations on the scope of their activity. This was a matter to be taken up with the Combined Chiefs of General Staff through whatever might prove to be the appropriate channel.

M. Cassin suggested that the agreements made with the United Kingdom should have a reciprocal character, i.e. should give it in the territory of each United Nation the facilities it was granting that nation in its own territory.

It was agreed that Sir Cecil Hurst would endeavour to arrange for a joint meeting of Committees I and III at which representatives of His Majesty's Government would attend, and the question of agreements to increase the facilities for perpetuating testimony would be discussed with them.

See 1/37

215 216

UNITED NATIONS WAR CRIMES COMMISSION

4

PROCEDURE OF EXAMINATION OF CHARGES BY COMMITTEE I.

On 1st March, 1944, the Committee decided that its examination of charges would for the time being be directed to classifying them under three headings:

A. Charges to be proposed to the Commission in the near future for inclusion in the Commission's List or Lists. ts:

Until more experience is acquired by examination of cases, the Committee does not contemplate placing cases on List A.

B. Charges placed on the Committee's Provisional List. This list is to be divided into two sub-divisions: l

1. Charges in which the evidence is reasonably complete;
2. Charges in which the evidence is incomplete, but further information will be available before fighting ceases. ce

C. Charges consideration of which is suspended until the National Office provides further information. or

Note: The word "charges" is used above instead of "cases" because it would seem that where there are several accused persons it may not infrequently happen that the charges against some of them are sufficiently complete to be marked "B.1" while the charges against others may have to be marked "C." -  
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5. It is important that the cases should be marked, in the place provided in the Form, (i.e. "CHARGE No . . . .") with national serial numbers indicating the way in which the charges are filed by the National Offices. The object is to provide a fool-proof method by which the cases can be identified in any correspondence relating to them between the Commission and the Offices. Unless this is done, cases may be confused with one another, particularly where the name of the accused is not known.

6. Titles, whether military or civil, and the names of military, naval and air formations, units, government departments or organisations etc. should not be translated, but should be left in their original language, with or without a translation, in order that they may be correctly stated in the Commission's list of persons charged with war crimes

17

SECRET26A 7 (1)  
February 1944UNITED NATIONS WAR CRIMES COMMISSIONFIRST REPORT OF COMMITTEE I (FACTS AND EVIDENCE) AS ADOPTED BY THE COMMISSIONPreparation and presentation of cases of war crimes to the Commission

As a result of examining a certain number of cases which have been transmitted to the Commission, Committee I proposes that the Commission should call the attention of the National Offices to the following points:

1. In the opinion of the Commission the papers sent to it in any particular case should state:

- (1) What is the offence alleged?
- (2) Can the offender be identified?
- (3) What was the degree of responsibility of the offender having regard to his position?
- (4) Was the offence committed on the offender's own initiative or in obedience to orders, or in carrying out a system or legal disposition?
- (5) What evidence is available in support of the charge?
- (6) Any indication of the probable defence.
- (7) Whether the case appears to be reasonably complete.

2. It is desirable that in transmitting a charge the National Office should, in addition to specifying the heading in the List of War Crimes under which the charge falls, indicate what provisions, if any, of the national criminal law (whether civil or military) have been infringed by the accused.

3. It is understood that it may in some instances be impossible, for reasons of security, to identify a witness or witnesses by name in the documents transmitted to the Commission, but the National Offices are requested at least to state, in general terms, the evidence or information on which the charge is based; and all necessary information in regard to the witnesses should be available for communication orally to Committee I or to the Commission, if they are requested.

4. Committee I would be grateful if the National Offices would supply at least four copies of each case transmitted to the Commission - carbon copies on thin paper will suffice - in addition to the signed original.

5. It is important that the cases should be marked, in the place provided in the Form, (i.e. "CHARGE No. ....") with national serial numbers indicating the way in which the charges are filed by the National Offices. The object is to provide a fool-proof method by which the cases can be identified in any correspondence relating to them between the Commission and the Offices. Unless this is done, cases may be confused with one another, particularly where the name of the accused is not known.

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7. Reference to prisoners of war camps should show, if possible

- (a) whether the camp is one for officers or for other ranks
- (b) the official number or description,
- (c) the country in which the camp is situated and its location.

8. In view of the possible death or disappearance of witnesses of their geographical dispersal, and of the deliberate destruction of evidence by the Axis in occupied countries, the Commission wishes to call the attention of the National Offices to the necessity of recording at once, while it is still available, evidence of war crimes in an authentic form, with a view not merely to the work of the Commission but also to prosecution for such crimes before the competent tribunals.

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February 23rd, 1944.

## UNITED NATIONS WAR CRIMES COMMISSION

DRAFT OF PROVISIONAL SCHEME FOR RECORDING DECISIONS  
OF COMMITTEE I.

217

1. It is possible that the evidence for some of the charges presented to the Committee may be so complete that it can recommend placing the accused at once on the Commission's final list of persons wanted for trial for war crimes. In most instances, however, it seems likely that the particulars available either as to the accused or as to the evidence in support of the charge will be incomplete. Here two possibilities can be distinguished. The evidence available, though incomplete, may furnish good reason for believing that the accused is guilty of a war crime, but the Committee may feel it undesirable to take an immediate decision. For such cases the Committee appears already to have decided to establish a provisional list, but it has not defined exactly the effect of inclusion on this list. It is suggested that the charges placed on the provisional list might be regarded as charges which remain under consideration by the Committee but on which it wishes to have further evidence before taking a decision. In other instances the particulars given may be so incomplete as to lead to the Committee suspending all consideration of the case until further evidence is produced by the National Office or otherwise secured by the Commission.

2. Three kinds of decision by the Committee can therefore be contemplated:

A. Recommendation for definitive inclusion in the Commission's List.

B. Inscription of the charge on the "Provisional List", i.e., on a list of persons the charges against whom remain under consideration,

~~but in the Committee's opinion should be strengthened by the obtaining of further evidence or information by the National Office or by the Commission.~~

C. Suspension i.e., the Committee does not feel that further consideration of the case is justified on the existing evidence.

3. The Committee has found it desirable to make comments on particular cases to the representatives of the National Office, usually in the form of recommendations for the completion of the case.

February 23rd, 1944.

UNITED NATIONS WAR CRIMES COMMISSIONCOMMITTEE I (Facts and Evidence)

Third Meeting - 23rd February, 1944.

M. LITAWSKI attended on behalf of Poland.

Case 17/P/G/1.

Decision: Following to be put on provisional list of war criminals:

1. ZÖRNER, Ernst, Governor of the Lublin District (see p.4).  
N.B. Charges against this person are to be transmitted as a separate case.
2. ALVENSLEBEN, Graf Werner von, Landowner in the Lublin District, on charges falling under War Crimes List Nos. I, XVII and XVIII.

Comment: The evidence requires completion. Particulars as to witnesses are to be available later and the report of the Polish plenipotentiary was stated by the Polish representative not to be based on examination of witnesses.

The above case led Committee I to ask Dr. Eéer to draw up a fully documented report on Nazi organisation.

SC 1/M2  
February 16th, 1944.

UNITED NATIONS WAR CRIMES COMMISSION.  
<sup>I</sup>  
~~SUB~~-COMMITTEE ON (FACTS AND EVIDENCE.)

219

Notes of the Proceedings of the Sub-Committee  
at its Second Meeting on February 16th, 1944.

M. Cassin attended on behalf of the French National Office.  
General Questions. The Sub-Committee discussed the treatment of cases transmitted by National Offices which were incomplete in certain particulars.

It also discussed what part the Commission should play in rendering cases complete by obtaining particulars, e.g., of the identity of accused persons or witnesses or additional evidence.

M. Cassin raised the question of reporting incomplete cases to the Commission in order that the latter might use its authority to ensure the making of necessary enquiries in Germany and the obtaining of necessary material from Germany.

The following French-German cases were examined and adjourned pending completion by the French National Committee: Fr/G 9, Fr/G 10, Fr/G 11, Fr/G 12, Fr/G 14, Fr/G 15. In case Fr/G 14 the Sub-Committee asked the Secretary-General to list the accused, identified only as commander of the Gestapo at Guéret, as a person to be sought for.

The Sub-Committee decided to propose the French-Italian case, Fr/It 1, for inclusion in the Commission's List.

## UNITED NATIONS WAR CRIMES COMMISSION

## I

SUB-COMMITTEE ON (FACTS AND EVIDENCE.)

Notes of the Proceedings of the ~~Sub~~-Committee  
at its First Meeting on February 9th, 1944.

*Mr. Cassin attended on behalf of the French National Office.*  
Meetings. It was decided that the Chairman might cancel a  
meeting and might call special meetings.

Letters from private individuals bringing accusations of war crimes.

The Secretariat was instructed to file such letters, forward a  
copy to the relevant National Office, and inform the writer that a  
copy had been sent to that Office.

Instructions for National Offices. Examination of cases from the  
French National Committee led to the Secretariat being instructed  
to make the following requests to the National Offices:

- (1) that they should not omit to number their cases serially;
- (2) that all indications regarding military rank, military units,  
and non-military official positions should be given in  
their original language and not in translation;
- (3) that the National Offices should be careful to maintain  
contact with their witnesses, e.g., by asking witnesses  
to keep them informed of any changes of address;
- (4) that the National Offices should accompany the original copy  
of each case with four carbon copies on thin paper, if  
possible, and in any case with two;
- (5) that the National Offices should specify for each case  
what provision(s) of their national criminal law,  
whether civil or military, was violated by the war crimes  
charged.

Examination of the cases.

Certain cases were examined with the results indicated:

- Fr/G/1 and 2 - adjourned pending further information;
- Fr/G/3 - provisionally listed and further information asked for;
- Fr/G/4,5,6,13 and 7 - adjourned pending further information;
- Fr/G/8 - provisionally ~~accepted~~ <sup>listed</sup> subject to completion.

The files containing all the cases before the Sub-Committee were  
handed over to M. Cassin in order that he might insert the numbers  
of the cases in the French National Office's files.

*H. McKinnon Wood*  
*Secretary General*

207

\*Resolution adopted by Committee I, September 27th, 1944.

In cases where the charge against a war criminal laid before the Commission is found to concern nationals of Government other than that submitting <sup>(such)</sup> the charge, notice should be given to ~~that~~ Government in order that it may have an opportunity of considering what action, if any, it desires to take. Such notice should be given to the National Office of the Government concerned, if there ~~is any~~ such National Office in London, or, if not, to ~~a~~ member of the Commission appointed by that Government.

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