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UNITED NATIONS WAR CRIMES COMMISSION

(1)

Draft - CONVENTION FOR THE SURRENDER OF WAR CRIMINALS

(Enumeration of the Heads of States)

Having resolved to conclude a Convention with the object of achieving the surrender of war-criminals;  
In view of the Declaration made at St. James's Palace, London on 13th January 1942;  
have appointed as their Plenipotentiaries the following:  
(List of Plenipotentiaries).  
Who, having communicated their full powers, found in due and good form, have agreed on the following provisions:

Article 1.

The High Contracting Parties mutually agree to surrender to each other for the purposes of trial or execution of judgment those persons who are, even temporarily, within their jurisdiction and who are charged with or convicted of an offence, which, since the date on which the State requesting the surrender entered into a state of war or on which its borders were crossed by enemy troops, was committed with intent to further the cause of the enemy, or with the power, opportunity or means, afforded by the state of war or the fact of the enemy occupation, and which according to the laws of the country requesting surrender is punishable with the death penalty or with detention in a penal institution of not less than three years and which offence was committed either within the jurisdiction of the State requesting surrender or against that State, its nationals or bodies incorporated or constituted under its laws, irrespective whether the alleged offence can be considered to have a political nature or not.

The present convention constitutes an exceptional measure, which does not prejudice the existing extradition treaties in any way.

Article 2.

The request for surrender shall be transmitted through the diplomatic channel and shall contain in any event:

1. In the case of an alleged offender:
  - A.
    - 1° the identity, nationality and description of the alleged offender;
    - 2° the description of the alleged offence and the maximum penalty which can be inflicted for that offence;
    - 3° the indictment or warrant for the arrest of the alleged offender in respect of the alleged offence;
    - 4° summary evidence of the alleged offence and of the alleged offender's intent to further the cause of the enemy or of his having had recourse to the power, opportunity or means afforded by the state of war or the fact of the enemy occupation;
    - 5° the appropriate court before which the alleged offender will be tried.
  - B. The Government requesting surrender shall in every case give written assurances to the Government from whom the surrender is requested to the effect:

- 
- 1) This draft was drawn up by the Ministers of Justice of certain of the occupied countries.



2.

- 1° that the trial will be conducted in accordance with the established legal procedure;
- 2° that the trial will take place before a court of law and that judgment will be pronounced in open court.
- 3° that the alleged offender will be afforded the assistance of counsel both before and during the trial.

11 In the case of a convicted offender:

- 1° the identity, nationality and description of the convicted offender;
- 2° the description of the offence, and the penalty imposed;
- 3° the original or an authenticated copy of the judgment given by the appropriate court in respect of the offence and in the presence of the offender;
- 4° summary evidence of the alleged offender's intent to further the cause of the enemy or of his having had recourse to the power, opportunity or means afforded by the state of war or the fact of the enemy occupation.

Article 3.

The High Contracting Parties shall not surrender to each other their nationals and former nationals.

a. when the alleged offender has by way of judicial process conducted within their jurisdiction been found guilty or not guilty of the offence in respect of which the surrender is requested.

b. when criminal proceedings are instituted against the alleged offender regarding the offence in respect of which the surrender is requested within a period of six months from the date on which the Government from whom the surrender is requested, shall have received the request; or

c. when the authority in charge of criminal proceedings of the Government from whom the surrender is requested shall have declared in writing that in his opinion the evidence available would be insufficient to obtain a conviction, if the offence had been committed within the jurisdiction of the national court of the alleged offender.

Article 4.

In the event that more than one of the High Contracting Parties shall request the surrender of the same alleged offender, such person shall be surrendered first to the Government of the State, the national legislation of which contains the heaviest maximum penalty in respect of the alleged offence regarding which surrender is requested.

Where the maximum penalties in respect of the offences for which surrender is requested are the same, surrender shall first be effected to the Government which first requested the surrender.

Article 5.

No surrender shall be effected during the preliminary investigation or the trial of the alleged offender in the Courts of the State, to the Government of which the request for surrender is directed.

3.

In the event of a sentence of detention in a penal institution having been pronounced, the execution of the sentence will be suspended even if it is in the course of being executed, if the surrender of the convicted person is requested in accordance with Article 1.

A sentence of death shall however be executed irrespective of whether a Government of one or more of the High Contracting Parties shall have requested the surrender of the offender.

Whenever the alleged offender has been tried and sentenced or found not guilty by the appropriate courts of all the High Contracting Parties, who have requested the surrender of the person concerned, the sentences pronounced against him shall be executed in the countries in which they were pronounced in the order of their date.

Article 6.

The Governments of the High Contracting Parties agree to allow the transit through their territories of persons who are being surrendered by one of the signatories to the present convention to another signatory, on production of a certificate emanating from the Government of the State from whom the surrender is obtained. During the passage through such territories the person being surrendered and his escort may be accompanied by officials designated to that end by the Governments concerned.

Article 7.

All articles which may serve as proof of the alleged offence will be given up when the surrender takes place.

Article 8.

Each of the High Contracting Parties shall bear the costs resulting within their jurisdiction from the application of this convention.

Article 9.

The present Convention which will remain open to the signature of all Allied and Associated Powers of the United Nations and of Neutral States, shall be ratified.

Ratification shall be deposited as soon as possible with . . . . ., who will notify such deposit to all signatories.

Article 10.

The present Convention shall come into force one month after the date on which it shall have been ratified on behalf of two of the High Contracting Parties. Thereafter it shall take effect in the case of each High Contracting Party one month after the date of the deposit of the ratification on its behalf with . . . . .

In faith whereof, the above named Plenipotentiaries have signed the present Convention.

Done at London, this .... day of ..... one thousand nine hundred and fortyfour, in a single copy of which the English and French texts are both authentic.



February 14, 1944

UNITED NATIONS WAR CRIMES COMMISSION

SUB-COMMITTEE ON ENFORCEMENT

DRAFT CONVENTION FOR THE CREATION OF AN INTERNATIONAL CRIMINAL COURT  
SUBMITTED TO THE LONDON INTERNATIONAL ASSEMBLY

(Drafted by M. de Baer and amended by Commission I of the L.I.A.)

CHAPTER I

INSTITUTION AND JURISDICTION

Article 1.

Establishment of the Court

1. The United Nations hereby establish an International Criminal Court for the trial as hereinafter provided, of persons accused of war crimes.

Article 2.

1. War crimes are any grave outrages violating the general principles of criminal law as recognised by civilised nations and committed in war-time or connected with the preparation, the waging or the prosecution of war, or perpetrated with a view to preventing the restoration of peace.

2. War crimes can be perpetrated, either by direct action, or by participating in the crime, by aiding or abetting, inciting, conspiring or giving the order to commit the crime.

3. War crimes can be perpetrated, as a principal or an accessory, by any person whatever, irrespective of his rank or position, Heads of State included.

Article 3.

Scope of Jurisdiction

1. As a rule, no case shall be brought before the Court when a domestic Court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction.

2. Accused persons in respect of whom the domestic Courts of two or more United Nations have jurisdiction, may however, by mutual agreement of the High Contracting Parties concerned, be brought before the Court.

3. Provided that the Court consents, any crime as defined in Article 2 may be brought before the International Criminal Court, either by national legislation of the State concerned, or by mutual agreement of the High Contracting Parties concerned in the trial.

Article 4.Committal for trial

1. Each H.C.P. shall be entitled, instead of prosecuting before his own Courts a person residing or present in his territory who is accused of a war crime, to commit such accused for trial to the I.C.C.

2. A High Contracting Party who has - or whose national has - suffered damage by a war crime shall be entitled to request the prosecuting authority of the I.C.C. to summon before that Court any person accused of such crime residing or present upon the territory of another H.C.P. The H.C.P. upon whose territory the accused is residing or present when he is summoned to appear before the I.C.C. shall if requested to do so, arrest the accused and hand over to the prosecuting authority of the Court.

Article 5Legal nature of the handing over to the  
I.C.C. of accused persons

The handing over of an accused person to the prosecuting authority of the I.C.C. is not an extradition. The I.C.C. is deemed for the purpose of this Convention a Criminal Court common to all nations, and justice administered by this Court shall not be considered as foreign.

CHAPTER IIORGANISATION OF THE COURT, AND OF ITS AUXILIARIESArticle 6

The seat of the Court shall be established in London, but the Court may decide to meet elsewhere.

Article 7Language.

The official language of the Court shall be the English language.

Article 8.Qualifications of Judges

The Court shall be composed of judges chosen or elected from among jurists who are acknowledged authorities on criminal law and who are or have been members of high courts of criminal jurisdiction or possess the qualifications required for appointment to high judicial office in their own countries or who are recognised as authorities on criminal or international law. They shall be chosen or elected from among jurists who are conversant with the English language.

Article 9Number of Judges.

1. The Court shall consist of thirty-five judges.
2. The number of judges may be increased if the need arises.



Article 10.Election of Judges.

1. Each time a vacancy occurs, any H.C.P. in respect of which the present Convention is in force may nominate not more than three candidates for appointment as judges of the Court. The candidates may or may not be nationals of the nominating H.C.P.

2. The International Criminal Court shall elect the judges from the persons so nominated.

3. The appointment of the original judges shall be made by a joint decision of the H.C.Ps. Such appointment shall be made regardless of the nationality of the judge, but it shall take into account that the Court should represent the principal legal systems of the world and that it should ensure a fair representation of the countries that have been occupied by the enemy. Such appointment shall be made not more than two months after the time when the present Convention has been signed by seven H.C.Ps.

Article 11Declaration on assuming office

Every member of the Court shall, before taking up his duties, give a solemn undertaking in open Court that he will exercise his powers impartially and conscientiously.

Article 12Diplomatic privileges.

The H.C.Ps. shall grant the members of the Court diplomatic passports, privileges and immunities when engaged on the business of the Court.

Article 13Duration of appointments

1. Judges shall hold office for seven years, unless the Court has ceased to exist before the lapse of such period.

2. Every year, a number of judges shall retire. This number shall be adjusted in order to allow for a renewal of the Court after seven years.

3. Judges may be re-elected.

4. Judges shall continue to discharge their duties until their places have been filled.

5. Judges, though replaced, shall finish any cases they have begun.

Article 14Vacancies.

1. Any vacancy, whether occurring on the expiration of a judge's term of office or for any other cause, shall be filled as provided in Article 10.

2. In the event of the resignation of a member of the Court, the resignation shall take effect on notification being received by the

4.

Registrar.

3. If a seat on the Court becomes vacant more than eight months before the date at which a new election to that seat would normally take place, the H.C.Ps., shall within two months nominate candidates for the seat in accordance with Article 10, section 1.

#### Article 15

##### Unexpired term of office

A judge appointed in place of a judge whose period of appointment had not expired shall hold the appointment for the remainder of his predecessor's term.

#### Article 16

##### Judges Emeriti

A judge who has been honourably discharged from office shall be styled judge emeritus and shall be entitled to his full salary; he may, in case of emergency, be called upon to perform such duties as the Court may decide.

#### Article 17

##### Loss of office

A member of the Court cannot be dismissed unless in the opinion of the two-thirds of the other members, including the judges, the Procurator General and his deputies, he has ceased to fulfill the required conditions. The dismissal shall be pronounced by the I.C.C. upon request of the President or of any other judge or of the Procurator General, or of any of his deputies.

#### Article 18

##### Election of President and Vice-President

The Court shall elect its President and Vice-President for two years; they may be re-elected.

#### Article 19

##### Divisions of the Court

1. The Court may decide to split into two or more divisions.
2. The number of members who shall sit to try an accused shall be three, five, seven or more, according to the rules of the Court; when a case is submitted for revision, the number of judges who shall sit shall be at least seven.

#### Article 20

##### Disabilities of Judges

1. Judges may not take part in trying any case in which they have previously been engaged in any private capacity whatsoever, except with permission of the Court.
2. Judges who have, in the case which is before the Court, acted as counsel to one of the parties or otherwise, in any capacity other than official shall not take part in trying that case.



5.

3. If, for some special reason, a judge considers that he should not sit to try a particular case, he shall so notify the President and the Court shall decide

#### Article 21

##### Prosecuting Authority

1. The Prosecuting authority near the Court shall be a United Nations' Procurator General. He shall act on behalf of the United Nations as a whole. He shall be chosen by the Court among candidates of any nationality possessing the qualifications required in Article 8 and nominated in the manner prescribed in Article 10, Section 1. He shall hold his office for three years and may be re-appointed by the Court. The provisions of Articles 11, 12, 14, 15 and 16 apply to him. The appointment of the original Procurator General shall be made in the way prescribed in Article 10, Section 3, for the judges.

2. A number of deputies may be appointed to the Procurator General as the need arises. Their number is unlimited. They are appointed in the same manner and are submitted to the same provisions as the Procurator General. They act under his direction.

3. In respect of specific cases, the H.C.P. concerned may appoint an officer who will assist the Procurator General with his advice and act under his direction.

#### Article 22

##### Functions of the Procurator General

1. The functions of the Procurator General will be among others:
  - (a) To receive the complaints, conduct the preliminary investigations, collect the evidence, describe the charges, prepare the case for the prosecution, call witnesses and in general do all that is necessary to bring the case before the Court;
  - (b) To summon a person accused by a H.C.P. to appear before the Court in conformity with Article 31, Section 1;
  - (c) To demand, whenever necessary, the arrest and the handing over of persons mentioned in (b) hereabove;
  - (d) To give his opinion as to whether a person committed for trial shall be placed in custody by operation of Article 39;
  - (e) To appear and act on behalf of the prosecution whenever necessary;
  - (f) To bring before the Court on his own authority any person whom he accuses of a war crime, and to conduct the prosecution in any case which is sent to the Court by the United Nations Commission for the Investigation of War Crimes;
  - (g) To ensure the carrying out of the Court's decisions and orders; such decisions will be carried out in the name of the United Nations.

#### Article 23

The provisions of Article 17 apply to the Procurator General and to his deputies.

Article 24Registry

1. The work of the Registry of the Court shall be performed by a Registrar appointed by the Court.
2. The Court's archives shall be in the charge of the Registrar.

Article 25International Constabulary

1. Near the Court there shall be a body of International Constabulary which will be charged with the execution of the orders of the Court and of the Procurator General;
2. The members of this body shall be chosen by the Court among candidates belonging to different nationalities, in the manner prescribed for the nomination of the judges.
3. The H.C.Ps. will confer upon the Constabulary the necessary power to call the assistance of the local police, when such assistance is necessary for the performance of its duties.

CHAPTER IIIPRACTICE, PROCEDURE AND LAWArticle 26Power of the Court to enact Regulations

1. Within the limits traced by Chapter IV of the present Convention, the Court shall establish Regulations to govern its practice and internal procedure. These rules shall be decided by a majority of the judges, meeting to this effect.
2. The Court shall decide any questions as to its own jurisdiction arising during the hearing of a case; it shall for this purpose apply the provisions of the present Convention and the generally accepted principles of law.

Article 27Law to be applied

1. Until a convention laying down the main principles of international criminal law, defining the crimes and affixing penalties to them has been agreed upon, the Court shall apply:
  - (a) International custom, as evidence of a general practice accepted as law;
  - (b) International treaties, conventions and declarations, whether general or particular, recognised by the H.C.Ps.
  - (c) the general principles of criminal law recognised by the United Nations;
  - (d) judicial decisions and doctrines of highly qualified publicists as subsidiary means for the determination of rules of law;



2. No act may be tried as an offence unless it is specified as a criminal offence either by the law of the country of the accused, or by the law of his residence at the time of the commission of the act, or by the law of the place where the act was carried out, provided in each case that such law is in accordance with the general principles of criminal law recognised by the United Nations.

3. The penalty is, until a convention on international criminal law has been agreed upon, at the discretion of the Court. In administering the penalty, the Court shall however take into consideration the law of the territory on which the offence was committed, the national law of the accused person, and the law of the country where the crime was carried out, but the Court shall not be bound by any of these laws.

4. If the Court has to consider, in accordance with Article 1, the law of a State of which no judge sitting on the Bench is a national, the Court may invite a jurist who is an acknowledged authority on such law to sit with it, in a consultative capacity on points of law only.

#### Article 28

##### Superior Order

With regard to the plea of Superior Order the Court shall apply the following rules:

- (i) an order given by a superior to an inferior to commit a crime is not in itself a defence;
- (ii) the Court may consider in individual cases whether the accused was placed in a state of irresistible compulsion and acquit him or mitigate the punishment accordingly;
- (iii) the defence that the accused was placed in a state of compulsion is excluded:
  - (a) if the crime was of a revolting nature,
  - (b) if the accused was, at the time when the alleged crime was committed, a member of an organisation the membership of which implied the execution of criminal orders.

#### CHAPTER IV

##### INTRODUCTION OF CASES BEFORE THE COURT, PROCEDURE AND TRIAL

#### Article 29

##### Service of charge

1. Except in the case where he is committed for trial and delivered to the Court by virtue of Article 4, section 1, an accused person who is required to appear before the I.C.C. must be summoned by the Procurator General to this effect.

2. The Procurator General shall issue such summons if requested to do so by a H.C.P.

3. The summons shall be notified by the Procurator General to the accused through the channel of the H.C.P. upon whose territory he is present, or by any other means decided by the Court.

4. The charges brought against the accused shall be mentioned in the summons.

5. The Procurator General may request that the H.C.P. shall arrest

an accused who is present in his territory and hand him over to the Court for trial. If the accused is in Axis territory the Procurator General shall issue a warrant for his arrest by the International Constabulary.

#### Article 30

##### Procedure in the case of a H.C.P. committing a person for trial before the I.C.C.

1. A High Contracting Party who avails himself of the right conceded to him by operation of Article 4, section 1, of the present Convention to commit an accused person for trial to the Court shall notify the President through the Registry.

2. The President of the Court, on being informed by a H.C.P. of his decision to commit an accused person for trial to the Court in accordance with Article 4, section 1, shall notify the State on whose territory the offence was committed and the State of which the accused is a national.

3. The Court is in this case seized so soon as the above-said decision is notified to the Registry.

4. The document committing an accused person to the Court for trial shall contain a statement of the principal charges against him and the allegations on which they are based.

#### Article 31

##### Procedure in the case of a H.C.P. requesting that an accused shall be tried by the I.C.C.

1. A High Contracting Party who availing himself of the right conceded him by operation of Article 4, section 2, requests the Procurator General to summon an accused person to appear before the Court, shall state all the charges against him and the allegations on which they are based. The Procurator General shall deliver a summons requesting the accused to appear before the Court.

2. The accused who has been summoned by the Procurator General to appear before the Court, shall be compelled to do so. The Procurator General shall issue a warrant for his arrest by the International Constabulary.

3. The Court is in the case provided in this Article seized so soon as it has received communication of the request, either from the H.C.P. himself, or from the Procurator General.

4. After having heard the accused and taken the opinion of the Procurator General the Court shall decide whether the accused shall be committed for trial.

5. The Court may postpone this decision until it has obtained further information on the matter, either by means of letters of request or as provided in Article 41 or otherwise at the Court's discretion.

6. If the accused is committed for trial the prosecution shall be conducted by the Procurator General.



Article 32Rights of States to intervene

Any State entitled to seize the Court by virtue of Articles 30 and 31 may intervene, inspect the file, submit a statement of its case to the Court and take part in the oral proceedings.

Article 33

No accused shall be tried in absentia

Article 34Previous trial of accused

1. The fact that a person accused of a crime has been previously tried by an Axis Court for this same crime is not an obstacle to a trial before the I.C.C., whether the first trial ended with a conviction or with an acquittal. The Procurator General is in this case entitled to obtain without delay, from the H.C.P. in whose Courts the trial was held, the whole original file and evidence, which shall be submitted to the consideration of the I.C.C.

2. Conversely no person who has been tried by the I.C.C. shall be tried again for the same offence by a National Court.

Article 35"Partie Civile"

Any person who has directly suffered damage by the crime or offence may, if authorised by the Court, and subject to any conditions which it may impose, constitute himself "partie civile" before the Court; after he has constituted himself "partie civile" he shall not take part in the oral proceedings except when the Court is dealing with the damages.

Article 36Scope of the trial

The Court may not entertain charges against any person except the person committed to it for trial, or try any accused person for any offences other than those for which he has been committed, except by mutual consent of all parties concerned.

Article 37Abandonment of the Prosecution

The Court shall not proceed further with the case and shall order the accused to be discharged if the prosecution is abandoned and not at once recommenced by a State entitled to demand prosecution or by the Procurator General.

Article 38Rights of the defence

1. Accused persons may be defended by persons admitted as advocates by the Court.

2. If provision is not made for the conduct of the defence by an advocate chosen by the accused, the Court shall assign to each accused

person a counsel selected from persons admitted as advocates by the Court.

3. The accused and his advocate shall be entitled to inspect the file, statements and evidence. The documents shall be translated into the language of the accused if he so desires; one or more translators shall be appointed by the Court to those effects.

#### Article 39

##### Arrest of accused

1. The Court shall decide whether a person who has been committed to it for trial shall be placed or remain under arrest. Where necessary, it shall determine on what condition he may be provisionally set at liberty.

2. The state on the territory of which the Court is sitting shall place at the Court's disposal a suitable place of internment and the necessary staff of warders for the custody of the accused, if this is necessary.

#### Article 40

##### Evidence, Witnesses, Experts

1. The parties may submit to the Court the names of witnesses and experts, but the Court shall be free to decide whether they shall be summoned and heard. The Court may always, even of its own motion, hear other witnesses and experts. The same rules shall apply as regards any other kind of evidence.

2. The Court may decide that the witnesses will be heard either in Court, or before one of the judges of the Court at a place prescribed by the Court, or before the judicial authorities of another State, by letters of request.

3. H.C.P. undertake to give the Court every assistance, especially in respect of the attendance of witnesses, which will be secured, eventually by compulsion, according to the rules of the country where the witness is residing.

4. Any evidence shall be recorded.

#### Article 41

##### Letters of request

1. Any letters of request which the Court considers it necessary to have despatched shall be transmitted to the State competent to give effect thereto by the method prescribed by the regulations of the Court.

2. When one of the judges is charged with the mission of conducting these operations, the H.C.P. upon whose territory they are to take place will give him any assistance required by him for the fulfilment of his mission. He shall be entitled to demand such assistance to the Government of the H.C.P. concerned.

#### Article 42

##### Hearings of the Court : presence of the accused

Except when the Court decides otherwise, no examination, no hearing of witnesses or experts and no confrontation may take place before the Court in the absence of the accused, and his advocate. The operations



11.

mentioned in Article 41 are not subjected to the conditions of this Article.

#### Article 43

##### Publicity of hearings

1. The hearings before the Court shall be public.
2. Nevertheless, the Court may, for special reasons decide that the hearing shall take place "in camera". Any judgment shall be pronounced at a public hearing.

#### CHAPTER V

##### THE JUDGMENT, ITS EXECUTION, PARDON AND REVISION

#### Article 44

##### Delivery of judgment.

1. The Court shall sit in private to consider its judgment, and the judges are bound to secrecy as to their deliberations.
2. The decisions of the Court shall be by a majority of the judges sitting in the case, and the decisions shall be deemed to be the opinion of the Court as a whole.
3. Every judgment or order of the Court shall state the reasons therefor and be read at a public hearing by the chairman. Only the reasons which carry the decision of the majority shall be included in the sentence, and no dissenting opinion shall be published or divulged in any way.

#### Article 45

##### Confiscations and damages.

1. The Court shall decide whether any object is to be confiscated or be restored to its owner.
2. The Court may sentence the persons committed to it to pay damages, and costs of proceedings.

#### Article 46

##### Restitutions and recoveries

1. H.C.Ps. in whose territory objects to be restored or property belonging to convicted persons is situated, shall be bound to take all the measures provided by their own laws to ensure the execution of the sentence of the Court.
2. The provision of this article shall also apply to cases in which pecuniary penalties imposed by the Court, compensation for damages or costs of proceedings have to be recovered.

#### Article 47

##### Fines

The Court shall determine the way in which any fines shall be dealt with : failing special determination any amounts collected as fines or

costs shall be credited to the common fund established by Article 53 hereafter. Costs shall be in the discretion of the Court.

#### Article 48

##### Execution of sentences

Sentences involving loss of liberty shall be executed by a H.C.P. chosen with his consent by the Court. Such consent may not be refused by the State which committed the convicted person to the Court for trial, or by the State upon whose request the convicted person was committed to the Court for trial; the sentence shall always be executed by the State which committed the convicted person to the Court if this State expresses the wish to do so.

#### Article 49

##### Capital Punishment

If sentence of death has been pronounced, and the legislation of the State designated by the Court to execute the sentence does not provide for capital punishment, the State concerned shall be entitled to substitute therefor the most severe penalty provided by its national law which involves loss of liberty.

#### Article 50

##### Pardon

The right of pardon shall be exercised by the State which has to enforce the penalty.

#### Article 51

##### Revision

1. Against convictions pronounced by the Court, no proceedings other than an application for revision shall be allowable.
2. The H.C.Ps. mentioned in Article 30 and 31 and the persons sentenced by the Court shall have the right to apply for a revision.
3. It is in the discretion of the Court to grant or to refuse a revision; the reasons for the grant or refusal shall not be given except when the revision has been requested by a H.C.P.

### CHAPTER VI

#### MEASURES FOR THE APPLICATION OF THE PRESENT CONVENTION

#### Article 52

##### Assistance

The H.C.Ps. undertake to assist the Court and the Procurator General in the discharge of their duties. They undertake to adjust their national legislation to meet the requirements of the present Convention.

#### Article 53

##### Common fund

1. There shall be created by contributions from the H.C.Ps. a



common fund from which the salaries and pensions of all members and officers of the Court, the costs of the proceedings and other expenses involved in the trial of cases, including any fees and expenses of counsel assigned to the accused by the Court, shall be defrayed, subject to recovery from the accused if he is convicted. The expenses of the Court, of the Procurator's office and of the Registry shall be met out of this fund.

2. The salaries of the judges, of the Procurator General and of the other officers of the Court shall be payable from this fund on a scale fixed by the H.C.Ps., as well as any pensions which may be payable to their widows.

#### Article 54

##### Transitional measure

Until the time when the present Convention is in force between sixteen States it shall be possible for a judge and a deputy judge to be both nationals of the same State, but a judge and a deputy judge of the same nationality shall not sit together in a case, except when it is impossible to do otherwise.

#### Article 55

##### Meetings with representatives of H.C.Ps.

1. Representatives of the H.C.Ps. shall meet whenever necessary together with the Court and the Procurator General with a view to taking all necessary decisions concerning:

- (a) the constitution and administration of the common fund and the division among the H.C.Ps. of the sums considered necessary to create and to maintain such fund;
- (b) the appointment of additional judges in the event provided in Article 10, section 2;
- (c) the appointment of additional deputies-Procurator General as provided in Article 21, section 2;
- (d) all other questions bearing on the establishment and the working of the Court,
- (e) the prolongation or curtailment of the Court's existence.

2. The Government of the first State to sign this Convention is requested to convene the first meeting of representatives of the H.C.Ps. The Meeting is to take place within two months after the date upon which the Convention has been signed by seven H.C.Ps.

3. The Registrar of the Court shall act as Secretary of those meetings, he shall convene subsequent meetings in conformity with the rules which may be established to that effect or the orders of the Court.

#### Article 56

##### Contestations or disputes

1. If any dispute should arise between the H.C.Ps. relating to the interpretation of application of the present Convention, and if such dispute has not been satisfactorily solved by diplomatic means, it shall be settled in conformity with the settlement of international disputes.

2. If such provisions should not exist between the parties to the dispute, the parties shall refer the dispute to an arbitral or judicial procedure. If no agreement is reached on the choice of another court,

the parties shall refer the dispute to the Permanent Court of International Justice, if they are all parties to the Protocol of December 16th, 1920, relating to the Statute of that Court; and if they are not all parties to that Protocol, they shall refer the dispute to a court of arbitration constituted in accordance with the Convention of The Hague of October 18th, 1907, for the Pacific Settlement of International Disputes.

#### Article 57

##### Date, signature, and ratification of the present Convention

1. The present Convention, of which the French and English texts shall both be authentic, shall bear today's date. Until . . . . . it shall be open for signature on behalf of any State.

2. The present Convention shall be ratified. It shall however provisionally come into force, without awaiting such ratification, on the day following that upon which it has been signed by seven H.C.Ps.

#### Article 58

##### Accession to the Convention

1. After . . . . . the present Convention shall be open to accession by any State on whose behalf the Convention has not been signed.

2. The instruments of accession shall be transmitted to the Secretary-General of the League of Nations to be deposited in the archives of the League; the Secretary-General shall notify their deposit to all the Members of the League and to the States referred to in Article 57.

#### Article 59

##### Territorial reservations

1. Any H.C.P. may declare, at the time of signature, ratification or accession, that in accepting the present Convention he is not assuming any obligation in respect of all or any of his colonies, protectorates or overseas territories, territories under his suzerainty or territories in respect of which a mandate has been entrusted to him: the present Convention shall, in that case, not be applicable to the territories named in such declaration.

2. Any H.C.P. may subsequently notify the Secretary-General of the League of Nations that he desires the present Convention to apply to all or any of the territories in respect of which the declaration provided for in the preceding section has been made. The Convention shall, in that case, apply to all the territories named in such notification ninety days after the receipt thereof by the Secretary-General of the League of Nations.

3. Any H.C.P. may, at any time, declare that he desires the present Convention to cease to apply to all or any of his colonies, protectorates, overseas territories, territories under his suzerainty or territories in respect of which a mandate has been entrusted to him. The Convention shall, in that case, cease to apply to the territories named in such declaration one year after the receipt of this declaration by the Secretary-General of the League of Nations.



4. The Secretary-General of the League of Nations shall communicate to all the Members of the League of Nations and to the non-member States mentioned in Articles 57 and 58 the declarations and notifications in virtue of the present article.

#### Article 60

##### Registration of this Convention

The present Convention shall be registered by the Secretary-General of the League of Nations in accordance with Article 18 of the ~~Convention~~. Covenant.

#### Article 61

##### Denunciation

The present Convention may be denounced on behalf of any H.C.P. by a notification in writing addressed to the Secretary-General of the League of Nations, who shall inform all the States referred to in Articles 57 and 58. Such denunciation shall take effect one year after the date of its receipt by the Secretary-General of the League of Nations, and shall be operative only in respect of the H.C.P. on whose behalf it was made.

#### Article 62

##### Effects of denunciation upon specific cases

1. A case brought before the Court before the denunciation of the present Convention, or the making of a declaration as provided in Article 59, section 3, shall nevertheless continue to be heard and judgment be given by the Court.

2. A High Contracting Party who before denouncing the present Convention has under the provisions therefor incurred the obligation of carrying out a sentence, shall continue to be bound by such obligation: unless the Court decides to entrust another H.C.P. with this obligation, in which case the convicted person shall be surrendered to the H.C.P. who has undertaken to carry out the sentence.

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SC II / 3.  
25th February, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

SUB-COMMITTEE II (ENFORCEMENT)

Report

on the Constitution of and the Jurisdiction

to be conferred on an

INTERNATIONAL CRIMINAL COURT (1)

(submitted to the London International Assembly by Dr. J.M. de Moor)

Par. 1. INTRODUCTION.

Before dealing with the more technical juridical side of the institution and the method of procedure of an International Criminal Court (initially for the punishment of War Criminals, and later on as an indispensable organ of a new International order), we have first of all to look at the practical side of the problem, and weigh up the chances of achieving our object.

Therefore it is useful briefly to go over what recently has been said by leading statesmen in this connection about the punishment of War Criminals.

It will be remembered that, following upon the well known Declaration of Allied Continental Powers made at St. James' Palace on the 13th January 1942, in which the punishment of War Criminals by means of an organised administration of justice was declared to be one of the chief war aims, the subject was exhaustively discussed on the 7th October 1942 in the House of Lords (2).

At the same time President Roosevelt made a similar declaration.

An Anglo-American proposal, vigorously acclaimed by all the Allies, was also made known, having as object the establishment with as little delay as possible of a "United Nations Commission for the Investigation of War Crimes" whose task would be to collect evidence of war crimes during the war, and to take steps to produce the criminals for trial.

The individuals suspected of war crimes would as far as possible have to be surrendered at the signing of, or during the period of the Armistice, The Lord Chancellor was of the opinion, and in this he was supported by Lord Addison, that when this Commission had collected the evidence and the suspect had been arrested, the further administration of justice could best be left to the National Courts.

- (1) In this report certain special considerations have been devoted to the possible powers of the proposed "United Nations Commission for the Investigation of War Crimes."
- (2) See Parliamentary Debates: House of Lords Official Report-vol. 124. No. 86. Wednesday 7th October 1942, in which were included, in addition to the Speech of Lord Simon, also those of Lord Maughan, Lord Cecil and others. See also "Punishment of War Criminals"(2). A document issued by the Allied Information Committee, London. Published by H.M. Stationery Office.



With regard to the establishment of one or more International Criminal Courts, the Lord Chancellor declared himself willing to discuss this with the Allies, but he thought that it would be very difficult to find a solution to this problem, more particularly in view of the great difference in procedure between the Anglo-American and the European-Continental legal system.

In the Speech to Members of St. Stephens Club which he gave at the beginning of this year (1943) the Lord Chancellor further developed this theme, and according to the newspaper reports, he once more emphasized that it was the Allies' firm intention "to mete out just and sure punishment to ringleaders responsible for the organised murder of thousands of innocent people, and for atrocities, which had violated every tenet of the Christian faith." The guilty should include not only the highly placed individuals who inspired and directed these monstrous crimes, but also those who in cold-blooded ferocity had organised and taken a definite and responsible part in carrying them out.

"The modus operandi of the United Nations Commission for the Investigation of War Crimes still formed the subject of a special study."

#### Par. 2. The United Nations Commission for the Investigation of War Crimes

If it is intended to fix the task of this Commission in conformity with the scheme indicated at the time by the then Commission I of the London International Assembly, it would not only have to decide which cases should be brought before the Courts, and to take steps to produce the criminals for trial, but it would have a far more extensive task.

For instance, it would be obvious, that - so long as an International Criminal Court is not in existence - the Commission should have to decide to what extent an eventual call upon the "Plea of Superior Order" would permit the case to be sent forward to be judged or not. This would have the advantage that with respect to such a matter of principle a certain unity would be achieved - in spite of all divergence of procedure - without any alteration in the respective National Legislations.

Besides this, the Commission would be most competent to decide which "United Nations Courts - in case of equal competency - would be appointed, and have the honour of administering justice.

In the third place, this Commission - as long as the International Criminal Court does not exist - could fulfil the work which in the Report of Dr. Benes to Commission I regarding "Extradition" was attributed to that Court, namely, to decide whether or not a crime has to be considered as a political one, with respect to an Allied request for extradition by Neutral Countries of persons suspected of War Crimes. - (This "extradition" to be requested of the Neutral Countries, is to be clearly differentiated from the "Surrender" to be made by the Axis States, and the "exchanges" which may take place between the Allies themselves.)

With regard to cases which have been sufficiently investigated before the Armistice, the Commission will have to produce a List of names of suspects to the Allied Governments, in order to ensure their surrender immediately at the cessation of actual hostilities.

In respect of complaints coming in later, and which still ought to be investigated, the Commission should have the power independently to trace suspects in the occupied and ex-enemy territories, there to collect the necessary evidence, hear witnesses, prepare the cases for submission to the Courts, if necessary also to demand the "surrender or Extradition" of

to be requested of the Neutral Countries, is to be clearly differentiated from the "Surrender" to be made by the Axis States, ...

suspects, and finally to hand over such suspects to the afore-mentioned Courts of Justice, - or, as Lord Simon said: "to take steps to produce the criminals for trial " (1)

In art. 230 of the Treaty of Versailles, it was already laid down that "the Germans had to furnish all documents and information of every kind, necessary to ensure the full knowledge of the incriminating acts, etc." This did not appear to be sufficient, and ended in a fiasco at Leipzig (2), We shall therefore have to take matters into our own hands this time.

If the competence of the United Nations Commission for the Investigation of War Crimes would be fixed on the large above mentioned basis, - the Commission working on one side partially as a general tribunal, on the other as a great International Public Prosecuting Office, and the great majority of the cases finally being judged by the National Courts, the question of the punishment of war criminals would, to a considerable extent, be solved.

I feel myself obliged in this connection once more to emphasize this point, because the establishment of the United Nations Commission for the Investigation of War Crimes may now be considered as very near, and a development of the functions and of the task of this Commission in the direction indicated is by no means excluded. To my knowledge, this opinion is shared by many prominent English Jurists.

On the other hand, although only a short while ago Lord Lytton and the English Trade Unions Council declared themselves in favour of such a Court, and in addition Mr. Hambro, in his book: "How to win the Peace", recommended it warmly, the chances of founding an International Criminal Court for the punishment of war criminals are alas somewhat smaller, at least in the immediate future.

As we all know, on one side, it takes a certain time to establish an International Organisation of this kind, and especially to get the ratification of all the concerned Nations, - on the other the available time in so urgent a matter as the judging of war criminals is now very short.

For this reason it would seem to me to be a token of wise discretion to strive in the first place for the development and consolidation of the tasks and powers of the United Nations Commission for the Investigation of War Crimes in the direction already indicated. The liberation of Mussolini after the signing of the Armistice with Italy, with all its consequences, in spite of the constant and re-iterated urgings of the experts that this time the surrender of the chief war criminals must take place before, and as a condition of, the signing of an Armistice, only proves once more how important it is in such a matter to stick to one's guns, and above all to act in a practical fashion.

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- (1) Of course in cases where the concerned United Nations Governments have the suspects already in hands, and the Government of no other United Nation claims them, the intermediary of the United Nations Commission is not necessary. All these cases can be judged by the competent national Courts.
  - (2) See inter alia Claude Mullins: "The Leipzig Trials", London 1921, and "German War Trials", Report of Proceedings before the Supreme Court in Leipzig, published by H.M. Stationery Office, London, 1921.



Paragraph 3. Grounds for the institution of an International Criminal Court.

In the meantime, the foregoing does not mean that the speedy formation of an International Criminal Court alongside the United Nations Commission for the Investigation of War Crimes, either in independent form or as part of the "Permanent Court of International Justice at the Hague, is not extremely desirable, and we should continue to strive for it with all our strength.

In the first place, surely the judging of a certain, be it limited, number of the most prominent criminals, such as HITLER, HIMMLER, GOEBBELS, GOERING, MUSSOLINI, CIANO, etc., etc., could take place much better by an International Criminal Court than by any National Court of Law, however high its standing and however undoubted its integrity might be. It can even be said that the trial of these individuals, if it is to give general satisfaction, can and may only take place through the medium of an International Organ.

In the second place, an International Criminal Court is still more qualified for the three functions which in the absence of such a Court have to come to the United Nations Commission for the Investigation of War Crimes, namely: -

- (a) the settlement of competence between the Allied Courts in cases where several consider themselves equally competent;
- (b) the decision regarding eventual Pleas of Superior Order; and
- (c) deciding the question whether a crime is a political or a social one in the case of requests for extradition to so-called Neutrals - which question would surely be more in its place at an International Criminal Court.

In the third, and certainly not the least important, place, the establishment of an International Criminal Court is of the greatest importance for the future, as it cannot be done without in the post-war World-Organisation. Any organisation for the maintenance of International Order and Peace is in my opinion not complete if it does not possess an International Criminal Court before which these persons who disturb or threaten to disturb international order or peace can be summoned, and by which they can, if need be, punished or eliminated.

Indeed, the real significance of the punishment of war criminals, is only made clear when it is viewed in conjunction with the construction of a new International Order. For the object of this punishment - as Lord Cecil expressed so lucidly in his Speech in the House of Lords on the 7th October 1942 - is chiefly threefold, viz:

- (a) to give satisfaction to the shocked sense of right and wrong of the whole civilized world, and particularly of the peoples in the Axis-occupied territories;
- (b) to frighten future wrong-doers; and
- (c) to re-establish respect for Law and Order in the whole world.

These basic principles can undoubtedly best be established by the activities and judgements of a really International Criminal Court.

Par. 4. History and Development of the idea of the formation of  
an International Criminal Court. (1)

In the past there have been several attempts to establish an International Criminal Court, and we have a number of projects and examples at our disposal.

More particularly in the course of the Great War of 1914 - 1918 the idea of an International Criminal Court was frequently brought up.

The Committee of Fifteen, formed after the War of 1914 - 1918 by the Temporary Peace Conference, recommended on the 25th January 1919 the constitution of a "High Tribunal" to be formed by three Members appointed by each of the Five Great Powers, and one by each of the smaller Powers. It would apply the principles of the Law of Nations as they result from the usages established among civilized peoples, from the Laws of Humanity, and from the dictates of public conscience. The Court would itself decide upon its procedure. Especially four classes of charges should be brought before the Court:

- a) those against civilians and soldiers of several Allied Nations, such as outrages committed in prison camps, where prisoners of war of several nations were congregated;
- b) those against persons of authority, whose orders were executed not only in one area or on one battlefield, but affected the conduct of operations against several of the Allied Armies;
- c) those against civil or military authorities, without distinction of rank, including the Heads of States, who ordered, or, abstained from preventing or taking measures to prevent, putting an end to, or repressing, violations of the laws or customs of war;
- d) those against such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court, other than the "High Tribunal."

A special ruling was made for the prosecuting organ at the Tribunal. These proposals were not accepted, chiefly owing to objections from America and Japan.

In art. 227 of the Versailles Treaty, a special International Criminal Court was thereupon proposed to try Wilhelm the Second of Hohenzollern. This article reads as follows: -

"The allied and associated powers publicly arraign Wilhelm II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of Five Judges, one appointed by each of the following Powers, namely: the United States of America, Great Britain, France, Italy and Japan.

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(1) In order to enter not too much in details we will not mention here other forms of International Penal Jurisdiction, which are not concentrated in one Central International Court, such as the jurisdiction of the "Tribunaux Mixtes" in Egypt and the "Allied Maritime Courts" (Allied Powers Maritime Courts Act 1941), etc., although they possess some interesting aspects for our problem, and have worked very successfully.



In its decision the Tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings, and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed."

Solely because, under the existing regulations, the Netherlands could not, and should not, surrender William II for an "offence against international morality and the sanctity of treaties", the International Criminal Court in question never became a reality.

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The President of the Hague Jurists-Committee for the drawing up of a scheme for a Permanent Court of International Justice of 1920, the Belgian Descamps, made a proposal regarding a "Haute Cour de Justice Internationale" entitled to deal with crimes against public order and the general law of nations, which would be referred to the Court by the Council or the Assembly of the League of Nations. The Court would have the competence "pour caractériser le délit, fixer la peine, et déterminer les moyens appropriés à l'exécution de la sentence." The Committee passed a "votum" recommending an inquiry into this proposal by the Council and the Assembly of the League. The Assembly decided - in agreement with the statement of their appointed Reporter, the Belgian, Fontaine, that the problem was still "très prématuré" (1)

The Conference of the International Law Association at Buenos Ayres (1922), Stockholm (1924) and Vienna (1926) were more successful, causing the acceptance of a draft-Statute for a Permanent International Court of Justice.

Afterwards the institution of such a Court was constantly discussed, especially at the Congresses of the "Union Interparlementaire" and of the "Association internationale du droit pénal". - In 1937 a scheme for an International Court of Justice was presented by the League of Nations at the "Conference regarding the Repression of Terrorist Deeds". A Convention was signed by the representatives of all the participating States, but unhappily it was never ratified by the various Governments. These two projects of the International Law Association and the League of Nations can now be of great use to us, and I shall revert to them later.

Of no less significance are the experiences of the Permanent Court of International Justice in the Hague, which has gained great authority in the course of time. It is true that this court has so far not been occupied with "Criminal Law", but its rules of procedure and its composition may serve us to some extent as an example.

The question even arises as to whether - especially in view of the very limited time remaining to us to arrive at a result (it has now actually become a matter of months) - the solution could not be found in the formation of a separate "Penal Chamber" of the Permanent Court of International Justice in the Hague, whereby the existing organisation and procedure could be utilized. -

I think, however, that I must answer this last question in the negative, because the existing organisation and procedure - taking into consideration the altered circumstances and the special task of the new "Penal Chamber" - would in any case not satisfy. For instance, the Court could no longer remain coupled to the Organisation of the League of Nations, as it has been so far. Discussions regarding this are already taking place between the United Nations.

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(1) See Report of the 3rd Committee, Actes, Séances Plénières 1920, p. 764.

Moreover, the Criminal Court here envisaged is - at any rate for the time being - more an Inter-Allied Court than a strictly International Court, whilst for instance the choosing of the Judges of the Permanent Court of International Justice is also fairly intricate, and the last existing composition of the Judges of the Court would not help us in the least.

Finally, a penal law suit is directed by quite other rules, than for instance, a civil one.

#### Par. 5. Difficulties

Undoubtedly the questions, which material law and which procedure are applicable, and that of the language to be used, are among the most difficult problems which we have to solve in order to establish an International Criminal Court.

The Lord Chancellor, Lord Simon, in this connection said in his Statement in the House of Lords on the 7th October, 1942: -

"I will venture to make one observation, purely provisional and tentative, on the third class of tribunal to which attention has naturally been drawn, and which both the noble Viscount, Lord Cecil, and the noble and learned Viscount, Lord Maughan, discussed. I agree, if I may say so, with the noble Viscount, Lord Cecil, that the main difficulty in creating and putting to work effectively this conception of an International Criminal Court is not the difficulty of language; but let nobody run away with the idea that this is an easy conception to make speeches about in general terms. It is an exceedingly difficult matter to deal with if one desires to face and to try to overcome the practical difficulties. The composition of such a Court is not going to be a very easy matter, especially when there are so many belligerents. Strictly speaking, I do not think that it ought to be called an International Court; it ought to be called a United Nations Court, or an Allied Court, for, unlike the Hague Tribunal, or bodies of that sort, it does not really aim at staffing itself by Judges drawn from, amongst others, the enemy countries, or, I should think, the neutral countries.

Then, when you have created this novel Tribunal, you still have to face the question of what is the code of law which it is going to apply. I think myself, as a man who has spent a good deal of his life in the practical business of the law, that one of the greatest difficulties of all, which I dare say to a layman seems comparatively unimportant, would be procedure; for the procedure which is understood and followed in a British Court is completely unlike the methods which are followed elsewhere. There may be a great deal to be said for both views, but before your Court can even start you have to decide what your procedure is going to be. Therefore, without in the least wishing to pour cold water on the idea - and indeed, I see the importance of the point made both by the noble and learned Viscount, Lord Maughan, and by the noble Viscount Lord Cecil, regarding exceptional cases - I think that we shall probably be wise to put our main trust, as far as a tribunal goes, in tribunals, which do not call themselves international."

A former Lord Chancellor, Lord Maughan, spoke in somewhat similar terms. But these and other intricate problems should not to my mind frighten us or lead us to the conclusion that therefore it is impossible to establish an International Criminal Court. - It is true that the formation of an International Criminal Court does bring us upon wholly untrodden paths. But the same could have been said of the Permanent Court of International Justice, and yet this was established, and in the short period of its existence acquired great authority.



Par. 6. The Competence of the International Criminal Court

There was originally a considerable difference of opinion regarding the question whether an eventual International Criminal Court would have to try all war criminals, or only a limited number. But on this point, and also on the question of the describing of the competence of the International Criminal Court, a positive opinion - at any rate in the London International Assembly - has been established. It has been laid down in a motion passed by the Assembly, which we can here take over as far as is necessary, and which proposes: -

"that war crimes which come under the jurisdiction of Municipal Courts of the United Nations will be tried by such Courts (either civil, military, or mixed), in conformity with the laws of the country concerned; that an International Criminal Court shall have jurisdiction over the following categories of crimes:

- (a): Crimes in respect of which no United Nations Court has jurisdiction (e.g.: crimes committed in Germany against Jews and stateless persons and possibly against Allied nationals);
- (b): crimes in respect of which a United Nations Court has jurisdiction, but which the State concerned elects not to try in its own Courts (for reasons such as the following:  
where a trial in the country concerned might lead to disturbances,  
where a National Court would find it difficult to obtain evidence);
- (c): crimes which have been committed or which have taken effect in several countries or against nationals of different countries;
- (d): crimes committed by Heads of States."

This, however, only describes the first and most urgent task of the Court. Later on a more comprehensive description of the Court's powers would have to be added in the sense of the Report of the International Law Association of 1926.

According to this Report the Court would have to decide on violations of international legal obligations of criminal character, on violations of treaties regulating the usages and methods of warfare, and on violations of the customs of war generally accepted as binding by all civilised nations. (art. 23 du Statut de la Cour.)

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Par. 7. The composition of the International Criminal Court.

According to art. 1. of the Statute of the Permanent Court of International Justice, (1), this "shall be composed of a body of independent Judges", chosen from amongst those who "possess the qualifications required in their respective countries for the highest judicial offices, or are jurisconsults of recognised competence in international law."

By virtue of art. 3. of the Statute this Court consists of eleven Judges and four Deputy Judges. This has since been increased to fifteen Judges and four Deputy Judges.

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(1) An extract from the Statute of the Permanent Court of International Justice is appended as Annex No. 1 to this Report.

The candidature takes place in principle through the national groups of arbiters of the Permanent Court of Arbitrage (Arbitration), that is to say in each country by the four persons whose names had been placed by the respective Government on the List of Arbitors (art. 4., par. 1.)

Each group can propose a maximum of four candidates, of which at the most two may be of the group's own nationality. (art. 5, par. 2.)

The elections take place simultaneously by the Assembly and by the Council of the League of Nations (art. 4., par. 8)

Only those who are chosen by both these organs are elected. If after three divisions seats are still unfilled, a special procedure of mediation is adopted, and should even this not yield any result, then the ones already elected are to choose the remainder from among those who have already had votes cast for them. (art. 12)

At each election care is to be taken that the Members elected should together represent the foremost forms of civilization and the most important systems of jurisprudence in the world. (art. 9.)

The election is valid for nine years, and Judges may be re-elected (art. 13).

Members of the Court can only be dismissed from their functions if in the unanimous opinion of their colleagues they no longer fulfil the requisite conditions. (art. 18).

During the exercise of their functions they enjoy diplomatic privileges and immunity (art. 18).

The Court is established at The Hague (art. 22).

It is obvious that in this way the composition of the Permanent Court is closely allied to the organism of the League of Nations, and moreover is fairly complicated.

The project of the International Law Association adopted in Vienna in 1926 follows with regard to the composition of the Court almost entirely the system of the Permanent Court at the Hague (See arts. 1 - 14 of the Viennese proposed Statute (1)). It even stipulates that the International Criminal Court shall form a special Chamber of the Permanent Court, with this reservation: "qu'elle exercera sa juridiction séparément dans les affaires où des États ou des individus seront accusés d'infractions internationales."

The convention for an International Criminal Court for the prevention and punishment of acts of terrorism adopted at Geneva in 1937 also corresponds in many respects with the design of the Permanent Court of International Justice and the Vienna project of the International Law Association of 1926, but also shows some interesting differences.

For instance, the convention of 1937, diverging from what is laid down in Article 2 of the Statute of the Permanent Court, declares: "that the Judges shall be chosen among Jurists who are acknowledged authorities on Criminal Law, and who are or have been members of Courts of Criminal Jurisdiction, or possess the qualifications required for such appointments in their own country". - In this way a far stronger stress is laid upon legal experience and judicial training.

The method of election is also different. The respective Governments may each submit not more than two candidates. From these candidates the Permanent Court is to choose five Judges and five Deputy Judges, on regulations of its own making. The nominations in this instance are to be valid for ten years, and every two years one Judge and one Deputy Judge is to resign.

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(1) A Copy of the 1926 Statute is appended as Annex II to this Report.



I feel that when coming to the appointment of Judges and Deputy Judges, we shall have to separate ourselves from the League of Nations. On the one hand we shall have to keep the requirements for nomination very strict, as per the Convention of 1937, but on the other hand make the actual designations as simple as possible. The number of Judges will also have to be larger than is proposed in the above-mentioned projects.

When, however, the composition of the Court is being decided upon, perhaps the most important thing of all will be to differentiate between the:

1st period: during which it will chiefly be occupied with the punishment of war criminals; and the

2nd period: when after the Peace Treaty has been signed, it will also be occupied with a broader and more comprehensive task as is already indicated in par. 6 of this Report and amplified in art. 23 of the Vienna project.

In the first period the Judges and the Deputy Judges will of necessity have to be designated by the Governments of the United Nations direct, without the intermediary of any other organ. The Court will therefore - as I have already indicated - in the first period still be a "United Nations Criminal Court."

Later on, however, after the signing of Peace, and with the extension of the tasks of the Court, another method of composition could also be adopted. For instance, when finally ex-neutral Powers are conjoined, the various Governments could submit a certain number of candidates, from whom a body such as the Permanent Court of International Justice at The Hague could make a choice on a basis to be settled upon later.

In this way the establishment of the International Criminal Court will not have to wait until the end of the war.

On the contrary, it can and must be completely constructed and installed in the shortest possible time, so that it will be in full working order as soon as the Armistice is signed.

#### Par. 8. The Material Law to be applied

The International Criminal Court ought as soon as possible to be supplied with an International Criminal CODE, defining the crimes and limiting the punishments.

We must however not be so optimistic as to expect that such a Code will be compiled within the next two or three years and also be accepted by the respective Powers.

For the time being therefore we shall have to content ourselves with "mutatis mutandis" a description of the material law to be applied, as laid down in art. 23 of the Vienna project of 1926, which reads as follows:-

"La Cour applique:

1: Les traités, conventions et déclarations internationaux, soit généraux, soit spéciaux, reconnus par les Etats en litige.

2: La coutume internationale comme preuve d'une coutume générale acceptée ayant la force d'une loi.

3: Les principes généraux de droit public ou international reconnus par les nations civilisées.

4: Les décisions judiciaires comme moyens auxiliaires de détermination des règles de droit.

5: En outre, la doctrine des publicistes les plus qualifiés peut être citée.

Pourvu qu'aucun acte ne puisse être jugé comme infraction par le Statut de la Cour ou par la loi interne de l'accusé, ou, dans le cas d'un heimatlos, par la loi du lieu de sa résidence au moment de la perpétration du crime, ou, à défaut de résidence, par la loi de l'Etat où le crime aura été commis."

Particularly the last clause is of great significance.

With respect to the punishment to be inflicted, the second part of art. 22 can be very useful. It reads as follows:

"Lorsque la Cour trouve qu'une accusation contre un sujet, ou un citoyen, ou un heimatlos, est établie, la Cour peut le condamner à toute peine qu'elle croit juste, sous les conditions suivantes:

a: La peine de mort ne sera prononcée contre personne, à moins que cette peine ne puisse être infligée par une infraction similaire selon les lois de l'Etat auquel appartient le coupable.

b: En aucun cas, le fouet ne sera ordonné;

c: En tout autre cas, la peine d'emprisonnement ou de détention sera prononcée par la Cour, qui ordonnera la nature de l'emprisonnement ou de la détention infligée;

d: Les pénalités pécuniaires et les indemnités seront infligées, soit cumulativement, soit au lieu de la peine prononcée."

The description here given of the material law to be applied agrees approximately with the analogous precept for the Permanent Court of International Justice (art. 38 of the Statute), with this reservation, that no act be punishable unless it is indicated so to be by the Statute of the Court, or by the national law of the accused person. (1).

According to the Statute of 1926, both, States and individuals may be arraigned before the Court. A State which has been found guilty may be sentenced to pay the plaintiff State a fine in cash, and to make good the damage, including the damage civilians have suffered. This regulation however is of little value for us in the immediate future.

In accordance with art. 22, private persons may be sentenced to whatever penalty the Court may deem fit, but only to the death penalty provided the guilty person's national court admits of such punishment.

The Spanish Jurist Baldana is somewhat more precise in his famous work published in 1923 entitled: "La Justitia penal internacional." He wanted eight kinds of crime to be submitted to the International Criminal Court, namely:-

- "1: les cas douteux de juridiction pénale nationale;
- 2: les cas pénaux extranationaux. (for instance those on the High Seas).
- 3: les crimes internationaux de droit commun. (for instance, white slave trade, opium offences, etc.)
4. les crimes politiques internationaux. (art. 227, Treaty of Versailles).
5. les crimes militaires internationaux (art. 228, Treaty of Versailles).
6. les crimes contre le droit des gens.
7. les crimes d'un intérêt international commis dans un pays occupé:
8. les crimes sociaux collectifs non réprimés par un Etat." (2)

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(1) See Annex 1, art. 38.

(2) See: Recueil des Cours. A.D.I. 1925, V, p. 367



In contrast to this rather large conception the International Criminal Court for the Prevention of Acts of Terrorism (Convention of 1937) was to have a more limited sphere of activity. The following crimes were to come under the jurisdiction of this Court, viz: -

1. Any wilful act causing death or grievous bodily harm to:
  - a. Heads of States, persons exercising the prerogatives of the Head of State, their hereditary or designated successors;
  - b. The wives or husbands of the above-mentioned persons;
  - c. Persons charged with public functions or holding public positions, when the act is directed against them in their public capacity.
2. Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to, or subject to the authority of, another High Contracting Party.
3. Any wilful act calculated to endanger the lives of members of the public.
4. Any attempt to commit an offence falling within the foregoing provisions of the present article.
5. The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence, falling within the present article.

As we know, this Convention was signed by the Representatives of all the participating States (Belgium, Bulgaria, Spain, France, Greece, the Netherlands, Rumania, Czechoslovakia, Turkey and Yugoslavia), but it was never ratified by the various Governments.

For the first and most urgent task of the International Criminal Court now to be established, namely the punishment of war criminals, I think that, as we have said, we could if necessary be satisfied with the application of arts. 22 and 23 of the Statut de la Cour, of 1926.

It goes without saying, however, that it would be of the greatest importance if early agreement could be reached between the respective Powers regarding a fully elaborated List of War Crimes, with an exact and clear description of the offences, and with the maximum punishments.

With respect to the question as to which offences are to be regarded as war crimes, both in our own and other Commissions, full Reports (1) have been issued, accompanied by exhaustively elaborated Lists, and I think I can refer you to them. (2).

#### Par. 9. The formal law to be applied

The Statute of the Permanent Court of International Justice and that of the International Criminal Court (see annexes I and II) can also serve us as guides in this direction.

The official languages of the Permanent Court are English and French.

If the parties agree the whole proceedings take place in one of these languages, then the judgement will be pronounced in that language. In case such agreement is wanting, the parties may utilize whichever of these languages they choose, and judgement will in that case be pronounced both in French and in English; the Permanent Court will however decide which of the two texts is to be deemed the authentic one. (art. 39)

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(1) See inter alia the Report of the International Commission for Penal Reconstruction and Development - sub-Commission for War Crimes - and in particular the Memorandum of Professor Lauterpacht, contained therein, pp.5 to 11.)

(2) For the competence of the International Criminal Court see Par. 6.

Before the International Criminal Court the accused will have to be able to express himself in his own language, and everything he says, as well as all questions that are put, and everything that is said regarding the case of the accused, will have to be translated by experienced interpreters

As however, the large majority of war criminals will be able to understand German, the question arises as to whether it would not be advisable to recognize German as the third official language of the Court after English and French.

The accused will be permitted to be assisted by counsel chosen by him/herself/ themselves.

In general, and under reference to the respective articles of the Concept-Statute of 1926 (annex II), one may well say, with Professor Sheldon Glueck in "Free World," (1) that the procedure in the International Criminal Court ought to consist of a simplified combination of the best features of the Continental and Anglo-American criminal proceedings, guaranteeing certain fundamental rights, such as the right of counsel and the right to set up any legitimate defences found in civilized penal codes. Rules of evidence should be simple and should not too greatly stress exclusionary provisions, since the trials are to be before panels of judges trained by long practice.

The main point should be to seek the truth in the most impartial manner. When hearing the accused and the witnesses, full account should be taken of what modern criminology has taught us with regard to the psychology of the witnesses and the suspects, etc. -

"A Prosecuting staff of trained representatives of the various countries establishing the International Criminal Court, as well as a public defenders' staff, should be appointed by the Court from panels submitted by the Chief Executives of the countries involved", as Sheldon Glueck proposes in his work referred to above. - I thoroughly agree.

The seat of the Court should be established in the Capital of one of the Allied Countries (e.g. London, Paris or The Hague).

#### Par. 10. Final Conclusions

It will be clear from the foregoing that it is by no means impossible to come to a workable international agreement for the establishment of an International Criminal Court.

Above all else, however, in order this time to achieve the proper punishment of war criminals, and not again to fall into a hopeless fiasco as we did after 1914-1918, we must insist upon the greatest possible speed.

We have already been faced with a "fait accompli" with respect to Italy, and once more that which every expert insisted was absolutely essential, namely, the surrender of war criminals simultaneously with the signing of the Armistice, has been neglected.

We cannot tell how long we still have for further preparations, but it is certain that TIME IS EXCEEDINGLY SHORT

Should the punishment of war criminals again end in a fiasco, then the future peace of the world would be gravely endangered.

Therefore: CAVEANT CONSULES

LONDON, September 1943

(1) See: "Trial and Punishment of Axis War-Criminals," by Sheldon Glueck. Reprinted from "Free World". Vol. IV. no. 2. November 1942.



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CONFIDENTIAL.

OCTOBER 1943.

LONDON INTERNATIONAL ASSEMBLY

COMMISSION I. FOR QUESTIONS CONCERNED WITH THE LIQUIDATION OF THE WAR

REPORT OF THE COMMISSION ON SOME QUESTIONS CONNECTED WITH  
THE HANDING OVER OF WAR CRIMINALS FOR TRIAL.

(Drawn up by M. de BAER.)

PRELIMINARY OBSERVATIONS.

At the present time the only way for a country to obtain from another country the handing over of an alleged criminal is by means of the procedure of extradition. It is to be presumed that after the war other, maybe simpler means may be devised as a consequence of the victory. Therefore, in order to avoid confusion a distinction between the four following notions is made in this paper and each one is described by a different name :

- (1) the word "extradition" has been reserved for extradition proper, i.e. to the handing over of persons charged with extraditable crimes;
- (2) the handing over of war criminals to the United Nations by the Axis authorities after the war is called "surrender";
- (3) the handing over of war criminals by one of the United Nations to another is called "transfer";
- (4) the handing over of war criminals by a neutral country to the United Nations is called "delivery".

A question which, although distinct from the handing over of criminals, is in some measure connected with it, is that of the expulsion of undesirable persons.

A summary description of each one of these notions may be of some use.

1. Extradition may be demanded and granted in time of war as well as in time of peace; it is in most countries governed, primarily, by a general Extradition Act or Statute, in which are laid down, either the instances in which a person may be handed over to the authorities of another country, or else the instances in which such handing over is prohibited. Extradition Acts also determine the formalities to be complied with, and the part which belongs to the judicial authorities to whose agreement extradition is usually subjected. The conditions in which extradition can be granted by one particular country to another are determined by extradition treaties. Although extradition may be granted even in the absence of any treaty it is needless to point out that when an extradition treaty exists, it must conform to the laws of both the countries who are its signatories. In all of them, extradition is prohibited when the crime was of a political nature; in many countries extradition of nationals cannot be granted.

2. Extradition of criminals from neutral countries should not be confused with surrender of war criminals by the Axis countries.

By the Lord Chancellor's statement of October 7th, 1942, we know that the surrender of some named criminals will be demanded as a condition of the cessation of hostilities, and that the United Nations will reserve their right to demand the surrender of others as soon as the investigations are complete. Such surrender is in no way to be conditioned by extradition conventions, but by the Armistice Terms. The operation of this measure will be limited to the immediate post-war period! It will be for the United Nations to impose their will in this respect and Germany will have nothing else to do than to comply with the United Nations' orders.

3. Transfer of accused by one Ally to another will also essentially be a post-war measure. It is assumed that a special understanding to that effect is being prepared by the Government of the United Nations. The understanding should be designed in such a way as to provide for speed in the transfer of the accused. Such an understanding is highly necessary, otherwise, as this matter is still governed by extradition law, if a quisling elects, when fighting ceases, to flee to England or to any other Allied country, he will be in a position to demand the protection of the Courts, whose duty it is to apply the law and which will therefore be unable to allow his arrest, unless the quisling in question has personally committed murder or any other extraditable crime; (N.B. Expulsion of the quisling will not help much, for, in most countries, no compulsion can be used against an expelled person to force him to enter a specified country against his will.)

4. Delivery of war criminals by the neutral countries will be most difficult to achieve. It should be a temporary measure for the post-war period only. Under this designation are not included extraditable crimes (which come under section 1), but war crimes which are outside the scope of the extradition laws and treaties, and, possibly, war crimes of a political nature. Delivery of war criminals should be conceived, if possible, and in order to avoid delay, as a purely administrative measure, which should not be subjected to the permission of a court.

5. Expulsion is an administrative measure which can be applied at will by any government to any alien whom, for any reason whatsoever, such government considers undesirable. Expulsion is applicable alike to aliens who have lawfully or unlawfully gained admission into the country. Under the present circumstances it cannot be expected that States which are unwilling to change their liberal policy as far as the extradition is concerned would proceed voluntarily to expulsion. This would, there is no doubt, require very energetic pressure from the Allies.

x x  
x

#### What happened in this connection after the last war.

It is a common saying that the extradition of war criminals failed after the last war; perhaps it is more accurate to say that it was not seriously attempted. According to the Treaty of Versailles there were two categories of war criminals: (1) the German Kaiser with whom Article 227 was concerned and (2) the other war criminals whose trial was provided for in Articles 228 - 229 and 230.

(1) The German Kaiser. After he had fled to Holland in November 1918 and as soon as it became known that the Allies intended to demand his surrender the German international lawyers began to study the technical objections which could be brought against that demand: Dr. Pawong, Prof. Jellinek of Kiel, Prof. Zitelmann, Rector of the University of Bonn, unearthed the most far fetched reasons why it should be refused; their panic can be judged from the large quantity and inferior quality of the arguments which they set forth. Little did they know what assistance they would get from the Allies themselves. Many international lawyers are



of the opinion that, if when the Kaiser's delivery was requested by the Allies, in January 1920, the request had been based upon extradition law, on the grounds that the Kaiser was a partner or an accomplice in one or more specified crimes, it would have been extremely difficult for the Dutch Government to refuse it. But instead of following this course the Allies adopted the wording of Article 227 of the Versailles Treaty and demanded that he should be "handed over" for trial (not extradited), for "a supreme offence against international morality and the sanctity of treaties". In effect, it was a demand for his extradition, and the Dutch Government, which was bound as well by the Dutch law governing extradition in general as by the extradition treaties which it had signed with each one of the Allies, could do nothing else but refuse the Allied request, for if it had complied with it, it would have violated its own laws which forbade extradition in this case. What the Dutch Government could have done was to expel the Kaiser to a country of his choice, and it has been assented that this could have been easily obtained. But, although official views outwardly showed resentment, the expressions of relief which appeared in the Press - even in "The Times" - when the surrender was refused, were significant.

(2) In the case of the war criminals other than the Kaiser who had fled to neutral countries, nothing was done by the Allies to obtain their extradition. The Crown Prince of Germany who had escaped to Holland and was accused of atrocities at ~~the~~, Warsage, deportation of inhabitants and looting at Coincy and Mézières was never molested. Neither was Crown Prince Rupprecht of Bavaria who is said to have found shelter in Switzerland for some time; although he was charged with the deportation of civilians in Flanders, the destruction of Cambrai and the massacres of Dieuze, and although when the Belgian Army entered Brussels in November 1918 thirty-nine large cases marked with his name and containing the product of his lootings in the French châteaux where he had resided were found in the railway station awaiting transport to his home in Munich, his extradition was never requested.

It is true that, for the sake of appearance, the German Government demanded the extradition of one or two war criminals such as U-Boat Commander Patzig who had fled to Dantzig, but it cannot have exercised much pressure on the Dantzig Government otherwise the extradition could not possibly have been refused: it is not improbable that the Dantzig authorities were advised by the Germans to reject it.

The Allies on their side never demanded the surrender of a single one of the war criminals, not even when some of them escaped to Sweden after they had been convicted by the Leipzig Court. When the U-Boat Lieutenants Dithmar and Boldt escaped from Naumburg prison about the end of 1921 after having been sentenced to four years' imprisonment for the sinking of the British hospital ship "Llandoverly Castle" and after having served only a few weeks of their sentence, nothing was done about it.

It is perhaps even more typical that some of the criminals who at the time of the Armistice were in the hands of the Allies themselves were allowed to return to Germany without being punished. Such was the case of U-Boat Lieutenant Kiese Wetter who had sunk the British hospital ship "Glenart Castle" and who after having been confined for trial in the Tower of London was sent back in October 1919 to his home town of Kiel untried and unconvicted although in the meantime full evidence of his guilt had been obtained.

From what precedes, and from circumstances such as

- (1) that the Allies agreed, in Art. 6 of the Armistice terms (Nov. 1918), to abstain until the Peace Treaty came into force (Jan. 1920), from prosecuting any war criminals who they might find in occupied Germany (the only part in which

they could lay hands upon them);

- (ii) that even after the Peace Treaty had come into operation the Allies did nothing to get hold of the war criminals who were residing in the part of Germany occupied by them;
- (iii) that never did the Allies attempt to obtain from the German Government any information about the residence of the accused, thus failing to take a practical step which might have enabled them to find some of the accused and bring them to trial;
- (iv) that the list of persons accused of war crimes was and has remained a secret document which was not divulged or published, to the extent that those who were mentioned in it were not informed of the fact;

it can be inferred that after the last war the Allies made no efforts to lay hands on the war criminals, so that the defects of the machinery may be less to blame than the defective way in which that machinery was used.

The reason for this absence of retribution was that after the last war the world was permeated with the idea that it was unnecessary to punish the guilty because there would be no more wars, the institution of the League of Nations having marked the beginning of a new era of peace and goodwill; it was optimistically believed that a lasting peace would be secured by appeasement of Germany and that it was unwise to create bitterness.

#### I. THE SURRENDER OF WAR CRIMINALS BY THE VANQUISHED NATIONS.

The Commission is of the opinion that if such surrender is to be made effective the following principles should be taken into account :

1. The Governments of the United Nations have an unlimited right to bring to trial before any court, national or international, civil or military, any persons whom they accuse of war crimes.
2. Such remaining Axis authorities which have been authorized and accepted by the United Nations to work under their control in their country shall have the duty to co-operate with the occupying authorities in the work of investigation and punishment, namely by obtaining the presence of witnesses, by providing documentary evidence, by arresting the accused or in any other way in which their co-operation may be requested. They will have the duty immediately and without the authorized representatives to comply with all requests of the competent organs of the United Nations relating to the apprehension, arrest and delivery of the accused, without regard to his nationality or the law of his country. The Axis authorities are bound by the provisions and orders of the representatives of the United Nations; these representatives will have the right to control any Axis, civil or military, organs of security in order to supervise the way in which their orders are carried out.
3. Any Axis official who fails to comply with any request from a competent United Nations' authority will be removed from office and his rights to a pension will be forfeited. Moreover he will be liable to a penalty of imprisonment up to 5 years and to a fine; these penalties may be imposed by any court of the United Nations. In order to secure the application of such penalties the local Axis authorities will provide the Allied authorities of Occupation who control them with lists of military and civil officials who are entrusted with the execution of the above provisions.



4. Whoever intentionally aids and abets a person whose surrender has been demanded, in evading apprehension, arrest or surrender; Whoever destroys or conceals documentary evidence, impedes or obstructs the examination of witnesses;

Any official who by negligence makes possible the escape of a person whose surrender has been demanded;

Whoever incites another to resist in any way the provisions concerning the surrender and the punishment of war criminals; commits a crime and will be liable to a penalty of imprisonment up to 5 years and to a fine; any court of the United Nations shall have jurisdiction to impose sentence upon him.

5. No Axis resident or national can be punished for communicating to the authorities of the United Nations information concerning evasion of - or resistance to - the provisions concerning the surrender and punishment of persons accused of war crimes.

## II. THE TRANSFER OF PERSONS BY ONE ALLY TO ANOTHER.

In respect of transfer the Commission proposes the following governing principles :

1. Post-war transfer of persons by one of the United Nations to another should not be considered as a judicial, but as a purely political and temporary measure, connected with the necessity of assuring the safety of the State during the difficult post-war period. Its confusion with extradition should be most carefully avoided. The power to grant it should be given to the executive, without any intervention of courts, otherwise the person concerned may be in a position to obstruct the procedure and cause delay. To obtain this result it may be necessary to bring some minor alterations to the Extradition Acts of some countries, or to suspend their operation temporarily, but the United Nations should be prepared to sacrifice some of their national traditions to the common purpose for which we are fighting, i.e. the ultimate restoration of order and justice in the world. Such a measure might be taken provisionally for a short period only, - let us say for three years -, after which the normal situation should be restored.

2. If this measure is to be really effective, the United Nations should undertake to hand over to each other, any person whose transfer may be demanded, whether he is a criminal or not. Such a measure involves the existence of a considerable amount of confidence and mutual trust between the United Nations, as the required state would be expected to hand over, to any one of its Allies, without any investigation or possibility of refusal and with the greatest possible celerity, any person whose transfer should be demanded. It would be a welcome gesture, and an ominous one, if the Allies, after having fought for 4 or 5 years side by side for the same cause, temporarily removed, in favour of each other, some of their peace-time prohibitions and defences. It may not be possible to attain an agreement according to which the United Nations would agree to hand over any person without regard whether he is a criminal or not. It might be advisable to limit this duty to "war criminals" provided that a satisfactory definition of war crimes is accepted by the United Nations.

3. Should transfer be demanded with a view to a trial by several United Nations, or should the required nation wish to hold the accused for trial by her own courts then the matter could usefully be referred to an inter-allied body such as the Commission for the Investigation of War Crimes, to which might be given the power to decide by what court the accused shall be tried.

### III. HOW THE HANDING OVER OF WAR CRIMINALS MAY BE OBTAINED FROM NEUTRALS.

#### A. The position as it is today.

In respect of war criminals there are several lines of conduct which a neutral state might adopt : the state might (1) allow him in and grant asylum, (2) refuse his admission, (3) expel him after he has been admitted (expulsion), or (4) hand him over to a state who has requested his extradition.

Extradition being at this moment the only means by which the handing over of an accused can be demanded from a neutral, it is proper to examine first the defects of that machinery : An examination of some of the extradition treaties in existence with the neutrals, such as those which have been passed by Argentina, Portugal, Spain, Sweden and Switzerland with belligerent countries such as Great Britain or Belgium reveals that these treaties provide long lists of specified crimes which include murder (including assassination and poisoning), attempt or conspiracy to murder, manslaughter (wilful slaying), rape, arson, robbery with violence, malicious wounding, malicious injury to property, etc... It seems that the majority of crimes committed by Axis subjects could be construed by a willing court as coming under one or the other of its headings.

In no treaty is immunity from extradition provided for Heads of State, but political crimes are never extraditable. Furthermore all treaties provide that no extradition will take place if exemption from punishment has been acquired by lapse of time. (In the case of deportation of civilians exemption would in some countries be acquired by lapse of three years.)

Extradition is only provided for crimes which have been committed in the territory of the requiring state; crimes committed elsewhere are not treated in the same way in all the extradition treaties. Therefore, the existing extradition treaties and extradition laws would not provide for crimes committed for instance in German concentration camps in Germany against nationals of the other state.

In respect of deprivation of liberty, which includes the deportation of slave labour, a provision for kidnapping is made in some treaties : Kidnapping, sometimes described as "kidnapping and false imprisonment" is included in the British Treaties with Argentina, Portugal and Spain, but it is not mentioned in the Treaties with Sweden or Switzerland. In the Treaties signed by Belgium extradition for false imprisonment is allowed only when it has been committed by a private person : deportations of civilians done by a person in authority (which has consistently been the case) are not covered. On the other hand all treaties provide extradition for abduction : in some cases this might possibly cover the deportation of miners, and that of females for the purposes of prostitution, but not of male adults.

From this we may conclude that the machinery of extradition does not cover all the crimes which have been committed by Axis nationals during this war, and that the gaps may be used by neutrals to justify a refusal of extradition in some cases.

#### B. REMEDIES WHICH HAVE BEEN SUGGESTED :

1. Warnings : If warnings to neutrals are to have their full effect it is obvious that the United Nations should make lists of the accused, describe them as accurately as possible together with the charges which are brought against them, and communicate



these lists to the neutrals, otherwise it will be impossible for them to know who are the persons concerned. The drafting of a provisional list of war criminals is therefore urgently needed. A general warning that granting asylum to war criminals will be construed as an unfriendly act towards the United Nations has been given; it will draw the attention of the neutrals on the consequences of harbouring the enemies of mankind and it may incite them to be cautious. It may be interesting to compare the compliance of some of the neutrals with German demands for the use of their railways with their resistance to the invitation of the United Nations to co-operate in the work of justice.

2. A modification of the Extradition Treaties : Another proposal which has been made is to modify the extradition treaties existing between each one of the neutrals and each one of the United Nations with a view to including all war crimes. In this respect there is little doubt that the modification of these treaties would involve such difficulties that it would not be possible to carry it out in time.

3. A separate agreement concerning the delivery of war criminals :

(a) For trial by one of the United Nations :

A more feasible proposition than the last is a separate and temporary agreement with the neutral countries concerning only war crimes; without modifying anything to the existing extradition treaties, these countries should, during a limited period, after the war, be asked to accept to deliver to the United Nations all persons accused of such war crimes; the list of those crimes should of course be drafted, and a new word such as "delivery" should be used in this respect to avoid confusion with ordinary extradition. In the agreement it should be specified (1) that delivery is a purely administrative measure, connected with the safety of the state, which applies not only to crimes which have been committed in the territory of the requiring state but also to crimes committed abroad against nationals of that state, or property belonging to that state or to its nationals, (2) that the traditional custom of refusing extradition when the crime was of a political nature does not apply to delivery, (3) that delivery will take place even if exemption from punishment has been acquired by lapse of time, (4) that the circumstance that the crime for which delivery is demanded is punishable by death shall not be a reason for refusing it, (5) that the circumstance that the accused alleges to have committed the crime by order of his superior will not be a reason for refusing delivery.

However desirable such an agreement may be, it is doubtful whether the neutrals would consent to it at this moment. Perhaps it could be more obtained when our victory is so near that there is no more danger for them of reprisals. Even then, such an agreement may be difficult to reach, for Governments have hitherto shown themselves little inclined to renounce availing themselves of their extradition treaties; also the principle itself is in some countries in conflict with local law which prohibits surrender for political crimes. The agreement should provide simple rules of procedure for the speedy handing over of the accused whose delivery is demanded. Finally, some guarantees should be given by the requiring state; these might include the obligation to publish a record of the hearings and a promise that the case shall not be heard in camera. If such an agreement can be reached with the neutrals, so much the better, but it is perhaps unwise to count on it.

(b) For trial by an International Criminal Court :

When, in January 1920, the Kaiser was demanded for trial by the Allies, the Dutch Government answered that as the demand was not an act of justice but an act of high international policy it could not associate itself with it. "If in the future", it continued, "it was in the intention of nations to establish an international

"jurisdiction competent in the event of war to judge acts alleged to be crimes and liable to be punished by Statutes passed previous to the commission of the acts, it would be for Holland to associate herself with the new regime." In view of this statement it is true that an International Criminal Court instituted by the United Nations would not be strictly "international", because neither the enemy nor the neutrals concerned would have participated in its creation, but it is not unreasonable to assume that, should such a court be created (maybe with a possibility for neutrals of being represented on it), there might be, from the side of these neutrals, a greater willingness to deliver any accused persons to such a court, than if the delivery were to be made in the hands of the injured allied nation herself. A trial by an international court is a new principle, and it might be easier to obtain adhesion to a new principle than to obtain the modification of old established traditions, which have stood the test of centuries. It should be mentioned that although the institution of such a court would be a novelty, the idea has been debated many times; namely in 1937 when among the adherents to the League of Nations' scheme of an International Criminal Court two of the countries which are now neutral, namely Spain and Turkey, signed the Convention establishing that court; Switzerland and Argentina refused to sign it because they considered such a Convention unnecessary, whereas Sweden and Portugal expressed no opinion on the matter.

Requesting the delivery of war criminals from neutral countries should not be left to the injured state, but that request should be backed by the full authority of the United Nations as a whole. As refusal of delivery of an accused necessarily involves a loss of prestige for the requiring party, any request should, before being presented to the neutral state concerned, be carefully investigated by an inter-allied body at whose discretion it would be to set it aside if, through lack of evidence, faulty procedure or on any other valid grounds, the delivery ran serious risks of being refused by the neutral government required. The consequence of this sifting process may well be that some criminals will escape, but in the long run, it may prove to be a wise precaution.

4. Should it not be possible to reach an agreement with the neutrals, then solely the extradition conventions which are already in existence will have to be relied upon to obtain the handing over of the accused.

It will then be most important that the accused whose extradition is demanded be charged with an extraditable offence. If, as happened with the Kaiser, an accused is charged with offences not mentioned in the treaty with the country from which extradition is demanded, then there is no hope that that country will consent to surrender him. But if the accused is charged with crimes such as murder, arson, looting, bodily harm or torture, there will be, for the neutral courts, no unsurmountable legal obstacles to prevent them from complying with the request.

However, as political crimes are expressly excluded from extradition, it will be impossible to obtain the surrender of a quisling or traitor who is not accused of any other crime; but when there is evidence that the political crime has involved murder or manslaughter or that it has had death as a consequence, it is reasonable to assume that the majority of the courts of the civilized countries would grant the requested extradition.

5. Should some technical obstacle be sufficiently serious to impede the procedure of extradition, then there would still be, for a neutral country which would be willing to co-operate in our judicial effort, a possibility of resorting to EXPULSION, which is, as has been said, a purely administrative measure which can be ordered, practically at will, by a government. If we recollect the precedent of Tietzki who was, before finally gaining entry in Mexico, successively refused admission or expelled from a series



of countries, it is not difficult to conceive that neutral countries might deny asylum to Axis leaders and war criminals or expel them on the grounds that their presence endangers public order or the safety of the state, or that it is likely to undermine the good relations with the neighbouring countries.

It is true that the person who is expelled may choose the country to which he is to be sent, but this will make no difference, for each one of the neutral states will be surrounded either by United Nations or by territories occupied by them so that expulsion will for all practical purposes, have the same effect as extradition, and in both cases the accused will inevitably fall into our hands.

6. Finally, coercitive measures can be envisaged towards the neutrals who, notwithstanding the warnings that harbouring criminals will be construed as an unfriendly act, find it to their interest to disregard such admonition. In this respect, it should be remembered that the few neutrals who may not conform with the policy of the United Nations will be very isolated in the post-war world and lack support. Moreover, as Allied bodies will control most sources of production as well as the instruments of distribution, there will be little need to threaten an unfriendly neutral with the bombing of his capital, it may well be enough to inform him that, if his policy is not brought into line with ours and if he persists in refusing to help us re-establish the supremacy of law, order and justice, the United Nations will postpone considering any of his requests for shipments of food, equipment, oil, coal, or war material until the needs of all the other nations have been met.

To sum up : Understanding neutrals will have the possibility of co-operating with the United Nations in their post-war duty of Justice : either they may adhere to any scheme complementing the machinery of extradition, or else, should there be no opportunity of doing this, they may avail themselves of the existing remedies, however imperfect they may be : if the request for the surrender is properly framed, and if the neutrals show goodwill, if the United Nations show some measure of cohesion and firmly press the matter and if they show that they are not going to stand any nonsense, some means will be found to give them satisfaction. The United Nations are out for Justice, and it will be for the neutrals to collaborate comprehensively and assist them in dealing out condign and just punishment to the guilty, in the superior interest of mankind and of a lasting peace.

X X  
X

To conclude, the Commission recommends, on the lines indicated here/above :

1. In respect of surrender of war criminals by the vanquished nations :
  - (a) That such remaining Axis authorities who may have been allowed to function in their country shall be charged with the duty to co-operate effectively with the occupier in the work of investigation and punishment of war criminals;
  - (b) That failure on the part of such Axis officials to co-operate will make them liable to penalties;

(c) That any person who obstructs or impedes the execution of provisions concerning the surrender and the punishment of war criminals will be liable to penalties.

(d) That no Axis court may punish any person for communicating to the occupier informations concerning evasion or resistance to these provisions.

2. In respect of the transfer of persons by one Ally to another :

That the United Nations shall agree upon suitable measures to hand over to each other after the war any person whose transfer may be demanded, especially when he is a war criminal .

3. In respect of the delivery by neutral countries of war criminals :

(a) That the United Nations endeavour to reach, with the neutral countries, an agreement, to last a limited period after the war, to the effect of obtaining the delivery of war criminals for trial by the courts of the injured nation; or otherwise for trial by an international court;

(b) That if such an agreement cannot be reached the requests for the handing over of the accused after the war be properly based on extradition law and treaties, that they be backed by the whole authority of the United Nations and, if need be, the necessary pressure brought upon the neutrals to ensure such extradition.

4. In general :

That the carrying out of provisions concerning the transfer, delivery and extradition of war criminals shall be made mainly through the channel of a United Nations' body or Commission, and shall be made, not in the name of one nation, but in the name of the United Nations as a whole.

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II/5

Benes document on *Extradition*  
(see London International Assembly  
documents)

SECRET

II/6  
28th February 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II (ENFORCEMENT)

Notes of speech made by Lord Atkin at the Meeting  
of 25th February 1944

Lord Atkin considered the discussion should proceed on two assumptions,  
(a) an inter-allied court (as he preferred to style it) was desirable, and  
(b) its jurisdiction was likely to be wide rather than narrow, e.g. it would deal with crimes not falling under national law - gaps in national law - as for example, crimes committed in Germany by Germans against German Jews or other German nationals, and other outrages which shocked the conscience of humanity.

Questions arising were:

- (1) What law the court would apply.
- (2) What acts were to be considered as crimes under that law.
- (3) How was the court to be composed?

In Lord Atkin's opinion the Court should consist mainly of persons trained as judges, in order to ensure the application of legal standards, but military assessors might be included, and there should be a judge belonging to the country bringing the charges before the court. Three, or, at most, five judges should hear cases. There might be a panel, formed by each United Nation nominating three suitable persons, out of which the judges would be chosen. Lord Atkin expected the court to be divided into a number of branches meeting in different countries. There might be a President at the head of the whole organisation.

There could be no question of trial by jury.

The substantive law applied by the court should not be laid down by it. The United Nations should lay it down. The only question for the court would be whether the accused was guilty of the act defined in the charge which it had before it.

It was important that some uniform rule should be prescribed as to the defence of superior orders.

The court must be free to decide the admissibility and value of the evidence laid before it, as Lord Atkin said he understood was the case on the continent of Europe. Rigid rules of evidence, such as applied in English or the United States law, would be wholly out of place.



II/7

Press note on Interpretation  
of Moscow Declaration

(no copies available in Secretariat)

II / 8

Papers document U.S. correspondence  
with neutrals

(no copies available in Scotland)



No more copies available

Sec II/9(1)

II/9.

15th March, 1944.

Note. This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

DRAFT ARTICLE ON SURRENDER OF WAR CRIMINALS TO BE  
INSERTED IN TERMS OF ARMISTICE WITH GERMANY

1. Germany recognizes the right of the United Nations to bring to trial before any Tribunal, national or international, all persons accused of crimes connected with, or incidental to, a state of war or hostilities conducted by Germany against any State who is a party to this instrument. This provision shall apply notwithstanding any procedure or prosecution before a Tribunal in Germany or in the territory of any State or political entity acting in alliance or in concert with Germany, irrespective whether such proceedings have ended in a conviction or in an acquittal, provided that if a sentence has been imposed by a national Court of Germany the penalty already undergone shall be taken into account in fixing any sentence which may be imposed;
2. To this effect, Germany accepts the following obligations:
  - (a) to hand over to the United Nations, within fifteen days subsequent to the time when the demand is made, all persons whose surrender is demanded, wither upon the date that this instrument becomes effective or upon any date subsequent thereto;
  - (b) to co-operate with the United Nations in all measures necessary to give effect to the obligations recognised in Section 1;
  - (c) immediately to intern and to keep in custody until such

time as the United Nations may otherwise direct all members of the State Police and other similar organizations which may be designated by the United Nations;

3. The right to apprehend the accused is hereby conferred;
  - (a) upon any central United Nations Agency, military or civil, which may be in control of German territory, or which may be appointed to give effect to the present provisions;
  - (b) upon any military or civil authority of any one of the United Nations which may be in control of the whole or part of German territory;
  
4. Such German authorities as may be acknowledged by agencies of the United Nations shall have the duty:
  - (a) to comply immediately with all requests of the said agencies relating to the identification, discovery, apprehension, arrest and delivery of accused persons without regard to their nationality or the law of their country and without any right to examine the case upon its merits. The United Nations agencies shall be given every facility to supervise the way in which their orders shall be carried out;
  - (b) To disclose and produce any document exhibit or any other thing the production of which may be considered necessary to ensure the full knowledge of the acts incriminated and the just appreciation of responsibility, to obtain the presence of witnesses and to co-operate in any other way in which such co-operation may be requested;
  
5. Any German official or authority who in any way obstructs the execution of the foregoing provisions or who fails to comply with any request relating thereto shall be subject to a penalty of imprisonment for a term which shall not exceed twenty years and to payment of a fine or both. The German



authorities shall, when requested to do<sup>so</sup> provide the United Nations with the names of the officials who are responsible for the execution of the provisions of this instrument.

6. Whoever aids and abets a person whose surrender has been demanded, in evading apprehension, arrest or surrender;

Whoever destroys or conceals documentary evidence, impedes or obstructs the calling or the examination of witnesses, or attempts to do so;

Whoever incites another to resist in any way the provisions concerning the surrender and the punishment of war criminals; shall be liable to a penalty of imprisonment for a term which shall not exceed ten years and to payment of a fine or both;

7. Any German official who prosecutes or punishes anyone for having reported to the authorities or agencies of the United Nations any evasion of - or resistance to - the foregoing provisions concerning the surrender or punishment of persons accused of crimes specified in Section 1 shall be liable to imprisonment up to twenty years;

8. Any Court of a member of the United Nations, or any Tribunal instituted by the United Nations shall have jurisdiction to try persons accused of having violated Sections 5, 6 or 7.

SECRET

II/9 (i)  
(Second revised text)

Note This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

DRAFT ARTICLE ON SURRENDER OF WAR CRIMINALS TO  
BE INSERTED IN TERMS OF ARMISTICE WITH GERMANY

1. The United Nations may bring to trial before any Tribunal, national or international, all persons accused of crimes connected with, or incidental to, a state of war or hostilities conducted by Germany against any State who is a party to this instrument. This provision shall apply notwithstanding any procedure or prosecution before a Tribunal in Germany or in the territory of any State or political entity acting in alliance or in concert with Germany, irrespective whether such proceedings have ended in a conviction or in an acquittal, provided that if a sentence has been imposed by a national Court of Germany the penalty already undergone shall be taken into account in fixing any sentence which may be imposed;
2. To this effect, "Germany" shall:
  - (a) hand over to the United Nations, within fifteen days subsequent to the time when the demand is made, all persons whose surrender is demanded, either upon the date that this instrument becomes effective or upon any date subsequent thereto;
  - (b) co-operate with the United Nations in all measures necessary to give effect to the obligations recognised in Section 1;
  - (c) co-operate with the United Nations in immediately interning and keeping in custody until such time as the United Nations may otherwise direct all members of the State Police and other similar organisations which may be designated by the United Nations;
3. The right to apprehend the persons referred to in 2 may be exercised:
  - (a) by any central United Nations Agency, military or civil, which may be in control of German territory, or which may be appointed to give effect to the present provisions;
  - (b) by any military or civil authority of any one of the United Nations which may be in control of the whole or part of German territory;



4. Such German authorities as may be allowed by the United Nations to continue or to exercise their functions shall have the duty:
  - (a) to comply immediately with all requests of the said agencies relating to the identification, discovery, apprehension, arrest and delivery of accused persons without regard to their nationality or the law of their country and without any right to examine the case upon its merits. The United Nations Agencies shall be given every facility to supervise the way in which their orders are carried out;
  - (b) to disclose and produce any document exhibit or any other thing the production of which may be considered necessary to ensure the full knowledge of the acts incriminated and the just appreciation of responsibility, to obtain the presence of witnesses and to co-operate in any other way in which such co-operation may be requested;
5. Any German official or person in authority who in any way obstructs the execution of the foregoing provisions or who fails to comply with any direction relating thereto shall be subject to a penalty of imprisonment for a term which shall not exceed twenty years and to payment of a fine or both. The German authorities shall, when requested to do so, provide the United Nations with the names of the officials who are responsible for the execution of the provisions of this instrument;
6. Whoever aids and abets a person whose surrender has been demanded, in evading apprehension, arrest or surrender; Whoever destroys or conceals documentary evidence, impedes or obstructs the calling or the examination of witnesses, or attempts to do so; Whoever incites another to resist in any way the provisions concerning the surrender and the punishment of war criminals; shall be liable to a penalty of imprisonment for a term which shall not exceed twenty years and to payment of a fine or both;
7. Any German official who prosecutes or punishes, or any individual who in any way molests anyone for having reported to the authorities or agencies of the United Nations any evasion of - or resistance to - the foregoing provisions concerning the surrender or punishment of persons accused of crimes specified in Section 1 shall be liable to imprisonment up to twenty years;
8. The Courts of a Member of the United Nations, or any Tribunal instituted by the United Nations shall have jurisdiction to try persons accused of having violated Sections 5, 6 or 7. German Courts shall have no such jurisdiction.

II/10

thoroughly numbered - see III/1



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for the personal use of members of the  
Commission and their substitutes.

II/11.

14 April 1944

SECRET

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT CONVENTION ON THE TRIAL AND PUNISHMENT  
OF WAR CRIMINALS

CHAPTER I

SCOPE OF WAR CRIMES

Article 1

Offences

The offences listed hereinafter, committed in violation of the laws of war, by members of the armed forces, the civilian authorities, or other persons acting under the authority of, or claim or colour of authority of, or in concert with, a state or other political entity engaged in war or armed hostilities with, or in hostile occupation of territory of, the United Nations, or any one of them at any time since July 7, 1937, shall be punishable as war crimes, in accordance with the provisions of this Convention:

- (1) Murder or massacre.
- (2) Execution of hostages.
- (3) Rape.
- (4) Abduction of women for the purpose of enforced prostitution.
- (5) Segregation, internment or deportation of civilians under degrading or inhuman conditions, or under conditions unrelated to bona fide military necessity.
- (6) Forcing civilians to take part in military operations or preparations, in a manner calculated to endanger their lives.
- (7) Wilful deprivation of localities or districts of foodstuffs, shelter, clothing or other means of sustenance, in a manner calculated to cause unnecessary suffering.
- (8) Deliberate attack upon defenceless persons or upon centres of civilian population for the purpose of terrorisation.
- (9) Attack upon survivors of merchant vessels or aircraft which have been abandoned or destroyed.
- (10) Looting or pillage.

Wanton devastation or destruction of property.

Killing or maltreatment of wounded or prisoners of war.

(13) Refusal to give quarter.

(14) Deliberate attacks on hospitals or hospital ships, and other offences against sanitary personnel or the Red Cross.

(15) Other similar acts, which by reason of their atrocious character, their ruthless disregard of the sanctity of human life and personality or their wanton interference with rights of property, are unrelated to reasonably conceived requirements of military necessity.

## Article 2

### Persons Liable

All persons, irrespective of their rank or position, who have committed, or have ordered, caused, aided, abetted or incited another person to commit, a crime specified in Article 1, shall be punishable, in accordance with as principals or accessories, under the provisions of this Convention:

Provided, that the application of this Article shall be subject to the provisions of Article 30.

## CHAPTER I

### (Alternative Articles)

### Scope of War Crimes

## Article 1

### Definition of War Crimes

War crimes, within the meaning of this Convention, are acts, committed in violation of the laws of war, by members of the armed forces, the civilian authorities, or other persons acting under the authority of, or claim or colour of authority of, or in concert with, a state or other political entity engaged in war or armed hostilities with, or in hostile occupation of territory of, the United Nations, or any one of them at any time since July 7, 1937.



## Article 2

### Persons Liable

All persons, irrespective of their rank or position, who have committed, or have ordered, caused, aided, abetted or incited another person to commit, a crime specified in Article 1, shall be punishable, in accordance with as principals or accessories, ~~under~~ the provisions of this Convention:

Provided, that the application of this Article shall be subject to the provisions of Article 30.

## Article 3

### Offences

The following offences shall be deemed to be war crimes within the meaning of this Convention:

- (1) Murder or massacre.
- (2) Execution of hostages.
- (3) Rape.
- (4) Abduction of women for the purpose of enforced prostitution.
- (5) Segregation, internment or deportation of civilians under degrading or inhuman conditions, or under conditions unrelated to bona fide military necessity.
- (6) Forcing civilians to take part in military operations or preparations, in a manner calculated to endanger their lives.
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- (10) Looting or pillage.
- (11) Wanton devastation or destruction of property.
- (12) Killing or maltreatment of wounded or prisoners of war.
- (13) Refusal to give quarter.
- (14) Deliberate attacks on hospitals or hospital ships, and other offences against sanitary personnel or the Red Cross.
- (15) Other similar acts, which by reason of their atrocious character, their ruthless disregard of the sanctity of human life and personality or their wanton interference with rights of property, are unrelated to reasonably conceived requirements of military necessity.

## CHAPTER II

### ELECTION AND ORGANIZATION

#### Article 3

##### Establishment of the Tribunal

There shall be established for the trial of persons charged with the commission of offences specified in Article 1, a United Nations War Crimes Tribunal and such Divisions thereof as may be constituted in accordance with the provisions of Articles 6 and 7.

#### Article 4

##### Seat of the Tribunal

The seat of the Tribunal shall be at London. The Tribunal may decide to meet elsewhere for the trial of any particular case or group of cases.

#### Article 5

##### Qualifications of Judges and Members of the Tribunal

The Judge and Members of the Tribunal shall be chosen regardless of their nationality from among persons who possess the qualifications required in their respective countries for appointment to high judicial office, or are experts in international law, in criminal law or in military law. They shall be competent to read both, and to speak one, of the official languages of the Tribunal.

#### Article 6

##### Composition of the Tribunal

1. The Tribunal shall be composed of fifteen [eleven, nine] Judges, who shall be elected in accordance with the provisions of Article 8.

2. Nine [seven, five] Judges of the Tribunal shall constitute a quorum.



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for the personal use of members of the  
Commission and their substitutes

II/11.

SECRET

14 April 1944

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT CONVENTION ON THE TRIAL AND PUNISHMENT  
OF WAR CRIMINALS

CHAPTER I

SCOPE OF WAR CRIMES

Article 1

Offences

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## CHAPTER I

(Alternative Articles)

### Scope of War Crimes

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Provided, that the application of this Article shall be subject to the provisions of Article 30.

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The seat of the Tribunal shall be at London. The Tribunal may decide to meet elsewhere for the trial of any particular case or group of cases.

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##### Qualifications of Judges and Members of the Tribunal

The Judge and Members of the Tribunal shall be chosen regardless of their nationality from among persons who possess the qualifications required in their respective countries for appointment to high judicial office, or are experts in international law, in criminal law or in military law. They shall be competent to read both, and to speak one, of the official languages of the Tribunal.

#### Article 6

##### Composition of the Tribunal

1. The Tribunal shall be composed of fifteen [eleven, nine] Judges, who shall be elected in accordance with the provisions of Article 8.
2. Nine [seven, five] Judges of the Tribunal shall constitute a quorum.



## Article 7

### Composition of the Divisions of the Tribunal

1. The Divisions of the Tribunal shall be drawn from the panel of Members of the Tribunal, who shall be chosen in accordance with the provisions of Article 8.
2. Each Division shall consist of not less than five judges who shall be designated from time to time by the Tribunal. The Divisions shall sit at such places, and shall continue to exist for such periods, as the Tribunal may direct.
3. A Member of the Tribunal shall have the rank and dignity of a Judge of the Tribunal, and during any period in which he shall sit as a judge of a Division he shall be entitled to the privileges and emoluments of a Judge of the Tribunal.
4. Two-thirds of the judges of a Division shall constitute a quorum.

## Article 8

### Election of Judges and Members of the Tribunal

The Judges of the Tribunal and Members of the panel of the Tribunal shall be elected in accordance with the following provisions:

- a) Within thirty days after the date on which this Convention becomes effective, each member of the United Nations shall appoint as Members of the Tribunal, three persons [four], at least one of whom shall not be a national. The names of the persons so appointed shall be transmitted to the Chairman of the United Nations Commission for the Investigation of War Crimes, who shall forthwith communicate them to the members of the United Nations.
- b) Within fifteen days following the notification of the above list, the Chairman of the United Nations Commission for the Investigation of War Crimes shall call a conference of the heads of diplomatic missions of the United Nations, accredited to the Court of St. James's, to meet at London at such time as he may direct. Members of the United Nations which are not represented

at the Court of St. James's may appoint a special representative.

c) The conference shall proceed to the election of Judges of the Tribunal. The representatives of the members of the United Nations shall, by secret ballot and by such method of voting as they may determine, elect the Judges of the Tribunal from among the Members of the Tribunal.

d) Any state which becomes a party to this convention subsequent to the date on which it becomes effective shall appoint Members of the Tribunal as provided in Paragraph a) of this Article.

#### Article 9

##### Term of Office

1. Judges and Members of the Tribunal shall be chosen for a term of three years, unless the Tribunal has ceased to exist before the expiration of that period.

2. Judges and Members of the Tribunal shall be eligible for re-election.

3. Judges and Members of the Tribunal shall continue to discharge their duties until their place has been filled.

#### Article 10

##### Vacancies

1. In the event of a vacancy among the Judges of the Tribunal, whether resulting from resignation or from any other cause, the Tribunal shall proceed to the election of a Judge from among the Members of the Tribunal. A Judge so elected shall hold office for the remainder of his predecessor's term.

2. In the event of a vacancy among the Members of the Tribunal, whether resulting from resignation or from any cause other than the election of a Member as a Judge of the Tribunal, the member of the United Nations which appointed the Member whose place is vacated shall designate his successor, who shall hold office for the remainder of his predecessor's term.



## Article 11

### Increase in Number of Judges and Members

In the event that the number of Judges or Members of the Tribunal is not, in the opinion of the Tribunal, adequate for the speedy despatch of its business or that of its Divisions, the President of the Tribunal shall call a conference of the heads of diplomatic missions of the United Nations accredited to the Court of St. James's. This conference, after considering the recommendations of the Tribunal, and acting by such methods as it may determine, shall take such action as it may deem appropriate.

## Article 12

### Institution of the Tribunal

1. The date of the first meeting of the Tribunal shall be set by the conference of representatives of members of the United Nations referred to in Paragraph b) of Article 8.

2. Within fifteen days following its convening, the Tribunal shall establish rules for regulating its administration and procedure, and that of its Divisions. The Tribunal shall have the authority to amend or to supplement these rules from time to time.

## Article 13

### Declaration on Assuming Office

Every Judge of the Tribunal or of its Divisions shall, before taking up his duties, make a solemn declaration in open court that he will exercise his functions impartially and conscientiously.

## Article 14

### Election of Officers

1. The Tribunal shall elect its President and Vice-President appoint its Registrar, and otherwise perfect its organization and that of its Divisions.

2. The President and Vice-President shall be elected for a term of one year, and shall be eligible for re-election.

## Article 15

### Privileges and Immunities

Judges of the Tribunal, Members of the Tribunal serving as judges of one of its Divisions, and the Registrar of the Tribunal, when engaged on their official business or travelling to or from any place at which such business is performed, shall enjoy diplomatic privileges and immunities.

## Article 16

### Incompatible Activities

1. Judges of the Tribunal may not exercise any political or administrative function, or engage in any activity of a professional nature during their term of office, save with the previous consent of the Tribunal. Any doubt upon this point shall be settled by the decision of the Tribunal.

2. Members of the Tribunal shall be subject to the provisions of the preceding Paragraph during the time that they are assigned to active duty as judges of a Division of the Tribunal.

## Article 17

### Sessions of the Tribunal and its Divisions

1. The Tribunal shall remain permanently in session. It may recess from time to time as the business before it may permit.

2. Members of the Tribunal shall hold themselves at the disposal of the Tribunal, and shall at all times, be prepared, after suitable notice has been given, to assume the duties of a judge of a Division of the Tribunal.

## Article 18

### Withdrawal of Judges

The Tribunal shall establish rules which shall determine the conditions under which a Judge of the Tribunal or one of its Divisions shall be authorized or required to withdraw from participation in any case.



Article 19

Dismissal from Office

The Tribunal, with the concurrence of not less than twelve  
nine, seven Judges thereof, may dismiss a judge of the Tribunal  
or one of its Divisions who has ceased adequately to perform the  
functions of his office.

Article 20

Assessors

The Tribunal and its Divisions shall have the power to  
appoint experts in international law, in criminal law, in military  
law, or in any other field of law, to sit with them as assessors,  
but without the right to vote, in the trial of any particular case  
or class of cases.

### CHAPTER III

#### AUXILIARIES OF THE TRIBUNAL

##### Article 21

##### United Nations Commission for the Investigation of War Crimes

1. The United Nations Commission for the Investigation of War Crimes, established at a meeting of United Nations and Dominions representatives held at London on October 20, 1943, shall continue its existence during the life of this Convention, or until such time as it may, with the consent of the parties to the said agreement, be merged with the United Nations Commission for the Prosecution of War Crimes.

2. The Commission for the Investigation of War Crimes shall exercise such functions as may have been conferred upon it by the parties to the agreement by which it was established, or by the terms of this Convention.

##### Article 22

##### United Nations Commission for the Prosecution of War Crimes

1. The conference of representatives of members of the United Nations referred to in Article 8 shall elect a United Nations Commission for the Prosecution of War Crimes of seven members, one of whom shall be designated Chief Prosecutor.

2. Members of the Commission for the Prosecution of War Crimes shall be chosen for a term of three years, unless the Tribunal has ceased to exist before the expiration of that period.

3. In the event of a vacancy among the members of the Commission for the Prosecution of War Crimes, the Tribunal shall proceed to elect a member, who shall hold office for the remainder of his predecessor's term.

4. In addition to exercising such functions as may be conferred



upon it by the terms of this Convention, the Commission for the Prosecution of War Crimes shall:

- a) Receive evidence of war crimes submitted to it by the Commission for the Investigation of War Crimes.
- b) Select and prepare cases for trial by the Tribunal and its Divisions.
- c) Conduct prosecutions before the Tribunal and its Divisions.
- d) Ensure that the judgments and orders of the Tribunal and its Divisions are carried out.

5. The Commission for the Prosecution of War Crimes shall appoint its staff and shall otherwise perfect its organization.

#### Article 23

##### General Provisions

The provisions of Articles 5, 9, 16, 18 and 19 shall apply, mutatis mutandis, to members of the Commission for the Investigation of War Crimes and of the Commission for the Prosecution of War Crimes.

#### CHAPTER IV

### SURRENDER, EXTRADITION AND TRANSFER OF PERSONS ACCUSED OF WAR CRIMES

#### Article 24

##### Surrender

The Tribunal shall have the authority to require, upon the motion of the Commission for the Prosecution of War Crimes or upon that of any member of the United Nations, that an enemy or former enemy state surrender into the custody of the Tribunal any person within its jurisdiction who is charged with an offence specified in Article 1, either for trial by the Tribunal or one of its Divisions, as the case may be, or for delivery to one of the United Nations.

#### Article 25

##### Extradition

The Tribunal shall have the authority to request, upon the motion of the Commission for the Prosecution of War Crimes, or upon that of any member of the United Nations, that a neutral or former neutral state deliver into the custody of the Tribunal any person within its jurisdiction who is charged with an offence specified in Article 1, for trial by the Tribunal or one of its Divisions, as the case may be, or, if he is a national or former national of a member of the United Nations, for delivery to such state.

#### Article 26

##### Transfer

The Tribunal shall have the authority to require any member of the United Nations to transfer into the custody of the Tribunal any person in the custody or within the territorial jurisdiction of that nation, and with respect to whom the Tribunal has jurisdiction, subject to the right of any member of the United Nations to retain custody of, and to bring to trial, its own nationals or former nationals, as provided in Article 28.



## CHAPTER V

### JURISDICTION WITH RESPECT TO WAR CRIMES

#### Article 27

##### Jurisdiction of the Tribunal

1. Except as otherwise hereinafter provided, the Tribunal shall have jurisdiction to try all persons surrendered by an enemy or former enemy state pursuant to the terms of Article 24; or extradited from a neutral or former neutral state pursuant to the terms of Article 25; or transferred to the Tribunal by any one of the United Nations pursuant to the terms of Article 26; or any other person accused of an offence specified in Article 1 whose trial by the Tribunal is requested by the member of the United Nations which has him in custody, or by the state or states upon whose motion his surrender or extradition was required or requested: Provided, that the Tribunal may direct that any person or group of persons over whom it has jurisdiction shall be tried by one of its Divisions.

2. Any person referred to in Paragraph 1 of this Article who is a national or former national of a member of the United Nations shall, unless the Tribunal has jurisdiction under the terms of Paragraph 4 of this Article and chooses to exercise such jurisdiction, be delivered by the Tribunal to that state for trial.

3. Any person referred to in Paragraph 1 of this Article, who is charged with the commission of an offence or offences within the territory of a member of the United Nations, or against the person or property of one or more of its nationals or former nationals, shall, upon demand by such state, be delivered to it by the Tribunal for trial.

4. Any person referred to in Paragraph 1 of this Article, who is charged with the commission, at any one time or at different times, of offences within the territory, or against the property of nationals or former nationals, of more than one of the

United Nations, shall be tried by the Tribunal or by one of its Divisions: Provided, that if the members of the United Nations claiming jurisdiction under the provisions of this Article so agree, such person shall be tried by such state as they may designate.

5. Whenever the Tribunal or one of its Divisions initiates the trial of any person for two or more offences, in accordance with the terms of Paragraph 4 of this Article, the jurisdiction of the Tribunal or of the Division, as the case may be, shall not be divested by the fact that the accused is acquitted of all charges except those which would, in the absence of other charges, have made the accused subject to the jurisdiction of the state within whose territory or against the person or property of whose nationals or former nationals, the offence or offences were committed.

#### Article 28

##### Jurisdiction of National Courts

1. The jurisdiction of the Tribunal and of its Divisions shall not extend in any event to a national or former national of a member of the United Nations which has custody of such person.

2. A member of the United Nations shall not be precluded from trying persons in its custody, other than its own nationals or former nationals, over whom the Tribunal has jurisdiction under the terms of this Convention, unless their transfer for trial is required by the Tribunal in accordance with the provisions of this Convention.

3. A member of the United Nations shall in every case inform the Tribunal of the identity of the accused and of the nature of the charges against him before proceeding to the trial of any person for an offence specified in Article 1; [ or for an offence committed with the intent to further the cause of the enemy or by means of the power or opportunity afforded by a state of war or armed hostilities, or by hostile occupation of the territory of the state which has custody of the accused. ]



4. A member of the United Nations shall not proceed with the trial of any person, other than its own national or former national, who is selected for trial before the Tribunal in accordance with the terms of this Convention and with respect of whom the Tribunal has jurisdiction, but shall permit such person to be dealt with as directed by the Tribunal. The fact that proceedings have been initiated or that sentence has been imposed by a national court shall not preclude the Tribunal from requiring the transfer of the accused.

5. The jurisdiction of the Tribunal, as provided in Article 27, shall not be affected by any agreement which has been concluded, or which may be concluded, by members of the United Nations for transfer to each other of persons accused of war crimes or other war offences.

## CHAPTER VI

### LAW AND PROCEDURE

#### Article 29

##### Law to be Applied

In the trial of persons charged with the offences specified in Article 1, the Tribunal and its Divisions shall apply:

a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions

establishing rules of the laws of war expressly recognized by the belligerent states;

b) International customs of war, as evidence of a general practice accepted as law;

c) General principles of criminal law recognized by civilized nations;

d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of the laws of war.

#### Article 30

##### Superior Orders

1. The plea of superior orders shall not constitute a defence against a charge arising under Article 1 if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know, given his rank or position and the circumstances of the case, that such order was illegal.

2. It shall be for the Tribunal and its Divisions to consider to what extent irresistible compulsion shall be a ground for mitigation of the penalty or for acquittal.



#### Article 31

##### Official Languages

1. The official languages of the Tribunal and other Divisions shall be English and French, but the Tribunal, or any one of its Divisions may direct that the proceedings shall be conducted in another language.

2. All documents submitted in any language other than one of the official languages shall be translated into one of the official languages. At the request of the accused, all documents shall be translated into a language with which he is conversant.

3. At the request of either party, oral proceedings may be conducted in whole or in part in a language other than one of the official languages, but in such case they shall be currently translated, at the request of the accused, into a language with which he is conversant.

#### Article 32

##### Production of Evidence

The Tribunal or its Divisions shall, at the request of the accused, or of the Commission for the Prosecution of War Crimes:

- (a) Order any witness to attend and be examined before the court.
- (b) Summon any person with expert knowledge in legal, military, naval, aerial or other relevant matters to give evidence in any case where it appears to the court that such special knowledge is necessary to the proper determination of the case.
- (c) Order the disclosure and production of any document, exhibit or any other thing connected with the proceedings, the production of which it may deem necessary to the proper determination of the case.

- (d) Issue letters of request or appoint special commissioners for the taking of evidence out of court whenever it is not possible otherwise satisfactorily to dispose of the case. Such evidence shall be taken under such safeguards prescribed by the Tribunal as will protect the interests of the accused and promote the administration of justice.

#### Article 33

##### Rights of the Accused

1. The accused shall be informed in writing of the nature of the charges against him, which shall be set forth in sufficient detail to give to the accused a reasonable opportunity to prepare his defence.
2. The accused shall have the benefit of qualified legal counsel, chosen by himself with the approval of the Tribunal or the Division before which he is to be tried. If the accused is not represented by counsel of his own choice, the court shall assign qualified legal counsel for his defence.
3. The accused shall have the right to be present during the conduct of proceedings against him in the Tribunal or in a Division.

#### Article 34

##### Publicity of Hearings

Hearings before the Tribunal or before one of its Divisions shall be public unless the court, by a reasoned judgment, shall direct that the hearing shall take place in camera.

#### Article 35

##### Intervention

Any member of the United Nations may intervene, submit a statement of its case and appear in the oral proceedings in a case in which the accused is charged with the commission of an offence within its territory or against the person or property of one or more of its nationals or former nationals.



## Article 36

### Revision of Judgments

The Tribunal shall establish rules which shall determine the conditions under which questions may be certified by its Divisions, and under which judgments of the Tribunal or of its Divisions may be reopened or reviewed.

### Alternative Article 36

#### Revision of Judgments

1. Against convictions pronounced by the Tribunal or by one of its Divisions, no proceedings other than an application for revision shall be allowable.

2. Proceedings for revision may be initiated by the Tribunal upon its own motion, upon the motion of the Commission for the Prosecution of War Crimes, upon the motion of the person convicted, or upon the motion of any member of the United Nations which has intervened in the case, and then only upon the discovery of some fact of such nature to be a decisive factor, which factor was, when judgment was given, unknown to the Tribunal, or a Division, or to the applicant.]

## Article 37

### Ne Bis in Idem

1. No person shall be prosecuted before the Tribunal, before one of its Divisions, or before a national court of a member of the United Nations if such person has already been prosecuted before the Tribunal, before one of its Divisions, or before a national court of a member of the United Nations and has been convicted or acquitted on the merits of an offence which is specified in Article 1 and requires proof of substantially the same acts.

2. No trial or sentence by a national court of an enemy or former enemy state shall bar trial or sentence by the Tribunal, by one of its Divisions, or by a national court of a member of the United Nations for an offence specified in Article 1: Provided, that if a sentence has been imposed by a national court of an enemy or former enemy state, the penalty already undergone shall be taken into account in fixing any sentence which may be imposed.



## CHAPTER VII

### THE JUDGMENT, ITS EXECUTION AND PARDON

#### Article 38

##### Delivery of Judgment

1. The Tribunal and its Divisions shall sit in private to consider their judgments.

2. Every judgment or order of the Tribunal or of its Divisions shall be pronounced at a public session and shall state the reasons on which it is based.

3. The decisions of the Tribunal and its Divisions shall be by a majority of the judges participating, and shall be deemed to be the opinion of the entire court. No dissenting opinion shall be published or divulged in any way.

#### Article 39

##### Detention of the Accused

The state on whose territory the Tribunal or one of its Divisions is sitting shall, if so directed by the court, supply suitable facilities for the detention of the accused.

#### Article 40

##### Penalties

1. The offences specified in Article 1 shall be punishable by death or by lesser penalty.

2. The Tribunal and its Divisions may impose pecuniary penalties.

3. The Tribunal shall determine the way in which fines shall be dealt with.

#### Article 41

##### Execution of Sentences

Sentences involving loss of liberty or death shall be executed by a member of the United Nations designated with its consent by the Tribunal or by a Division which has imposed the sentence: Provided, that such consent cannot be refused by the state which has requested the surrender, extradition, or trial of the person convicted, or which has intervened in his trial.

#### Article 42

##### Pardon and Commutation

The right of pardon or commutation of sentences imposed by the Tribunal or by one of its Divisions shall be exercised by the state which has to execute the penalty, in the absence of objection by any state which has requested the surrender, extradition or trial of the person convicted, or which has intervened in his trial.



## CHAPTER VIII

### GENERAL PROVISIONS

#### Article 43

##### Expenses

1. All expenses involved in the execution of this Convention, including costs arising from trial proceedings and from the execution of such sentences as may be imposed, shall be defrayed from a common fund created by contributions from the members of the United Nations according to a plan which shall be adopted by the conference of representatives of the United Nations referred to in Article 8, paragraph 5.

2. All emoluments of the Judges of the Tribunal, the Registrar of the Tribunal, the Judges of the Divisions and the members of the Commission for the Prosecution of War Crimes shall be determined by the conference of representatives of members of the United Nations referred to in Article 8, paragraph 5. The salaries of the clerical and other personnel of the Tribunal and of its Divisions and of the Commission for the Prosecution of War Crimes, shall be determined by the President of the Tribunal and by the Chief Prosecutor respectively.

3. Further conferences of representatives of the members of the United Nations shall be convened by the Registrar of the Tribunal at intervals which shall not exceed one year for the consideration of financial questions involved in the execution of this Convention.

#### Article 44

##### Enforcement of Convention

The members of the United Nations undertake:

- (a) To adopt such measures as may be necessary to give effect to the provisions of this Convention;
- (b) To impose upon enemy states, as a part of the terms of surrender, an obligation to deliver up for trial any and all persons charged with an offence or offences specified in Article 1, and to

take all other steps necessary to facilitate the execution of this Convention; and

(c) To secure the recognition by neutral or former neutral states of an obligation to deliver up for trial any and all persons within their territories charged with an offence or offences specified in Article 1, and to take all other steps necessary to facilitate the execution of this Convention.

#### CHAPTER IX

#### RATIFICATION, DENUNCIATION AND TERMINATION

(Reserved)



Note. This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/12  
30 March 1944

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE II

Second Revised Draft

CONVENTION FOR THE TRANSFER OF WAR CRIMINALS

AND OTHER WAR OFFENDERS

(Rapporteur: Dr. Liang)

(Enumeration of the Heads of States)

Having resolved to conclude a Convention with the object of achieving the transfer of war-criminals and other war offenders;  
have appointed as their Plenipotentiaries the following:  
(list of Plenipotentiaries)  
Who, having communicated their full powers, found in due and good form, have agreed on the following provisions:

Article I

The H.C.P.s mutually agree to transfer to each other, according to the procedure hereinafter provided, persons found within their jurisdiction who are charged with or convicted of an offence against the laws and customs of war, which offence was committed either within the jurisdiction of the requesting state or against that state or its nationals; provided that the offence is punishable according to the laws of the requesting State with the death penalty or with detention in a penal institution of not less than three years.

Article II

The H.C.P.s further mutually agree to transfer to each other, according to the procedure provided hereinafter, all persons, nationals of the requesting state, who are within their jurisdiction and are charged with or convicted of an offence committed with the intent to further the cause of the enemy or by means of the power or opportunity afforded by a state of war or armed hostilities, or by hostile occupation of territory of the requesting state; provided that the offence is punishable according to the laws of the requesting state with the death penalty or with detention in a penal institution of not less than three years.

Article III

The offences referred to in Articles I and II shall not be deemed to have a political character within the meaning of any treaties of extradition between or among the H.C.P.s.

#### Article IV

The request for transfer shall be transmitted through the diplomatic channel, and shall be executed by the appropriate executive or administrative authorities of the requested state. The person whose transfer is requested under the terms of this Convention shall in no case have recourse to any form of judicial procedure provided in the extradition treaties, laws or regulations of the requested state. The request shall contain in any event:

1. In the case of an alleged offender:

A. 1° the identity, nationality (if known), and description of the alleged offender;

2° the description of the alleged offence and the maximum penalty which can be inflicted for that offence.

B. The Government requesting transfer shall in every case give written assurances to the Government from whom the transfer is requested to the effect:

1° that the trial will be conducted in accordance with an established legal procedure;

2° that the trial will take place before a civil or military court and that judgment will be pronounced in open court;

3° that the alleged offender will be afforded the assistance of counsel both before and during the trial.

2. In the case of a convicted offender:

1° the identity, nationality (if known), and description of the convicted offender;

2° the description of the offence, the penalty imposed, and the allegation that the offence falls within the terms of the present Convention;

3° the original or an authenticated copy of the judgment given by the appropriate court in respect of the offence and in the presence of the offender.

#### Article V

The H.C.P.s may decline to transfer to each other their own nationals and former nationals.

In the event that two or more of the H.C.P.s request the transfer of any person, the party within whose jurisdiction the offence is alleged to have been committed may decline to transfer such person.

In all other cases where two or more H.C.P.s request the transfer of the same alleged offender, such person shall be transferred first to the Government of the State, the national legislation of which contains the heaviest maximum penalty in respect of the alleged offence regarding which transfer is requested.

/Where



Where the maximum penalties in respect of the offences for which transfer is requested are the same, transfer shall first be effected to the Government which first requested the transfer.

#### Article VI

No transfer shall be effected if the alleged offender is under investigation or trial in the courts of the requested state at the time when the request is made.

In the event of a sentence of detention in a penal institution having been pronounced, the execution of the sentence will be suspended, if the transfer of the convicted person is requested in accordance with Article I. (?)

A sentence of death shall however be executed although one or more of the H.C.P.s have requested the transfer of the offender.

If an alleged offender has been tried and sentenced by the courts of two or more H.C.P.s who request the transfer of the person concerned, the sentences pronounced against him shall be executed in the several States in the order of the date of the sentences.

#### Article VII

The Governments of the H.C.P.s agree to allow the transit through their territories of persons who are being transferred by one of the signatories to the present convention to another signatory, on production of a certificate emanating from the Government of the State from whom the transfer is obtained. During the passage through such territories the person being transferred and his escort may be accompanied by officials designated by the Governments concerned.

#### Article VIII

The H.C.P.s agree to produce at the time of transfer all documents, exhibits, or any other thing which may serve as proof of the alleged offence.

(a paragraph on judicial assistance reserved)

#### Article IX

The requesting State shall bear all costs arising out of a transfer made at its request under the terms of this convention.

#### Article X

The present Convention constitutes an exceptional measure and shall not affect the operation of any treaty of extradition between or among the H.C.P.s except as may be expressly provided by the terms of this Convention

Article XI

(Denunciation and termination  
text provisionally reserved)

Article XII

The present Convention shall be ratified.  
Ratification shall be deposited as soon as possible with  
....., who will notify such deposit to all  
signatories.

Article XIII

The present Convention shall come into force one month  
after the date on which it shall have been ratified on behalf  
of two of the H.C.P.s. Thereafter it shall take effect in the  
case of each H.C.P. one month after the date of the deposit of  
the ratification on its behalf with .....

In faith whereof, the above named Plenipotentiaries have  
signed the present Convention.

Done at London, this .... day of .....  
one thousand nine hundred and fortyfour, in a single copy of  
which the English and French texts are both authentic.



Note. This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

11/13.  
1.5.1944.

UNITED NATIONS WAR CRIMES COMMISSION

NOTE BY H. de BAER ON THE CATEGORIES OF CRIMES WHICH WOULD COME BEFORE THE INTERNATIONAL CRIMINAL COURT.

1. When several National Courts have jurisdiction concurrently.

There is no doubt that there will be many cases of this kind; the objections which have been brought against their being dealt with by an International Criminal Court are :

(a) "This particularly applies to an inner ring of high accused, and these people shall be dealt with politically."

It is true that the Moscow Declaration says that "offences which have no geographical location will be punished by a joint decision of the Governments of the Allies." But does this mean that all German Ministers, Gauleiters, Generals, etc., etc., shall be dealt with politically? If this is so I am sure that the Commission would be grateful to receive some information on any such decision which may have been taken.

The danger of political decisions has already been mentioned : if by a political decision the leaders are put to death there may be fewer objections than if they are not. In the latter case, how can a National Court reasonably impose capital punishment upon the perpetrator of any atrocity when those who have ordered or instigated these atrocities (and who are moreover responsible for plunging the world into this war) get away with a less severe penalty? Furthermore if the subordinates who have committed these atrocities plead the Superior Order, and that those who have given such order are not examined by any court, how will it be possible for the court which is trying the subordinates to decide whether they were in a state of compulsion or not?

The responsibility of men such as Ministers, Gauleiters, Governors, etc., who have signed decrees (such as orders for deportations, or for shooting of hostages) which constitute in themselves a participation in those criminal acts, can be proved so easily before a court that one does not see why they should not be tried by the ordinary methods, in the traditional judicial manner of the democratic countries. Finally, is there not a danger in instituting two kinds of justice, one, political, for the elite, and the other, judicial, for the rabble?

(b) It has also been said that in respect of this category of criminals the Allied countries concerned might make arrangements for trying them before mixed military courts.

It is questionable however whether such arrangements would be more easily reached than a general convention of an I.C.C.

(c) Finally it has been proposed that the Commission for War Crimes should decide which Government shall try the accused.

It seems however that this could not be done without an agreement from all the Governments concerned, so that a convention is in any case necessary. Moreover in most Allied countries this solution would require legislation, in the same measure as would the institution of an I.C.C.

2. In respect of persons who have been surrendered by a neutral country.

There is no disagreement on this point, and all the members seem to concur that such persons should be judged by an I.C.C., if such a court were instituted.

3. Where no National Court has jurisdiction.

The objection which has been raised in this respect is that where an Allied Country has no court which has jurisdiction this could be cured by legislation of the country concerned. That is quite true, but the difficulty lies precisely in obtaining such modifications of legislation: The exiled Governments, alleging that they are not in touch with their people, and that their reduced "personnel" makes it most difficult for them to modify existing laws, show little inclination to bring alterations to their national laws. The annex to this paper gives an idea of the number of crimes which are not - or which are inadequately - punishable in some of the Allied countries, and of the enormous amount of legislation which would be necessary to make them punishable. Moreover it should not be forgotten that, even if the Governments concerned did legislate to make all these crimes punishable, such legislation could only operate for the future, and the crimes committed previously to the enactment would escape punishment.

If many governments have not altered their legislation it is because they are under the impression that the Commission is going to propose measures in respect of all crimes which cannot be punished by the National laws.

4. Cases where the country concerned prefers, for internal reasons, that the accused should be judged by an I.C.C.

The objection here is that this is a luxury. But if the countries that have been occupied agree that such a convenience should be afforded them one cannot see any good reason why it should be refused.

5. Cases where on account of technical obstacles or difficulties the competent allied court cannot obtain the presence of the accused or the witnesses.

(a) Accused: Let us remember that after the last war not one of the competent allied courts was in a position to obtain the presence of any accused. It is difficult to foretell the future but it is certainly not unreasonable to say that what happened in 1919-1920 may happen again.

(b) Witnesses: In many of the cases that have been forwarded to the Commission, namely in those which happened in prisoners' camps in Germany, there are witnesses of various nationalities. It will certainly be easier to obtain the presence of these people before an I.C.C. sitting in Central Europe than if they had to be sent to England, to U.S.A., India, etc... In any case, a change of legislation will be required, if only to compel witnesses to give evidence before a foreign court.

6. One fact is typical:

There is at this moment one case, and one case only, which is



ready for trial : the accused are in the hands of the Allies, testimonies have been recorded, and the necessary evidence is available. If an I.C.C. is not instituted, one cannot see by what other court it would be tried, the accused being Germans and the victims all Italians.

One cannot reasonably conceive an American Military Court trying this case merely because the accused happened to be captured by American Troops. (Admitting this would lead to conferring jurisdiction upon the courts of the armies of liberation in the territory of Allied Countries, e.g. conferring jurisdiction to British Military Courts in France in respect of Germans who have murdered Frenchmen.)

Putting the accused on trial before an Italian Court would also be creating a disastrous precedent : Italian Courts would insist upon trying their compatriots who have committed crimes in the Balkans in 1941-42, and the Fascists of Northern Italy would also insist upon trying the Italian war criminals themselves. This would encourage the Germans to demand the same thing, and lead to consequences which would be quite unacceptable.

7. Crimes which will be committed in Germany to prevent the restoration of peace.

In respect of this category it has been said that an I.C.C. will not be necessary as these crimes will be tried by the Allied Military Courts functioning in occupied Germany.

A Military Court functioning in an occupied country has jurisdiction only to try : (1) members of its own Forces, and (2) inhabitants who commit offences against members of its Forces, or who do acts which endanger the safety of these Forces. But offences committed by inhabitants against other inhabitants are expressly excluded from the jurisdiction of the Military Courts of the occupying Forces and should be tried by the local courts of the occupied country.

No one doubts that, after the war, there will be in Germany a much more considerable opposition to any democratic form of government than there was after the last war. We know the name of the man (Shepman) who is already now organising the guerilla troops which are to fight any attempt to democratise Germany.

Just as, in 1919 and thereafter, the Vehme, Stalhelm and the other militarist formations terrorised the democrats who were being taken against the murderers of Erzberger, Kurt Eisner, Paasche, Haase, Auer, Liebknecht, Rosa Luxemburg and so many other liberals and socialists, likewise, after this war, the few anti-Nazis who may be willing to accept to rule their countrymen with the uncertain support of the Allies will be considered as puppets by the Germans and will find themselves so isolated that they may not dare to take effective measures against criminal attempts to sabotage the restoration of peace.

Likewise, for their safety, the German judges may again close their eyes to any terrorist acts done against the democratic elements, just as they did twenty years ago. They may even go so far as punishing persons who help the Allies (cfr. the case of Wandt and many others) in rebuilding Peace. Would it then not be advisable to place this category of crimes under the jurisdiction of an I.C.C. rather than run the risk of history repeating itself ?

No reference has been made, either to the trial of persons such as Hitler, Mussolini, etc...; or to the trial of Germans who have committed crimes inside Germany (extermination of Jews).

## A N N E X

The following are cases :

1. as to which it is assumed that some of the Courts of the Allied Nations have no jurisdiction or :
2. which are not adequately covered by the penal law of some of the Allied Countries :

### 1. CRIMES AGAINST THE STATE OR OTHER POLITICAL UNIT

- (a) the crime of war (breach of Kellogg Pact);
- (b) altering the form of government (e.g. Croatia), setting up of a puppet or illegal government;
- (c) disregard or abolition by the occupier of the constitutional liberties of the people of the realm;
- (d) systematic debasement of currency and issue of spurious currency;
- (e) confiscation of public monies by order of the occupying authorities;
- (f) confiscation of art treasures by order of the occupying authorities;
- (g) requisition in excess of what is needed for the army of occupation (e.g. blankets and clothes commandeered in Western Europe for use of the German Army in Russia;
- (h) imposition of contributions other than for the needs of the army of occupation or of the administration of the country;
- (i) giving an order to inflict collective penalties;
- (j) imposition of fines upon cities or communities in an occupied country;
- (k) annexation of territory before the peace treaty (e.g. Alsace-Lorraine, Eupen-Malmedy, Poland, etc.);
- (l) denationalization of citizens;
- (m) compulsory enlistment of nationals in an enemy army;
- (n) Usurpation of sovereignty : altering the laws of the land when it was not absolutely impossible to do otherwise (violation of Article 43 of Hague Convention no. IV), such as : enacting decrees providing excessive penalties for minor or in-existent transgressions; making the criminal nature of an act depend upon the nationality, race or religion of the person who did the act; providing capital punishment for innocent relatives of transgressors; providing for the taking and shooting of hostages, etc.. etc..

### II. OFFENCES AGAINST THE FREEDOM OF PERSONS

- segregation of persons in concentration camps on sole account of ( race ) religion;
- segregation in ghettos;
- deportation of populations without their consent;
- arbitrary arrest of persons not suspected or accused of any crime :
  - ( 1. on account of their social standing : professors, intellectuals, etc.
  - ( 2. on account of their political ideas : communists, etc..
  - ( 3. on account of their creed or religion : Jews;
- abduction of girls and women for the purpose of (enforced work, )enforced prostitution;
- abduction of children for the purpose of Nazi education;



- forcing inhabitants to work for the enemy of their country in industries connected with the war.

### 111. CRIMES AGAINST LIFE AND LIMB

We assume that your national law, like any other, provides a possibility of punishing murder, rape, torture, etc... But there are some acts for which it may not be possible to obtain a technical conviction of murder, etc.. although the consequences have been similar and in some cases even much more serious, in view of the sufferings which the victims have endured.

It is namely doubtful whether it would be possible to obtain a conviction in the following cases on the basis of your national law :

- A. As to death caused in the field by members of the Armed Forces.
  - (1) the person who gives the order that "no quarter shall be given" (e.g. case of General Stenger 1921, Leipzig);
  - (2) the person who carries out such an order (e.g. case of Major Crusius, 1921, Leipzig);
  - (3) the person who gives the order to kill prisoners of war as a means of reprisals.
- B. As to death caused by action of a civil authority :
  - (1) the person who by an administrative measure orders the killing of another who is not guilty of any crime (e.g. order issued at Prague on May 27th 1942; Second Note of Czechoslovak Government; Stulpnagel ordering the execution of Communists in Paris; Heydrich in Norway and Czechoslovakia;
  - (2) the person who executes such order (e.g. officer commanding firing squad).
- C. Death caused by action of a Court of Justice :
  - constituted either (regularly, Edith Cavell case, Brussels, October 1915, or (irregularly, case of Capt. Fryatt, Bruges, 1916,
  - with or without jurisdiction,
  - delivering a sentence (in execution of a law or order :
    - e.g. ordering execution of hostages,
    - ) in violation or in excess of laws and orders.
- D.
  - (1) Causing death by starvation or exposure, by depriving persons of shelter and/or means of sustenance (e.g. order No. 24220 of Col. Nikolaesku, Chief of Staff of Roumanian 14th Division : Molotoff Notes, H.M. Stationery Office 1942, p. 6.
  - (2) Mass Murder ( (a) by excessive removal of foodstuff (e.g. starving populations in Greece; ) (b) by wilful destruction of foodstuff (e.g. sinking of the Swedish Mercy Ship "Stureborg" in the Aegean Sea on July 16th, 1942);
- E. Causing death by (1) forcing civilians to act as a screen for advancing units,
  - (2) ordering civilians to remove mines in a mine-field.

- F. Causing death by enforcing enrolment in the army of civilians belonging to territories which have been forcibly annexed before any Peace Treaty (e.g. inhabitants of Alsace-Lorraine, of Eupen-Malmedy, etc. killed in battle on the Russian front).
- G. Causing death by giving the order that torture shall be inflicted in view of obtaining information - or by carrying out such order.
- H. Causing death (by giving order to prevent saving of life after sinking of a merchant vessel. (Patzig, Dithmar and Boldt cases Leipzig 1921), by carrying out such order.
- I. Moral torture - e.g. taking an innocent person a number of times from his prison to the place of execution, with a view to induce him to disclose information. Threatening to torture a person's relatives, or to send his wife or daughter to brothels for German troops, etc....
- J. In respect of Superior Order : Some national laws provide immunity for the inferior who has carried out an order given by his superior, especially in military matters.
- K. Some national laws provide immunity for the doer when the criminal act is permitted by a statute and ordered by an authority : it is doubtful whether, in this case a punishment could reasonably be imposed in some countries upon a German ordered by an authority to do an act permitted by a statute. It should be noted in this respect that most war crimes are being permitted under the cloak of legality.

N.B. - In the Cambridge Commission the members belonging to the following countries declared that the laws of their country did not adequately provide for the punishment of war crimes committed within their territory : Belgium, Czechoslovakia, Holland, Luxemburg, Poland; The answers of the Norwegian and Greek members were similar, although to a minor extent.



SECRET

II/14  
17 May 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

PROPOSALS MADE BY M. DUMON ON THE LINES SUGGESTED BY  
BY M. DE BAER IN HIS REPORT OF MAY 9 (Doc. II/13)  
AND CONCERNING THE INSTITUTION OF A WAR CRIMES'  
OFFICE IN ENEMY COUNTRIES AFTER THE ARMISTICE. (1)

The creation of an international or allied body whose mission it would be to give every assistance to the Courts of the United Nations for the punishment of war criminals seems essential.

The present state of the discussions of the United Nations War Crimes Commission, as well as the intentions of the various Allied Governments render it as yet impossible to ascertain whether the trial of certain war crimes will be entrusted to an international court.

The same facts, however, make it clear that if not the majority of war crimes, at least a substantial number of them will be tried by the national allied courts, whereas the majority of the offenders and numerous witnesses will be residing in enemy countries, at the moment of prosecution.

- - - - -

This double statement lays down the factors of a problem the solution of which can only be found in the creation of an international body charged with the duties of finding the offenders wherever they are residing and then handing them over to the competent courts.

Normally when information has to be collected in a country other than that where the trial is held, a letter of request is addressed to the foreign country.

By means of this procedure, the trial-court may make use of information gathered elsewhere.

Moreover, the trial-court acknowledges for information so obtained from abroad the same probative value as if it had been collected by the home judicial machinery.

The setting up of an international or inter-allied body in accordance with the exigencies which in the extradition treaties necessitated the creation of the procedure by letter of request, seems imperative and to be a condition to the adequate repression of war crimes, based on sound principles of justice.

- 
- (1) The subject discussed has hitherto been described as "the Question of Establishing a Prosecuting Office."

The body in question could be called International or United Nations War Crimes' Office or International or United Nations Criminal Justice Office or International or preferably United Nations Court of Investigation, etc... In this paper, for short, we will call it "the Agency."

#### MISSION OF THE "AGENCY"

The "Agency" should especially be charged with the following duties:

- (1) to locate the whereabouts and to find within enemy territory the accused whose names, rank, position or other means of identification have been indicated by a national "parquet" or by the United Nations War Crimes Commission;
- (2) to hear and examine any witnesses or experts.

It would be understood that the same value would be assigned to the various components of the files gathered by the "Agency" as if they had been collected by the national judicial machinery itself. (Cfr. Bow Street in 1920).

Often, where the national court will be desirous to hear witnesses, it is obvious that it will frequently be most expedient for the national courts to have at their disposal within enemy territory a body by whom specified questions can be asked from the witnesses and answers registered under oath.

This method would reduce the too frequent need for witnesses having to give evidence of a not too essential importance, to travel to and fro between enemy countries and the country where the trial is held.

The nations whose responsibility it will be to ensure the maintenance of order in the enemy countries would no doubt welcome the setting up of such a body which would avoid unnecessary journeys for enemy subjects.

- (3) To ascertain, with the eventual aid of the allied "parquets" and the police of the defeated countries, the identity of all persons guilty of war crimes.

It is certain that, as the War Crimes Office will be functioning in the territory where most of the war criminals are residing, and will be charged with the duty of tracing war criminals, it will be in a far better position than any other body to do this work and to assist adequately the national courts.

- (4) To issue search warrants.

It is obvious that if justice is to be administered properly it is only a judicial body which will be in a position to carry out these tasks adequately.

- (5) To place and keep in custody the accused persons.

For this reason, only a judicial body, such as forecast hereabove, is able to carry out these tasks.

- (6) Make on the spot all such surveys which could not conveniently be carried out in other countries;



- (7) Ensure the conveyance of the accused and witnesses to their place of destination;
- (8) At the special request of an allied nation, eventually ask for the extradition of a war criminal (see below);
- (9) To collect information which might lead to the discovery of other crimes or of further evidence.

#### JUSTIFICATION OF THE "AGENCY" AND ITS LEGAL BASES

Various justifications have already been exposed hereabove.

One which we consider necessary to stress is the fact that if such an "agency" is not formed, it will be found unavoidable to request the military authorities of occupation in enemy countries to perform the above-mentioned essential tasks, or even, in spite of the undesirability of this intervention, ask for the assistance of the judicial machinery of enemy countries.

It is obvious that the military authorities will have many other essential and more urgent tasks to perform and would consequently be in a difficult position to attend to the aforesaid duties.

The exclusive assistance of such military authorities would no doubt offer neither the guarantee nor the efficiency which are expected from a qualified body.

It is sincerely believed that a speedy imposition of punishment can be achieved only if there is, in Germany, a body of men experienced in Continental judicial procedure and acting there to accelerate the delivery of war criminals and to assist the trial-courts.

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An inter-allied convention will have to be adopted regulating the organisation and the competency of the "Agency", as well as conferring on that body the means to enforce its mission.

National legislation will have to be adapted to the said convention so as to allow the proceedings of this "Agency" to be recognised as probative before the national courts.

The various countries, parties to the convention would provide the said "Agency" with the assistance of the national "parquets" and police. Furthermore, a clause would have to be included in the armistice convention, compelling enemy countries to recognise the international "Agency" and to grant to the said "Agency" the assistance of their judicial machinery and their police.

#### ORGANISATION OF THE "AGENCY"

##### A. STAFF

The following staff will be required:

1. Twenty members (jurists) (approximately) able to carry out functions similar to those of an investigating judge (juge d'instruction), with some knowledge of international law and of the required foreign languages;
2. A Chief Clerk entrusted with the administrative part;

3. About 40 clerks, who would assist the 20 investigating judges in the execution of their mission and also help with the administrative work;
4. A sufficient number of C.I.D. officers or constables taken from the personnel of the various Allies, and having some knowledge of foreign languages. Some of these C.I.D. officers would be chosen among the nationals of the enemy countries in order to facilitate the various investigations entrusted to the "Agency".  
A modern laboratory of criminology and of scientific police, provided with the required technical staff, will be put at the disposal of the C.I.D. officers.
5. It will be temporarily necessary to call upon the Allied armed Forces of Occupation to enforce the duties to be performed by the "Agency".

#### B. ORGANISATION OF THE "AGENCY"

Twenty investigating judges will be appointed by the various nations who are a party to the convention establishing the "Agency".

This "Agency" will have to be placed under the administrative direction of a Chairman elected either by the twenty investigating judges and chosen among them, or by the signatory States.

Their term of office will be fixed in the act of appointment and they cannot be dismissed except for bad behaviour and by decision of the majority of the twenty investigating judges.

The clerks, the C.I.D. officers, as well as the subordinate administrative staff will be subject, as regards hierarchy and discipline, to the Chairman of the Commission.

The staff will be appointed by the Chairman.

#### EVENTUAL ACCESSORY MISSION OF THE "AGENCY"

On the motion of any allied country, the "Agency" could be requested to demand the extradition, for account of this country, of a war criminal who has taken refuge in an ex-neutral country.

It can be safely assumed that a neutral country would be more willing to surrender the war criminal to an international or an inter-allied body than to a specified country.

This seems the more likely if the "Agency" would not limit its rôle to the part of intermediary, acting for account of the country in question, but rather demanding the extradition in its own name, thus engaging its own responsibility.

The consequences of such attitude would be twofold:

- (1) the "Agency" could freely study the judicial aspect of the circumstances of the offence of which the criminal is accused whose extradition is demanded and could consequently refuse this extradition, if their findings prove it to be unjustified either in law or in fact;



- (2) the assistance could be subordinated to certain conditions imposed upon the demanding country and with which the neutral country from which the extradition is demanded, would be made acquainted.

PRESENT AND FUTURE AIMS OF THE "AGENCY"

The present and immediate aim of the "Agency", as set out hereabove, would be to give assistance in making preliminary enquiries and investigations relating to war crimes.

Such a body could eventually form the nucleus of a post-war international institution whose rôle it would be to investigate the offences against an international criminal law, the creation of which would be justified by the imperative need of maintaining peace.

Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/15.

UNITED NATIONS WAR CRIMES COMMISSION

ANALYSIS of the still undecided questions arising out of the DE BAER - DUMON PROPOSAL FOR A WAR CRIMES OFFICE in enemy territory (Doc. II/14) and out of Committee II's discussion of it on 19th May, 1944.

Note by the Secretary-General.

The discussion in Committee II settled the main general question, namely that it would be desirable to have an agency to deal with war crimes attached to, or established as part of the Commander-in-Chief's Headquarters in each enemy territory. A number of other general questions, on which opinion appeared to be divided, still remained open, and must be decided before a detailed scheme can be voted by the Committee, namely - What are the functions and powers of the agency? How is it to be organised? What is its relationship to the War Crimes Commission? How is it to be established? It is hoped that the present paper, which is circulated with the approval of M. de Baer and attempts to set side by side the chief views expressed in regard to them, may facilitate their discussion.

1. Functions and Powers.

As described in Doc. II/14, the agency is to render the following services to the United Nations which utilise it :

- (i) To provide a substitute for the normal method of obtaining evidence from abroad by "Commissions rogatoires" (letters of request) since this method cannot successfully be applied to enemy territory. With this object the agency is to be organised for hearing and examining witnesses and experts in the enemy territory, and for making surveys on the spot, under conditions rendering the resulting evidence admissible in the national court concerned.
- (ii) To identify war criminals named or described by United Nations and ascertain their whereabouts in the enemy territory.
- (iii) To issue search warrants.
- (iv) To place and keep in custody persons accused of war crimes.
- (v) To ensure such persons being handed over for trial by the competent courts.
- (vi) To obtain extradition by ex-neutrals of persons accused of war crimes at the demand and for the account of the accusing United Nation. For this purpose it is suggested that the agency should make the request in its own name after satisfying itself that the request for extradition is justified.

Does Committee II desire to invest the contemplated agency with all or some of the above functions and powers?.



2. Organisation, Method of Operation, Relationship to the War Crimes Commission.

Doc. II/14 proposes that the agency should consist of about 20 lawyers qualified to perform tasks analogous to those of juges d'instruction (examining magistrates), be assisted by a staff of clerks, and adequate detective or police forces, and have at its disposal the outfit and staff of a modern criminological laboratory. The assistance of the local police and of the occupying forces would also be necessary.

Doc. II/14 regards the agency as a judicial organ co-operating with the judicial machinery of each one of the United Nations.

Some members of the Committee, on the contrary, seemed to consider that the agency could not be a judicial or an independent institution, but must be an organ of the War Crimes Commission attached to or forming part of Army Headquarters, and operating entirely as part of and through the occupying forces.

Which of these general conceptions does Committee II prefer?

3. Method of Establishment.

Doc. II/14 suggests that an international convention is necessary.

A number of members of the Committee felt it would be possible and desirable that the agency should be created by an Order of the Commander-in-Chief or a clause in the armistice terms. Doc. II/14 itself considers that a suitable provision in the armistice terms, compelling the enemy countries to recognise the agency and grant it the assistance of their judicial machinery and their police, would be necessary.

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and their substitutes.

SECRET

II/16.  
3 June, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

NOTE OF MEETING OF COMMITTEE II HELD ON 2 JUNE 1944.

Subject : Question of Establishing an International (Interallied) Court

Adopting the view that such a court was desirable, if practicable, and taking Mr. Preuss's draft (Doc. II/11), Articles 1 and 29, as the basis of discussion, the Committee discussed the law to be applied by the Court and agreed to give the following form to Article 29.

Article 29

Law to be Applied

In the trial of persons charged with the offences specified in Article 1, the Tribunal and its Divisions shall apply :

- (a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing rules of the laws of war expressly recognised by the belligerent states;
- (b) International customs of war, as evidence of a general practice accepted as law;
- (c) The principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience. (N.B. This phrase is taken from the eighth consideration set out in the Preamble of the 1907 Convention concerning the Laws and Customs of War on Land).
- (d) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

Futher consideration on Article 1 was adjourned.



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SECRET

II/17  
12 June, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

Article I of Draft Convention on the Trial and Punishment  
of War Criminals (Doc. II/11)

1. Text Proposed by Dr. Wellington Koo

War crimes including those committed in violation of the laws of war, such as are indicated below which have been committed by members of the armed forces, the civilian authorities, or other persons acting under the authority of, or claim or colour of authority of, or in concert with, a state or other political entity, engaged in war or armed hostilities with, or in hostile occupation of territory of the United Nations, or anyone of them at any time since ..... shall be punishable in accordance with the provisions of this Convention.

(Here follows list of crimes)

II. Amendment of Text I draft by Sir William Malkin

Offences against the laws or customs of war, such as but not limited to those listed below, committed by ..... (text as in I) ..... shall be punishable in accordance with the provisions of this Convention.

(Here follows list of crimes)

III. Text proposed by Sir William Malkin and supported  
by M. de Baer.

Offences against the laws or customs of war committed by ..... (Text as in I) ..... shall be punishable in accordance with the provisions of this Convention.

IV. Addition to Text III proposed by M. de Baer

2. Other offences may be brought under the provisions of this Convention by a decision of the Parties thereto.

V. Alternative List of War Crimes

1919 List

1. Murder and massacres - systematic terrorism.
2. Putting hostages to death.
3. Torture of civilians.
4. Deliberate starvation of civilians.
5. Rape.
6. Abduction of girls and women for the purpose of enforced prostitution.
7. Deportation of civilians.
8. Internment of civilians under inhuman conditions.

Preuss List

1. Murder or massacre.
2. Execution of hostages.
3. Rape.
4. Abduction of women for the purpose of enforced prostitution.
5. Segregation, internment or deportation of civilians under degrading or inhuman conditions, or under conditions unrelated to bona fide military necessity.
6. Forcing civilians to take part in military operations or preparations, in a manner calculated to endanger

1919 List (Cont.)

9. Forced labour of civilians in connection with the military operations of the enemy.
10. Usurpation of sovereignty during military occupation.
11. Compulsory enlistment of soldiers among the inhabitants of occupied territory.
12. Attempts to denationalise the inhabitants of occupied territory.
13. Pillage.
14. Confiscation of property.
15. Exaction of illegitimate or of exorbitant contributions and requisitions.
16. Debasement of the currency and issue of spurious currency.
17. Imposition of collective penalties.
18. Wanton devastation and destruction of property.
19. Deliberate bombardment of undefended places.
20. Wanton destruction of religious, charitable, educational and historic buildings and monuments.
21. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.
22. Destruction of fishing boats and of relief ships.
23. Deliberate bombardment of hospitals.
24. Attack and destruction of hospital ships.
25. Breach of other rules relating to the Red Cross.
26. Use of deleterious and asphyxiating gases.
27. Use of explosive or expanding bullets and other inhuman appliances.
28. Directions to give no quarter.
29. Ill-treatment of wounded and prisoners of war.
30. Employment of prisoners of war on unauthorised works.
31. Misuse of flags of truce.
32. Poisoning of wells.

Preuss List (Cont.)

- their lives.
7. Wilful deprivation of localities or districts of foodstuffs, shelter, clothing or other means of sustenance, in a manner calculated to cause unnecessary suffering.
8. Deliberate attack upon defenceless persons or upon centres of civilian population for the purpose of terrorisation.
9. Attack upon survivors of merchant vessels or aircraft which have been abandoned or destroyed.
10. Looting or pillage.
11. Wanton devastation or destruction of property.
12. Killing or maltreatment of wounded or prisoners of war.
13. Refusal to give quarter.
14. Deliberate attacks on hospitals or hospital ships, and other offences against sanitary personnel or the Red Cross.
15. Other similar acts, which by reason of their atrocious character, their ruthless disregard of the sanctity of human life and personality or their wanton interference with rights of property, are unrelated to reasonably conceived requirements of military necessity.



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SECRET

II/18  
13 June 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

DISCUSSION OF ARTICLE 6 OF CONVENTION FOR THE  
TRANSFER OF WAR CRIMINALS

A. Text of the successive drafts of Article 5 of the  
"Convention for the Transfer of War Criminals and  
other War offenders."

I TEXT OF ARTICLE 5 OF THE MINISTERS OF JUSTICE "CONVENTION  
FOR THE SURRENDER OF WAR CRIMINALS" (SC 2/1):

"No surrender shall be effected during the preliminary investigation or the trial of the alleged offender in the Courts of the State, to the Government of which the request for surrender is directed.

"In the event of a sentence of detention in a penal institution having been pronounced, the execution of the sentence will be suspended even if it is in the course of being executed, if the surrender of the convicted person is requested in accordance with Article 1.

"A sentence of death shall however be executed irrespective of whether a Government of one or more of the High Contracting Parties shall have requested the surrender of the offender.

"Whenever the alleged offender has been tried and sentenced or found not guilty by the appropriate courts of all the High Contracting Parties, who have requested the surrender of the person concerned, the sentences pronounced against him shall be executed in the countries in which they were pronounced in the order of their date."

II TEXT OF ARTICLE 6 OF THE "CONVENTION FOR THE TRANSFER OF  
WAR CRIMINALS AND OTHER WAR OFFENDERS" AS PRESENTED BY  
DR. LIANG IN DOC. II/12, OF 30 MARCH, 1944.

"No transfer shall be effected if the alleged offender is under investigation or trial in the courts of the requested state at the time when the request is made.

"In the event of a sentence of detention in a penal institution having been pronounced, the execution of the sentence will be suspended, if the transfer of the convicted person is requested in accordance with Article 1. (?)

"A sentence of death shall however be executed although one or more of the H.C.P.s have requested the transfer of the offender.

"If an alleged offender has been tried and sentenced by the courts of two or more H.C.P.s who request the transfer of the person concerned, the sentences pronounced against him shall be executed in the several States in the order of the date of the sentences."

P.T.O.

(N.B. Above draft was the result of Committee II having, at its meeting of 10 March, 1944, asked for a clarification of the Ministers of Justice article).

III TEXT OF FIRST PARAGRAPH OF THE ARTICLE PROVISIONALLY VOTED BY THE COMMITTEE ON 6 APRIL, 1944.

"Transfer may be declined if the alleged offender is under investigation or trial in the courts of the requested State for a crime more serious than the offence for which transfer is requested."

Dr. Böer proposed the following addition to this text, but the proposal was not accepted.

"In any event the transfer of the alleged offender shall be made after completion of his sentence in the requested State."

A further discussion of the article on 24 April resulted in the decision to take it up again in connection with the corresponding provisions of Mr. Preuss' draft convention.

B. Provisions of the Preuss 'Convention on the Trial And Punishment of War Criminals (Doc. II/11).

Under Chapter IV, (Articles 24, 25 and 26) surrender of war criminals by enemy states, extradition of them by neutral states and transfer of them by United Nations are made to the Tribunal on receipt of a request from that body. In the cases of surrender and extradition the request has to be made on the motion of the Commission for the Prosecution of War Crimes (Article 22) or of one of the United Nations, but this provision is omitted - possibly by accident - in the case of transfer by a United Nation.

The provision regarding transfer by United Nations is:

Article 26

"The Tribunal shall have the authority to require any member of the United Nations to transfer into the custody of the Tribunal any person in the custody or within the territorial jurisdiction of that nation, and with respect to whom the Tribunal has jurisdiction, subject to the right of any member of the United Nations to retain custody of, and to bring to trial, its own nationals or former nationals, as provided in Article 28."

Provision for delivery of persons coming into the custody of the tribunal is made by the following paragraphs of Article 27:

"2. Any person referred to in Paragraph 1 of this Article who is a national or former national of a member of the United Nations shall, unless the Tribunal has jurisdiction under the terms of Paragraph 4 of this Article and chooses to exercise such jurisdiction, be delivered by the Tribunal to that state for trial.

3. Any person referred to in Paragraph 1 of this Article, who is charged with the commission of an offence or offences within the territory of a member of the United



Nations, or against the person or property of one or more of its nationals or former nationals, shall, upon demand by such state, be delivered to it by the Tribunal for trial.

"4. Any person referred to in Paragraph 1 of this Article, who is charged with the commission, at any one time or at different times, of offences within the territory, or against the person or property of nationals or former nationals, of more than one of the United Nations, shall be tried by the Tribunal or by one of its Divisions: Provided, that if the members of the United Nations claiming jurisdiction under the provisions of this Article so agree, such person shall be tried by such state as they may designate."

The provisions of the draft concerning jurisdiction of national courts are contained in the following article:

Article 28

Jurisdiction of National Courts

"1. The jurisdiction of the Tribunal and of its Divisions shall not extend in any event to a national or former national of a member of the United Nations which has custody of such person.

"2. A member of the United Nations shall not be precluded from trying persons in its custody, other than its own nationals or former nationals, over whom the Tribunal has jurisdiction under the terms of this Convention, unless their transfer for trial is required by the Tribunal in accordance with the provisions of this Convention.

"3. A member of the United Nations shall in every case inform the Tribunal of the identity of the accused and of the nature of the charges against him before proceeding to the trial of any person for an offence specified in Article 1; [or for an offence committed with the intent to further the cause of the enemy or by means of the power or opportunity afforded by a state of war or armed hostilities or by hostile occupation of the territory of the state which has custody of the accused.]

"4. A member of the United Nations shall not proceed with the trial of any person other than its own national or former national, who is selected for trial before the Tribunal in accordance with the terms of this Convention and with respect of whom the Tribunal has jurisdiction, but shall permit such person to be dealt with as directed by the Tribunal. The fact that proceedings have been initiated or that sentence has been imposed by a national court shall not preclude the Tribunal from requiring the transfer of the accused.

"5. The jurisdiction of the Tribunal, as provided in Article 27, shall not be affected by any agreement which has been concluded, or which may be concluded, by members of the United Nations for transfer to each other of persons accused of war crimes or other war offences."

SECRET

II/19  
15 June 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

ARTICLE 6 OF CONVENTION FOR THE TRANSFER OF  
WAR CRIMINALS

Note drawn up by the Secretary General at the  
request of the reporter, Dr. Liang

I

The principal question discussed by Committee II in regard to Article 6 of the Convention for the Transfer of War Criminals has been one raised by Sir William Malkin, namely whether states can really be induced to hand over for trial as war criminals persons against whom they are themselves taking criminal proceedings.

In the form in which it appears in the Ministers of Justice Convention (Doc. II/18, par. I) the first paragraph of the article prevents such transfer "during" any criminal proceedings which may be in progress, but at the close of these proceedings the provisions regarding transfer must be applied, unless a death sentence has been pronounced, in which case such sentence is to be executed. The effect is not necessarily to prevent ultimate punishment of the criminal by the requested state. When he has been tried in a prescribed order, by all the United Nations which have asked for him, the sentences pronounced are to be executed in the order prescribed by the 4th paragraph of Article 6, and, if he lives long enough, he may incur the sentence inflicted by the requested state.

In the form in which the article appears in Dr. Liang's draft of 30 March, 1944, (Doc. II/18 par. II), the words "during the preliminary investigation or trial" have been replaced by the words "if the alleged offender is under investigation or trial." Since, however, the three remaining paragraphs, though somewhat altered, have the same meaning as in the original text, the new words doubtless have also the same meaning as in the original text, although by themselves they could equally well mean that, if criminal proceedings have been commenced, the transfer is not to be effected at all.

On the other hand the text which was voted for the first paragraph by the Committee on 6 April, 1944, (Doc. II/18 par. III), although it is capable of exactly the same meaning as Dr. Liang's text and the Ministers of Justice text, must apparently have been intended to mean that the fact that criminal proceedings are in process exempts the requested state from any obligation to transfer the criminal, since Dr. Eöer unsuccessfully moved an addition permitting transfer after he had served his sentence (*ibidem*).

P.T.O.L



The paragraph is only an incident in the system of handing on the alleged criminal from one United Nation to another till all are satisfied. It may not seem logical that the first state to have him in custody can stop the process in order to punish him at once itself, whereas no other one can do so. Moreover, the system itself was criticised but not fully discussed in Committee II.

It is suggested that the Committee should leave the existing texts on one side until it has decided:

- (a) Whether it wishes to maintain the "handing on" system.
- (b) Whether the state which first has the criminal in custody is to have the right to punish him before anyone else, or to the exclusion of anyone else, and, if so, on what conditions, if any.

~~A subsidiary question which was raised in Committee II, is whether the criminal proceedings referred to in the first paragraph of Article 6 may relate to any crime, or must relate to a war crime. If the latter is the case, this should be expressly stated. It could not be the case so long as the paragraph formed part of the Ministers of Justice Convention, since neutrals were to be parties to that Convention and obviously would not prosecute for war crimes.~~

- (c) Must the requested state, in order to be entitled to refuse transfer, be taking proceedings for a "war crime" or is it sufficient that there should be proceedings for any sort of crime?

This was not decided. As the text stands, the second answer seems to be correct. It would be desirable to clear up the point.

In addition to these questions, it would be desirable to consider whether the seriousness of different crimes can be compared in the absence of a standard of comparison. The standard laid down in Article 5 is severity of the maximum penalty under the national legislation.

~~A second subsidiary question is whether a standard of measurement of the gravity of crimes e.g. the severity of the punishment (o.f. the preceding article) is not required in the first paragraph of Article 6.~~

Once these questions are settled, there should be no difficulty in drafting a satisfactory text.

## II

The Preuss Convention throws no light on how Article 6 should be drafted, since it contains no corresponding provisions. The choice with which it confronts the Committee is between a system of direct transfer of accused persons from one United Nation to another and a system which utilises an international court to obtain custody of war criminals, whether from enemy states, neutral states and United Nations, and secure their being available for trial before the appropriate national courts or the international court itself. Committee II inserted in the Transfer Convention a new Article providing that its provisions should be "without prejudice to any arrangement which may be made for surrender of war criminals to an international court." It seems, however, to be questionable whether the Transfer Convention can co-exist with the arrangements proposed in the Preuss Convention.

Note This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/20  
20 June, 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

ARTICLE 6 OF THE CONVENTION FOR THE TRANSFER OF WAR CRIMINALS

ALTERNATIVE TEXT SUBMITTED BY DR. LIANG AND THE  
SECRETARY-GENERAL.

Draft A

- (1) If at the time when the request is made the alleged offender is undergoing investigation or is on trial in the courts of the requested state for a crime, whether a war crime or not, that state may decline to transfer him until the proceedings are terminated.
- (2) In the event of sentence of detention in a penal institution having been pronounced, the execution of the sentence shall be suspended, if the transfer of the convicted person is requested in accordance with Articles 1 and 2.
- (3) A sentence of death shall however be executed although one or more of the High Contracting Parties have requested the transfer of the offender.
- (4) When an alleged offender whose transfer has been requested by two or more High Contracting Parties has been tried and sentenced by their courts, the sentences shall be executed in the states concerned in the order of their dates: provided that, if the offender has been sentenced to death in one of the requesting states, he shall be transferred to that state for execution.

Draft B

- (1) If at the time when the request is made the alleged offender is undergoing investigation or is on trial in the courts of the requested state for a war crime, that state may decline to transfer him until the proceedings are terminated.

(Paragraphs 2, 3 and 4 as in A)

Draft C

- (1) If at the time when the request is made the alleged offender is undergoing investigation or is on trial in the courts of the requested state for a ..... which is more serious than that for which the transfer is requested, that state may decline to transfer him until the proceedings are terminated.

(Paragraphs 2, 3 and 4 as in A)

P.T.O.



Draft D

(1) If at the time when the request is made the alleged offender is undergoing investigation or is on trial in the courts of the requested state for a ..... which is punishable with a higher maximum penalty than that for which the transfer is requested, that state may decline to transfer him until the proceedings are terminated.

(Paragraphs 2, 3 and 4 as in A)

Commentary

All four Drafts are on the same basis as the Ministers of Justice Draft, i.e., they treat the existence of criminal proceedings in the requested state as merely entitling it to suspend transfer of the alleged offender until he has been sentenced or acquitted - not to refuse transfer altogether or until the sentence has been served.

If this is accepted, there are only two points to be decided, which all arise on Paragraph A. The Committee has :

Firstly - To choose between Drafts A and B of Paragraph (1),

Secondly - To fill in the blank space in Paragraphs B and C in accordance with the decision taken and choose between these two Drafts.

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See II/21(2)

SECRET

II/21  
22 June 1944

UNITED NATIONS WAR CRIMES COMMISSION

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COMMITTEE II

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ESTABLISHMENT OF AN INTERNATIONAL COURT

Articles adopted by the Committee

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ARTICLE A. (Preuss 1)

War crimes, including offences against the laws or customs of war, which have been committed by members of the armed forces, the civilian authorities, or other persons acting under the authority of, or claim or colour of authority of, or in concert with, a state or other political entity, engaged in war or armed hostilities with, or in hostile occupation of territory of the United Nations, or any one of them at any time since ..... shall be punishable in accordance with the provisions of this Convention.

ARTICLE B. (Preuss 29)

In the trial of persons charged with the offences specified in Article 1, the Tribunal and its Divisions shall apply:

(a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing rules of the laws of war expressly recognised by the belligerent states:

(b) International customs of war, as evidence of a general practice accepted as law;

(c) The principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience. (N.B. This phrase is taken from the eighth consideration set out in the Preamble of the 1907 Convention concerning the Laws and Customs of War on Land).

(d) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.



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See II/21(2)

SECRET

II/21(1)

27 June 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

ESTABLISHMENT OF AN INTERNATIONAL COURT

Articles adopted by the Committee

down to date (Revised edition)

ARTICLE A. (Preuss 1)

1. War crimes, including offences against the laws or customs of war, which have been committed by members of the armed forces, the civilian authorities, or other persons acting under the authority of, or claim or colour of authority of, or in concert with, a state or other political entity, engaged in war or armed hostilities with, or in hostile occupation of territory of the United Nations, or any one of them shall be punishable in accordance with the provisions of this Convention.
2. Other offences may be brought under the provisions of this Convention by a decision of the High Contracting Parties.

ARTICLE B. (Preuss 29)

In the trial of persons charged with the offences specified in Article 1, the Tribunal and its Divisions shall apply:

- (a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing rules of the laws of war expressly recognised by the belligerent states;
- (b) International customs of war, as evidence of a general practice accepted as law;
- (c) The principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience. (N.B. This phrase is taken from the eighth consideration set out in the Preamble of the 1907 Convention concerning the Laws and Customs of War on Land).
- (d) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

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SECRET

II/21 (2)  
1 July, 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

ESTABLISHMENT OF AN INTERNATIONAL COURT

ARTICLE ADOPTED BY THE COMMITTEE ON 30 JUNE, 1944

Article C (Preuss 2)

All persons, irrespective of their rank or position who, either by a positive act or by an omission, have committed or attempted to commit or have ordered, caused, aided, abetted or incited another person to commit a crime within the meaning of (1) Article A shall be punishable as principals or accessories in accordance with the provisions of this Convention.

(1) Note by the Secretary-General : Since Article A does not specify particular crimes, I have ventured to substitute "within the meaning of" for the words "specified in" used in the Preuss text.



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SECRET

II/22  
29 June, 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

CONVENTION FOR THE TRANSFER OF WAR CRIMINALS

AND OTHER WAR OFFENDERS

Draft adopted in First Reading by Committee II

(Enumeration of the Heads of States)

Having resolved to conclude a Convention with the object of achieving the transfer of war criminals and other war offenders;

have appointed as their Plenipotentiaries the following :  
(list of Plenipotentiaries)

Who, having communicated their full powers, found in due and good form, have agreed on the following provisions :

Article I

The H.C.P.s mutually agree to transfer to each other, according to the procedure hereinafter provided, persons found within their jurisdiction who are charged with or convicted of an offence against the laws and customs of war, which offence was committed either within the jurisdiction of the requesting state or against that state or its nationals or the armed forces of the state.

Article II

The H.C.P.s further mutually agree to transfer to each other, according to the procedure provided hereinafter, all persons, nationals or former nationals, of the requesting state, who are within their jurisdiction and are charged with or convicted of an offence committed with the intent to further the cause of the enemy or by means of the power or opportunity afforded by a state of war or armed hostilities, or by hostile occupation of territory of the requesting state.

Article III

The transfers provided for by Articles I and II shall be effected notwithstanding any contention that the offence was of a political character.

Article IV

The request for transfer shall be transmitted through the diplomatic channel, and shall be executed by the appropriate executive or administrative authorities of the requested state. The person whose transfer is requested under the terms of this Convention shall in no case have recourse to any form of judicial procedure provided in the extradition treaties, laws or regulations of the requested state. The request shall contain in any event ;

P.T.O.

1. In the case of an alleged offender :

- A. 1° the identity, nationality (if known) and description of the alleged offender;
- 2° the description of the alleged offence and the maximum penalty which can be inflicted for that offence.

B. The Government requesting transfer shall in every case give written assurances to the Government from whom the transfer is requested to the effect :

- 1° that the trial will be conducted in accordance with legal procedure;
- 2° that judgment will be pronounced in open court;
- 3° that the alleged offender will be afforded the assistance of counsel both before and during the trial.

2. In the case of a convicted offender :

- 1° the identity, nationality (if known), and description of the convicted offender;
- 2° the description of the offence and the penalty imposed;
- 3° the original or an authenticated copy of the judgment given by the appropriate court in respect of the offence and in the presence of the offender.

Article V

The H.C.P.s may decline to transfer to each other their own nationals and former nationals.

The Party within whose jurisdiction the offence is alleged to have been committed may decline to transfer such person.

In all cases where two or more H.C.P.s request the transfer of the same alleged offender, such person shall be transferred first to the Government of the State, the national legislation of which contains the heaviest maximum penalty in respect of the alleged offence regarding which transfer is requested.

Where the maximum penalties in respect of the offences for which transfer is requested are the same, transfer shall first be effected to the Government which first requested the transfer.

Article VI

1. If at the time when the request is made the alleged offender is undergoing investigation or is on trial in the courts of the requested state for a crime, whether a war crime or not, which is punishable with a higher maximum penalty than that for which the transfer is requested, that state may decline to transfer him until the proceedings are terminated.

2. In the event of sentence of detention in a penal institution having been pronounced, the execution of the sentence shall be suspended, if the transfer of the convicted person is requested in accordance with Articles I or 2.



3. A sentence of death shall however be executed although one or more of the High Contracting Parties have requested the transfer of the offender.

4. When an alleged offender whose transfer has been requested by two or more High Contracting Parties has been tried and sentenced by their courts, the sentences shall be executed in the states concerned in the order of their dates; provided that, if the offender has been sentenced to death in one of the requesting states he shall be transferred to that state for execution.

#### Article VII

The Governments of the H.C.P.s agree to allow the transit through their territories of persons who are being transferred by one of the Parties to the present convention to another Party, on production of a certificate emanating from the Government of the State from whom the transfer is obtained. During the passage through such territories the person being transferred and his escort may be accompanied by officials designated by the Governments concerned.

#### Article VIII

The H.C.P.s agree to produce at the time of transfer all documents, exhibits, or any other thing which may serve as proof of the alleged offence.

(a paragraph on judicial assistance reserved)

#### Article IX

The requesting state shall bear all costs arising out of a transfer made at its request under the terms of this convention.

#### Article X

The present Convention constitutes an exceptional measure and shall not affect the operation of any treaty of extradition between or among the H.C.P.s except as may be expressly provided by the terms of this Convention.

#### New Article

The provisions of the present Convention are without prejudice to any arrangements that may be made for the surrender of war criminals and other war offenders to an international court

#### Article XI

(Denunciation and termination text provisionally reserved)

#### Article XII

The present Convention shall be ratified.  
Ratification shall be deposited as soon as possible with  
....., who will notify such deposit to all signatories.

P.T.O.

Article XIII

The present Convention shall come into force one month after the date on which it shall have been ratified on behalf of two of the H.C.P.s. Thereafter it shall take effect in the case of each H.C.P. one month after the date of the deposit of the ratification on its behalf with .....

In faith whereof etc.

Article VIII

The H.C.P.s agree to submit to the jurisdiction of the Court of Arbitration, established by the Convention, all disputes which may arise between them in connection with the Convention.

(A paragraph on Arbitration removed)

Article IX

The Convention shall be open for signature by all States which are Members of the League of Nations.

Article X

The Convention shall be subject to ratification by the States which have signed it. The ratifications shall be deposited with the Secretary-General of the League of Nations.

Article XI

The Convention shall be subject to ratification by the States which have signed it. The ratifications shall be deposited with the Secretary-General of the League of Nations.

Article XII

(A paragraph on Arbitration removed)

Article XIII

The present Convention shall be subject to ratification by the States which have signed it. The ratifications shall be deposited with the Secretary-General of the League of Nations.



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SECRET

II/23

29 June 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

QUESTIONS AS TO THE JURISDICTION OF THE PROPOSED COURT

prepared by the Sub-Committee

PART I: JURISDICTION TO TRY OFFENCES

A. Offences in regard to which the Court has jurisdiction

(1) What is the nature of the offences themselves?

This has been defined by Committee II's Article A (Preuss 1) and Article B (Preuss 29).

(2) Preuss Article 2 provides that alleged offenders shall be punishable irrespective of their rank or position, and punishment may be inflicted not merely for the commission of an offence but also for ordering, causing, aiding, abetting or inciting another person to commit the offence.

(If retained, this formula should perhaps be completed by including a reference to failure to prevent the offence being committed).

B. Persons over whom the court has jurisdiction

Committee II's Article A (Preuss 1) limits the court's jurisdiction to "members of the armed forces, the civilian authorities, or other persons acting under the authority of, or claim or colour of authority of, or in concert with, a state or other political entity engaged in war or armed hostilities with or in hostile occupation of territory of the United Nations, or any one of them".

Is this satisfactory?

C. Relationship between the court's jurisdiction and that of national courts

The court is intended to deal with offenders whom there is some reason not to bring to trial in national courts. How is the distinction to be made?

/The following

The following are suggestions which were made in Committee II when the Committee was discussing the question whether the international court was required or which are contained in the Preuss draft:-

- (1) Where the alleged offender is charged with offences committed in the territories of more than one United Nation or against nationals of more than one United Nation the trial must be by the court unless the nations concerned agree to his being tried in the courts of one of their number (Preuss Article 27, par. 4)
- (2) In cases not falling within (1) above the United Nation against whom the offence has been committed may at its own discretion try it either in its own courts or before the international court (Preuss Article 27, par. 3).
- (3) If it so wishes, a United Nation has sole jurisdiction over war crimes committed by its nationals or former nationals unless the case falls under (1) above (Preuss Article 27, par. 2).
- (4) In cases over which no national court has jurisdiction the alleged offender must be tried by the court.

It appears from the Committee's discussions that such cases were (for example) expected to occur

- (a) as the result of the alleged United Nation not regarding the offence as punishable by its courts and feeling for some reason (e.g. constitutional reasons) unable to alter its law so as to give its courts jurisdiction;
- (b) as the result of the offence being one over which no national court could have or assume jurisdiction.
- (5) To encourage surrender of alleged offenders by neutral states, the surrender should be made to the court and the trial be held before the court.
- (6) The court should have sole jurisdiction to try Hitler and other arch criminals, since it alone would have enough prestige and could be trusted to inflict proper punishment.

Note: An alternative to (1) above would be to entrust the War Crimes Commission or other United Nations political organ with the right to decide disputes between Governments as to who should try a particular criminal where many claimed to try him.



PART II: AUXILIARY JURISDICTION

A. Obtaining custody of war criminals

Under the Preuss draft the United Nation having custody of an alleged offender, whom another United Nation wishes to put on trial, never hands him over directly to the latter state as is the case under the Transfer Convention. It is the court which calls for the handing over of the alleged offender, receives him into its own custody, and, if it does not try him, hands him over to the appropriate United Nation.

The question arises whether there is any place for this system if the Transfer Convention is adopted.

B. Prosecution before the court

Should the prosecution be conducted by an organ of the court, or of the United Nations or individually by each United Nation?

If there is such an organ, should it have the power to select persons for trial before the court, as in the Preuss draft (Article 22 par. 4(b) and Article 28 par. 4) ?

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SECRET

II/24.  
10 July, 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

QUESTION OF ESTABLISHING AN INTERNATIONAL COURT:

JURISDICTION AND APPLICABLE LAW

Progress made down to July 7, inclusive.

At its two previous meetings the Committee adopted in first reading Articles A, B and C, (Docs. II/21 (1) and II/21 (2)), laying down the kind of offences to be dealt with by the Court, the law applicable, and the persons capable of being prosecuted for the offences in question and the degree of connection with the offence which might make them liable for punishment.

Notice has been given by Dr. Eder and Monsieur de Baer that they propose to re-open the question of including in Article B a reference to the general principles of criminal law.

At the meeting of July 7th the Committee further considered Doc. II/23 entitled "Questions as to the Jurisdiction of the proposed Court", parts A and B of which had been disposed of in the previous meetings. The result of the discussion was as follows:

PART I. C.

Point (1). It was decided to alter the text to read:

"Where the alleged offender is charged with offences committed in the territories of more than one United Nation or against nationals of more than one United Nation, and the question which United Nation shall bring him to trial is not governed by the "Convention for the Transfer of War Criminals and other War Offenders", or otherwise settled by agreement, the trial may be before the court."

Point (2). It was agreed that subject to para. (1) a United Nation against which an offence has been committed may at its own discretion try the offender either in its own courts or before the international court.

Point (3). according to which a United Nation would have sole jurisdiction over war crimes committed by its nationals or former nationals was rejected, and it was agreed that the point fell under the Transfer Convention and should be raised in connection with it.

Point (4), relating to cases outside the jurisdiction of national courts was reserved in the hope that the Committee might discuss it in the presence of certain members who considered the court necessary for the purpose of dealing with cases of this kind.



Point (5), regarding the surrender of alleged offenders to the court by neutral states was rejected as inconsistent with the Transfer Convention.

Point (6), to the effect that the court should have sole jurisdiction to try Hitler, etc. was reserved in order to be discussed, if possible, when the members proposing this course were present.

## PART II

Section A, contemplating use of the court to obtain custody of war criminals was rejected as inconsistent with previous decisions of the Committee.

Section B, relating to the attachment to the court of an organ to conduct prosecutions was reserved in order to be discussed, if possible, when certain members in favour of such an institution were present.

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SECRET

II/25  
18 July 1944

UNITED NATIONS WAR CRIMES COMMISSION

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COMMITTEE II

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Notes on the Second Reading of the "Transfer  
Convention" (II/22) at the Committee's meeting of 14 July

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Description of purpose of the Convention

It was decided to substitute the word "surrender" for the word "transfer" throughout the draft convention on the ground that it was the appropriate legal term.

Article I

The opening words were changed to: "The H.C.Ps. mutually agree "to surrender to each other for the purposes of trial or execution of judgment." These words appeared in the Ministers of Justice draft.

The SECRETARY GENERAL pointed out that the description of the persons to be surrendered under this Article, viz. "persons ..... charged with or convicted of an offence against the laws and customs of war", did not correspond to the description of war crimes adopted in Article A of the draft on the International Court (Doc. II/21(1)) which is "War crimes, including offences against the laws or customs of war."

Dr. LIANG replied that the two drafts would need to be harmonised when the draft on the Court was finished.

Article II

Amended to read as follows:-

"The H.C.Ps. further mutually agree to surrender to each other, "according to the procedure provided hereinafter all persons, nationals "or former nationals of the requesting state, who are within their "jurisdiction and are charged with or convicted of giving aid or "comfort to the enemy or of an offence committed with intent to "further the cause of the enemy or of an offence committed by means "of the power or opportunity afforded by a state of war or armed "hostilities or by hostile occupation of territory of the requesting "state".

/ Article III



Article III

No change

Article IV

To take account of the fact that the United States and probably the United Kingdom will employ military tribunals, the following changes were made:-

At 1.B.-2° read: "2° that judgment or findings and sentence will be pronounced in open court;"

At 2.-3° read: "3° the original or an authenticated copy of the judgment or findings and sentence given by the appropriate court in respect of the offence and in the presence of the offender."

Add following new final paragraph: "The term 'court' as used in this Article shall include a military tribunal."

Articles V & VI

To make the meaning clearer, the following text was substituted for the existing text of the second paragraph of Article V, viz. "A H.C.P. may refuse to surrender an alleged offender, if the offence for which his surrender is requested was committed within that H.C.P.'s jurisdiction."

The decision on Articles V and VI was adjourned to the next meeting of the Committee in order that a question raised by M. Milanovitch might be further examined.

Article VII

No change

Article VIII

It was decided not to insert the contemplated paragraph on judicial assistance.

Articles IX & X

No change

New Article

The Secretary General was asked to propose a new text for this Article. He suggests the following:

"If any provision of this Convention should conflict with the provisions of any agreement which may be concluded between all or some of the H.C.Ps. for the purpose of establishing a joint tribunal, whether civil or military, to try persons accused of offences falling within the scope of this Convention, the latter provisions shall prevail."

Articles XI, XII & XIII

No change

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See II/26(1)

II/26.

1 August, 1944.

SECRET

UNITED NATIONS WAR CRIMES COMMISSION

PROPOSAL FOR A UNITED NATIONS MILITARY TRIBUNAL

(Mr. Dutt's proposal as amended by a Drafting Committee).

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It appearing to the United Nations War Crimes Commission that :

1. The Supreme Commander, Allied Expeditionary Forces, may establish military tribunals, and prescribe their composition, powers and procedure;
2. Such military tribunals have jurisdiction, without reference to the territorial limits of the command, to try all persons, military or civilian, who are within the custody of their convening authority and who are charged with having committed offences in violation of the laws and customs of war;
3. Such military tribunals provide just and expeditious means, in addition to any international Court which may be established by Convention, for the trial of persons charged with having committed offences in violation of the laws and customs of war who are apprehended by the Allied Expeditionary Forces in the course of military operations or are transferred to the Supreme Commander by any United Nations Government for trial.

It is recommended, therefore, that the United Nations Governments request that the Supreme Commander, Allied Expeditionary Forces, appoint such military tribunals, as he may consider advisable, for the trial of any persons who are charged with having committed offences in violation of the laws and customs of war and who are apprehended by the Allied Expeditionary Forces in the course of military operations or are transferred to the Supreme Commander by any United Nation for trial.



SECRET

II/26(1)  
16 August, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

PROPOSAL FOR UNITED NATIONS MILITARY TRIBUNALS

New text submitted by the  
Drafting Committee

Consonant with the Moscow Declaration, 1st November, 1943, the principle is accepted by the United Nations War Crimes Commission that, with the exception of major war criminals, whose offences have no particular geographical localization, war criminals, upon apprehension, will be sent back to the countries in which their crimes were committed in order that they may be judged by the courts of such countries. The mentioned countries thus have a paramount right to such criminals and their courts have primary jurisdiction. The recommendation contained herein is made in full recognition of these principles.

It is recognized that a military commander of an army in campaign has full power to constitute military tribunals and to try all offences against or affecting such army or arising out of an incident to the operations of the enemy or persons aiding or assisting the enemy. It is recognized also that a military commander of an army in occupation of enemy territory has full power to constitute military tribunals and to try all cases involving the safety of his army or the maintenance of law and order. Accordingly, such offences and cases are not within the purview of the recommendation contained herein and the recommendation is not to be considered as a limitation of these principles or as a restriction upon the mentioned powers of such military commanders.

The United Nations War Crimes Commission will recommend to the United Nations the creation by convention of a United Nations War Crimes Court or Tribunal, for the trial of certain war criminals. However, it recognizes that delay may occur while its recommendation and the proposed convention are being considered by the United Nations thereby affecting the expeditious trial of cases. Accordingly, it is deemed necessary that some tribunal or tribunals be established in interim to try certain war criminals.

In case a United Nations War Crimes Court or Tribunal is established by convention it is considered desirable that, in addition thereto, other tribunals be established to try such war criminals as any United Nation may so request, to the end, that every means for the effective prosecution of war criminals are established and maintained, and that no war criminal escapes trial and punishment by reason of the inability to effect a speedy trial.

It appears that the Supreme Commander of co-operating United Nations military forces in each theatre of operations has the power and is entitled to establish military tribunals and prescribe their composition, power and procedure.

P.T.O.

It further appears that such military tribunals have jurisdiction to try all persons, military or civilian, who are charged with having committed war crimes and are within the custody of their convening authority.

It is believed that such military tribunals provide a just and expeditious means for the trial of war criminals pending the establishment of a United Nations War Crimes Court or Tribunal, and thereafter in addition to such court or tribunal.

It is recommended, therefore, that the United Nations Governments request that the Supreme Commander of co-operating United Nations military forces in each theatre of operations appoint military tribunals for the trial of enemy nationals who are charged with having committed offences in violation of the laws and customs of war, upon the following conditions :

- (a) That, in accordance with the first paragraph hereof, a United Nations Government request in writing that such enemy nationals be tried by such a tribunal.
- (b) That, in accordance with the first paragraph hereof and consistent with the jurisdiction of such tribunals, the United Nation so requesting such a trial surrender custody of the accused to the convening authority of the tribunal.
- (c) That the United Nation so requesting such a trial produce substantial evidence of the guilt of the accused and fully co-operate with the convening authority or his designee in the preparation and trial of the case, including the attendance of witnesses and the production of documentary and other evidence.
- (d) That the tribunal does not sit in the territory of any United Nation, excepting, however, when necessary the territory of the United Nation requesting such a trial.
- (e) That in case such a trial terminates in a final sentence of imprisonment the sentence shall be executed in such manner as the supreme commander shall direct.



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SECRET

II/27  
2 August 1944

UNITED NATIONS WAR CRIMES COMMISSION

PROGRESS REPORT BY THE SECRETARY-GENERAL

For Articles adopted and decisions taken in previous meetings since the close of the general discussion see Documents II/21(1), II/21(2) and II/24.

At its last meeting (27 July 1944), Committee II continued its discussion of the questions regarding the Court's jurisdiction which are raised in Document II/23.

Dr. Liang pointed out that the reason for not providing that the Court should obtain surrender of war criminals to it by neutral states was that a different policy had been adopted by the Committee, and not the reason stated in Document II/24.

The Secretary-General was asked to draft an Article making clear the meaning of the decision recorded in Document II/24, Part I. C. Point (2). The following text is herewith submitted for this purpose:

"Subject to the provisions of this Convention, the United Nations may at their own discretion bring persons accused by them of war crimes falling within Article A. to trial either before the international court or before a competent national court."

The question of trying Hitler and other arch-criminals before the court was raised and the following Article was adopted:

"The United Nations may agree upon a list of persons accused of war crimes falling within Article A. for whose trial the international court shall alone be competent."

The question of attaching to the court an organ to conduct prosecutions was reserved.

Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/28  
REVISED TEXT.  
29 August, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT.

QUESTIONS CONCERNING THE MODE OF PROSECUTION.

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(M. de BAER)

1. Should the prosecution before the International Criminal Court be conducted :

- (a) in each case by a Public Prosecutor belonging to the nation concerned in the crime, or
- (b) should all prosecutions be conducted by a United Nations' Prosecuting Office attached to the I.C.C.?

If solution (a) is adopted :

- What will be the legal basis of the prosecution (it should be borne in mind that the crimes charged will mostly be crimes by international law)?
- In whose name and how will the prosecution be conducted when there are several nations concerned in the crime?

If solution (b) above is adopted :

Is it agreed that in this case the law to be applied will be the law provided in the Convention instituting the I.C.C. and that the prosecution will be conducted, not in the name of one particular nation, but in the name of the United Nations as a whole?

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The following questions are framed on the assumption that the Committee agrees upon a Prosecuting Office acting in the name of the United Nations.

2. What should be the functions of the Prosecuting Office :

- To receive the dossiers and/or complaints?
- To conduct investigations as to the identity of persons accused whose identity is incomplete and as to the whereabouts of the accused, and to take any steps to this effect including inspection of enemy records, documents or archives?
- To arrest the accused and to ascertain in each case whether the person arrested is the person wanted?
- To take down preliminary statements of the accused?

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- To collect preliminary information from possible witnesses?
- To take charge of exhibits to be presented to the Courts?
- To formulate the charge, to select and prepare cases for trial?
- To bring accused persons and/or witnesses before the Court for trial?
- To act before the Court on behalf of the Prosecution?
- To keep records of - and to centralise documents and information on - war crimes?
- To ensure that the judgments and orders of the Court are carried out?.

3. If large numbers of ex-enemies, or whole organised groups (such as the Gestapo) are interned, should it be the function of the Prosecuting Office :

- To ferret out among them such persons as are or can be accused of war crimes?
- To sift, among the material provided, that which can usefully serve as evidence in other cases of war crimes?.

4. Should the Prosecuting Office :

- Function only in respect of cases which are to be brought before the I.C.C.?
- Or should it be expected to act in lieu of the German authorities in the carrying out of letters of request or in any other activity in which it is asked to assist the national courts of any one of the United Nations?.

5. How many members should the Prosecuting Office include? Should it be presided over by a Chief Prosecutor, responsible for the good administration of the Office?.

6. Should the Chief Prosecutor :

- Be constantly in touch with the War Crimes Commission?
- Follow the governing directions given by the War Crimes Commission?
- Be chosen among the members of the War Crimes Commission?.

7. What should the name be :

- |  |   |            |
|--|---|------------|
| - Of the Prosecuting Office or Commission? | } | in English |
| - Of the Chief Prosecutor?                 |   | and        |
| - Of his deputies?                         |   | in French? |

8. By whom should the members of the Prosecuting Office be appointed :

- Individually by each one of the United Nations ?
- By a conference of representatives of members of the United Nations?

- By the I.C.C.?
  - By the United Nations War Crimes Commission?
  - By the League of Nations or whatever world authority takes its place?
  - Or should the United Nations War Crimes Commission be merged with the Prosecuting Office?.
9. For how long should the members of the Prosecuting Office be appointed :
- For the whole life of the I.C.C.?
  - For 2 - 3 - 4 years?.
10. Should any special qualifications be required from the members of the Prosecuting Office?.
11. Should the "Agency" which has been recommended by the War Crimes Commission be merged into the Prosecuting Office or should these two bodies remain separate?.



Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/29  
23 August, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

CONVENTION FOR THE ESTABLISHMENT OF A UNITED NATIONS JOINT COURT

DRAFT ARTICLES RELATING TO THE COURT'S JURISDICTION

Note by the Secretary-General

The present paper is circulated in response to Committee II's request for a document showing the results down to date of its discussion of the jurisdiction to be given to the Court, including the law applicable by it.

It contains all the articles adopted in first reading, or drafted by me on the Committee's instructions. I have made a few changes to remove awkward expressions.

The term "High Contracting Parties" has been substituted for "United Nations". The latter expression seems open to serious objection on two grounds: There is no official agreement as to what states it includes and differences of opinion on this point may exist or arise, and, even if the exact content of the expression were fixed, there is no certainty that all the United Nations will be parties to the Convention.

I have inserted one article - Article AA - on my own initiative. It performs two purposes :

- a) It provides for creating the Court and giving it the jurisdiction described in the other articles.
- b) It deals with a question of jurisdiction not yet discussed, namely that of competence to bring the persons referred to in Article A to trial before the Court.

ARTICLE A (Preuss 1)

1. War crimes, including offences against the laws or customs of war, which have been committed by members of the armed forces, the civilian authorities, or other persons acting under the authority of or claim or colour of authority of or in concert with a state or other political entity engaged in war or armed hostilities with or in hostile occupation of territory of the High Contracting Parties or any one of them, shall be punishable in accordance with the provisions of this Convention.
2. Other offences may be brought under the provisions of this Convention by a decision of the High Contracting Parties.

ARTICLE AA  
(Inserted by Secretary-General)

A joint tribunal, to be known as the United Nations War Crimes Court, shall be established by the High Contracting Parties in accordance with Articles ..... and ..... below and shall have jurisdiction to try and pronounce sentence upon all persons charged by the Governments of one or more of the High Contracting Parties with the commission of offences to which Article A applies.

ARTICLE AAA.

1. Subject to the provisions of this Convention, the High Contracting Parties may at their own discretion bring persons accused of offences to which Article A applies to trial either before the United Nations War Crimes Court or before a competent national court or national military commission or other military tribunal.
2. The High Contracting Parties may agree upon a list of persons accused of war crimes for whose trial the United Nations War Crimes Court shall alone be competent.

ARTICLE B. (Preuss 29)<sup>(1)</sup>

In the trial of persons charged with offences to which Article A applies, the United Nations War Crimes Court shall apply :

- (a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing laws of war expressly recognised by the belligerent states;
- (b) International customs of war, as evidence of a general practice accepted as law;
- (c) The principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience.
- (d) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

ARTICLE C (Preuss 2)

All persons, irrespective of their rank or position who, either by a positive act or by an omission, have committed or attempted to commit or have ordered, caused, aided, abetted or incited another person to commit a crime within the meaning of Article A shall be punishable as principals or accessories in accordance with the provisions of this Convention.

- 
- (i) Certain members of Committee II have given notice that on second reading they will raise the question of inserting the "general principles of criminal law recognised by civilised nations as part of the law to be applied by the Court.



Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/30.  
23rd August, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

NOTES OF DISCUSSION AT COMMITTEE II ON 10TH AUGUST, 1944,  
ON THE QUESTION OF ESTABLISHING A PROSECUTING OFFICE  
ATTACHED TO THE INTER-ALLIED COURT.

M. de BAER submitted Document II/28 which he said was merely a series of questions for consideration by the Committee and contained no expression of preference for any particular solution.

The first question raised in the paper was :

"Should the prosecution before the International Criminal Court be conducted :

- (a) in each case by a Public Prosecutor belonging to the nation concerned in the crime,
- or (b) should all prosecutions be conducted by a United Nations' Prosecuting Office attached to the I.C.C.?"

It was agreed that the establishment of a prosecuting office attached to the Court need not exclude the employment of national prosecutors. It could be left to each United Nation to employ the system it preferred, either generally or in a particular case.

The Utility of attaching a prosecuting office to the Court was questioned by SIR CECIL HURST on the ground that the Governments would prefer to have their own lawyers to conduct the prosecution. This was the system employed in the Permanent Court of International Justice.

M. de BAER said that no doubt the national courts and national prosecutors would deal with all cases that could be dealt with by them, but the proposed court would deal with cases not suitable for trial in national courts and under the national law, and he did see how a national prosecutor appearing before an international court in a criminal case could, using the habitual formula, "demand the application of the law". The mixed courts of Egypt were a precedent for a court with international characteristics before which cases were conducted through lawyers attached to the court.

SIR CECIL HURST said the projected court was to apply international law and he saw no reason why a national prosecution should not invoke that law before it.

DR. LIANG felt difficulty in discussing the question at issue so long as the Committee did not have before it a clear statement regarding the jurisdiction which was to be given to the court. The question whether there should be a prosecuting office depended on the nature of this jurisdiction.

MR. DUTT felt the same difficulty and it was agreed that the Secretary-General should circulate a paper showing the present stage of the discussions regarding the courts jurisdiction.

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MR. COLBAN and M. MILANOVITCH felt that while each United Nation should be free to employ its own prosecutor, a prosecuting office representing all the United Nations was a necessary adjunct to the court.

MR. PELL thought the institution necessary in cases where two states claimed to prosecute the same individual for the same crime.

M. CYPRJAN supported this view, instancing such a case as the trial of Himmler.

M. GROS considered the office would have no work to do.

SIR CECIL HURST thought that the whole responsibility for each prosecution should rest with the state or states concerned. If more than one, they could combine. If there was a prosecuting office, the individual states would quarrel with it or shift their responsibility on to it, e.g. as regards collection of evidence.

DR LIANG said such an office was essential if the court was to try Hitler and other arch criminals. If not, he did not regard it as useful. Why, for example, should a British prosecutor represent the Belgium Government? Two states wishing to prosecute the same person could easily combine. To create a prosecuting office with nothing to do would discredit international machinery.

MR. DUTT referred to the British Privy Council as a court which could deal with international cases without having them brought before it by lawyers forming part of the machinery of the court.

MR. PELL could not see how if it were decided to give the court jurisdiction against persons not entitled to the protection of particular United Nations, such as Axis nationals prosecuted by their Governments because of their race, religion or political opinions, the guilty persons could be brought to trial otherwise than through a United Nations prosecutor.

MR. DUTT did not think this was so. M. GROS AND DR. LIANG suggested that questions regarding arch criminals and axis nationals should be left until the Commission was given power to deal with them.

M. de MOOR supported the establishment of a prosecuting office as necessary for the prosecution of arch criminals, and of war criminals whom the law of the state concerned was not wide enough to punish and of persons who were outside all national jurisdiction. The majority of the United Nations were not well equipped to conduct international prosecutions and were not rich enough to pay large fees to international lawyers. The prosecuting office would enable them to secure the trial and conviction of war criminals more effectively and more cheaply than if they were left to their own resources. In its absence, many criminals might not be prosecuted at all.

M. COLBAN continued to regard a prosecuting office as a normal and desirable adjunct of the court. It would be part of the Secretariat and need not be large or expensive.

M. CYPRJAN suggested that it would be the complicated cases which came before the court and that this fact made a prosecuting office necessary.



MR. DUTT thought the staff of office could not fail to be numerous and expensive, and doubted if his Government would be prepared to share in such expenses.

SIR CECIL HURST said considerations of expense could, unfortunately, not be ignored in setting up an international institution and the fact that it would be a convenience to some United Nations was not in itself a reason for creating a prosecuting office.

M. de MOOR considered it to be a necessity, not a convenience.

MR. PELL urged that the Commission should prepare in advance to deal with all cases which were not at present within its competence but which it might be suddenly called upon to deal.

M. MILANOVITCH suggested that each state might maintain and pay for a representative in the prosecuting office. The decision to set up the office might, however, be adjourned until the Commission knew whether the court would try Hitler.

SIR CECIL HURST said that trials for war crimes would have to take place in several fields of operations - not merely in the Western European field - and not one but several prosecuting offices would be required. It might be difficult to find lawyers to staff them.

M. CYPRIAN on the contrary thought one office in Europe would be sufficient.

On the motion of M. MILANOVITCH it was decided to postpone any decision on the question of a prosecuting office and pass to other questions regarding the proposed court. The first subject to be considered would be the question of creating United Nations Military Tribunals (II/26 in the revised version to be produced by Mr. Dutt, Col. Hodgson and M. de Baer).

SECRET

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for the personal use of members of the Commission  
and their substitutes.

II/31  
28 August 1944

UNITED NATIONS WAR CRIMES COMMISSION

CONVENTION FOR THE ESTABLISHMENT OF A  
UNITED NATIONS JOINT COURT

Draft Articles on the Election and Organisation  
of the Court (Preuss Chapter II)  
(Adopted in first reading on 24 August)

Article A (Preuss 1)

(N.B. This text was adopted some time ago - see Doc. II/29.  
It is reproduced because it is referred to in the sub-  
sequent Articles).

1. War crimes, including offences against the laws or customs of war, which have been committed by members of the armed forces, the civilian authorities, or other persons acting under the authority of or claim or colour of authority of or in concert with a state or other political entity engaged in war or armed hostilities with or in hostile occupation of territory of the High Contracting Parties or any one of them, shall be punishable in accordance with the provisions of this Convention.
2. Other offences may be brought under the provisions of this Convention by a decision of the High Contracting Parties.

Article A 1. (Preuss 3)

(This replaces Article AA of Doc. II/29)

There shall be established for the trial of persons charged with the commission of offences specified in Article A a United Nations War Crimes Court comprising<sup>(1)</sup> such Divisions as may be constituted in accordance with the provisions of Article A 5.

Article A 2. (Preuss 4)

The first meeting of the Court shall be in London. It shall there decide upon its seat, which it may change at any time. It may decide to meet elsewhere than at its seat.

Article A 3. (Preuss 5)

The Judges of the Court shall be nationals of the High Contracting Parties and shall possess the highest legal qualifications. They shall be conversant with one of the official languages of the Court.

*See over -*

(1) This word, suggested by Sir Cecil Hurst, seems more accurate than "with" since all the Divisions (Chambers) are of equal authority.



Article A 4. (Preuss 6)

The Court shall be composed of Judges elected in accordance with the provisions of Article 6.

Article A 5 (Preuss 7)

1. For the trial of cases the Court shall sit in Divisions.
2. Each Division shall consist of not less than five Judges who shall be designated from time to time by the President of the Court. The Divisions shall sit at such places, and shall continue to exist for such periods, as the President may determine.
3. Not less than five Judges shall sit to hear and determine each case.

Article A 6 (Preuss 8)

(N.B. This Article has been redrafted by the Secretary General to adapt it to Committee II's decisions under earlier Articles and to the rôle which the "Panel" is apparently going to play in the Committee's scheme).

The (at first) Judges of the Court shall be elected in accordance with the following provisions from a Panel of persons having the qualifications specified in Article A 3:

- a) Within thirty days of the entry into force of this Convention each High Contracting Party shall appoint three duly qualified persons as members of the Panel. The names of the persons so appointed shall be transmitted to His Britannic Majesty's Principal Secretary of State for Foreign Affairs in the United Kingdom, who shall forthwith communicate them to all the High Contracting Parties.
- b) Within fifteen days following the notification of the composition of the Panel, His Britannic Majesty's Principal Secretary of State for Foreign Affairs in the United Kingdom shall convene a conference of the heads of the diplomatic missions accredited by the High Contracting Parties to the Court of St. James's to meet in London at such time as he may fix. Any High Contracting Party not represented at the Court of St. James's may appoint a special representative.
- c) The conference shall, by secret ballot and by such method of voting as it may determine, elect the Judges from among the members of the Panel.
- d) After the election of the Judges, the Panel shall continue to exist for the purposes provided in Articles - below.
- e) A state which becomes a party to this Convention after its entry into force shall be entitled to appoint members of the Panel in accordance with provision (a) above.

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SECRET

II/33.  
9th September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

CONVENTION FOR THE ESTABLISHMENT OF

A UNITED NATIONS JOINT COURT

Amendments in draft articles (Doc. II/32) as a result of the meeting of 7th September, 1944.

Article A (Preuss 1)

No change

New Article

Insert Article C (Preuss 2) from bottom of page 4, after redrafting.

Articles A 1 (Preuss 3) to A 5 (Preuss 7)

No change

Article A 6 (Preuss 8)

Para. (d) last line: for "Tribunal" read "Court".

Articles A 7 (Preuss 10) to A 13 (Preuss 19)

No change

Article to be substituted for Preuss 22

1. The responsibility for the conduct of prosecutions before the Court will in general rest with the Government of the United Nation by which the case is brought before the Court.
2. The Conference referred to in Art. A 6 (a) shall appoint an officer to whom may be entrusted the conduct of the prosecution in any case in which the Government of the United Nation primarily concerned prefers that the prosecution should not be undertaken by its own representatives.
3. This officer shall be assisted by such staff as the Court may think necessary.
4. The expenses incurred in connection with the prosecution of cases entrusted to the officer appointed by the Court shall be borne by the State which has transmitted the case to the Court.

Preuss 23 adapted

No change

P.T.O.



Article A 14

Incorporate in Preamble.

Article B (Preuss 29)

Para. (a) third line:

Delete the words "expressly recognised by the belligerent states".

Insert new para.(c):

"The principles of criminal law generally recognised by civilised nations"

(c) becomes (d)  
(d) becomes (e)

Article C (Preuss 2)

Insert as new article after Article A (Preuss 1)

Preuss 30

The substance of this article was reserved for inclusion in the General Recommendations to the Court.

Article D (Preuss 31)

No change

Article E (Preuss 32)

No change

Article F (Preuss 33)

Para. 2, second and third lines:

Delete the phrase "with the approval of the Court with which he is to be tried"

Articles G (Preuss 34) to L (Preuss 38)

No change

Article N (Preuss 39)

First line: the word "Divisions" should be "Division"

Article N (Preuss 40)

No change

Article O (Preuss 41)

Redrafted to read :

"Sentences shall be executed as directed by the Court".

Article P (Preuss 42)

Omit

Preuss 43

Para. 1:

1. All expenses involved in the execution of this Convention, including costs arising from trial proceedings and from the execution of such sentences as may be imposed, shall be defrayed in such manner as the High Contracting Parties may determine.

Paras. 2 and 3:

Reserved for redrafting by Diplomatic Conference.

Preuss 44

Omit

Ratification, Denunciation and Termination

Reserved for Drafting Committee.



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SECRET

II/34  
8th November, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

The Secretary-General believes that the following communication, dated 1st November, 1944, which was handed to him by M. Gros during the Commission's meeting of 7th November, will be of interest to the members of Committee II.

Translation

A SERVICE UNDER THE MINISTRY OF JUSTICE IS TO  
INVESTIGATE THE WAR CRIMES OF THE GERMANS AGAINST  
THE FRENCH (Resistance 1.11.44)

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Since 1942 there has been at work in London, a commission of enquiry into war crimes set up by the United Nations under the name of the "War Crimes Commission". With the object of assisting the work of this commission, i.e. the bringing to trial of the German criminals who have perpetrated so many misdeeds in our country, a service under the authority of the Ministry of Justice has been created in France. Its address is 22, Place Vendôme and its name the "Service des crimes de guerre ennemis".

Its function is to bring together all the obtainable information and, after careful verification of the reported facts on the spot, to submit the files to the War Crimes Commission.

The importance of the service and the extensive character of the enquiries which must be conducted throughout the country will at once be realised.

But the department's activity goes further than this. It is unfortunately only too true that our Allies, in particular the Americans, too often refuse to believe the stories of atrocities which are reported to them. Accordingly it has been decided to organise an exhibition at an early date, and publish in every language booklets on the subject, in order to prove beyond all question that the civilised world has no right either to forget these atrocities as it did only too thoroughly in 1918, or to make it easy for the guilty to escape chastisement.

The French commission will make it its particular care to discover who were the persons who were responsible for the massacres and atrocities; mere agents will not be punished unless they did something to aggravate the horrible character of the acts they were ordered to do. The commission will also use its best endeavours to frame a clear definition of what is to be understood by a war crime. This is a delicate matter, but the slaughter of women and children,

P.T.O.

the burning of hospitals, churches, villages, the torture of victims before they are put to death, which have occurred both in France and Germany, cannot be regarded as acts of belligerency: they are crimes against humanity and deserve exemplary punishment.

The commission also considers the systematic pillage of the French nation to be a war crime and, difficult as it is to do so, it will take every possible step to find the evidence of this work of destruction and death.

All French people are asked to help the "Service des crimes de guerre ennemis" and to report facts and incidents of which they are aware or have been witnesses either at the Service's headquarters, 22, Place Vendôme, or at the branches which will be created in all the departments.



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SECRET

II/35  
21 November 1944

UNITED NATIONS WAR CRIMES COMMISSION

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Reproduced below is the text, communicated by M. Gros to the Secretary-General of the Decree establishing the French organisation for the detection of War Crimes of which an account was given in the Document II/34.

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Translation

Decree of 14 October, 1944, establishing a temporary Service for investigation of enemy War Crimes (1)

The Provisional Government of the French Republic,  
Having considered the report of the Keeper of the Seals and Minister of Justice,  
.....

The Inter-Allied Declaration of 13 January, 1942, concerning the punishment of war crimes,

The Decree of 22 June, 1944, setting up an Inter-Commissional Commission for War Crimes,

The Ordinance of 28 August, 1944, concerning the punishment of War Crimes,

Ordains as follows:

Art. 1 A temporary Service for the detection of enemy war crimes under the authority of the Directorate of the Cabinet of the Keeper of the Seals is established in the Ministry of Justice.

Art. 2 This Service is generally responsible for all matters concerning war crimes. It is in particular responsible:-

/ For

---

(1) From Journal Officiel de la Republique Francaise, No. 99, of 15 Oct, 1944.

- (1) For making all investigations concerning such crimes, centralising all work done, information collected and statistics compiled, and conserving the evidence of such crimes;
- (2) For co-ordinating the activity of the other services concerned, giving them the necessary instructions, setting in motion and seeing to the carrying out of searches and enquiries for the purposes of detecting crimes committed by the enemy, compiling the "dossiers" relating to those crimes and bringing the cases to trial;
- (3) Preparing a "black-book" of enemy crimes for publication and employing all other possible means of informing the public about the subject;
- (4) Maintaining the necessary contact with the Allied civil and military authorities.

Art. 3 The Service may for this purpose require the communication to it of all information concerning enemy crimes coming to the knowledge of any other service, administration, individual or body.

Art. 4 The Chief of the Service of Enemy War Crimes, or his representative, shall be a member of the Commission set up by the Decree of 22 June, 1944.

Art. 5 The composition and operation of the Service shall be regulated by a Decree made on the proposal of the Keeper of the Seals and Minister of Justice and of the Minister of Finance.

Art. 6 The present Decree shall be published in the Journal Officiel and shall have the force of a law.



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SECRET

II/36  
29 November, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

REPORT OF M. R. ZIVKOVIC ON THE MODIFICATION OF THE  
SYSTEM NOW IN OPERATION FOR COLLECTION OF EVIDENCE  
IN RESPECT OF WAR CRIMES AS PROPOSED BY THE AUSTRALIAN  
DELEGATION.

The proposal of the Australian Delegation to modify the present system of collecting evidence of war crimes by the setting up of a Special Bureau under the United Nations War Crimes Commission, which would operate in addition to the existing National Offices, involves the consideration of the following practical issues :

The Three Activities: The work of investigating war crimes as entrusted by the United Nations Governments to the War Crimes Commission embraces three distinct activities:

- (i) -The investigation of war crimes.
- (ii) -The identification of war criminals in order that they may be apprehended and surrendered to the competent authorities.
- (iii) -The maintenance of contacts and collaboration between the War Crimes Commission and the United Nations Governments, on the one hand, and the National Offices, the military authorities, etc., on the other, in view of the two activities cited above.

I. The Investigation of War Crimes.

A. At present this investigation is being conducted entirely by the National Offices, which appears to be natural in view of the fact that:

- Most war crimes were committed on the territories of the occupied countries:
- Most war criminals will be tried by the courts of the countries where they committed their crimes.

B. It is, however, a fact that the following cases are not fully or quite satisfactorily covered by the work of the National Offices:

The collection of evidence in respect of war crimes committed against nationals of the United Nations outside the boundaries of their countries, i.e.:

- (a) On enemy territory, such as crimes against prisoners of war, workers, etc.;
- (b) On the territory of another United Nation under enemy occupation, such as crimes against Czechs in France, Dutch in New Guinea, etc.;
- (c) On the high seas.

For the collection of evidence in such cases the National Offices have at their disposal the following two means :

-The testimony of their nationals who have been repatriated from enemy territory or the occupied territory of another United Nation;

-Investigation conducted at the request of a National Office by the Allied authorities occupying the enemy territory concerned and/or by the competent services of the other United Nation on whose territory the crimes were committed.

With regard to the investigation of war crimes committed on enemy territory, an Agency has already been contemplated by the Commission in its Recommendation, G.30., and by several members at the last meeting of the Commission when the question which is the subject of this report was discussed. Such an Agency having been agreed upon by all the members of the Commission, no further comment appears to be necessary.

With regard to the investigation of war crimes committed on the territory of another United Nation, it has to be decided:

-Whether to allow the present state of affairs to continue and so place on each of the Governments concerned the entire burden with all the necessarily complicated machinery of applying to the various Allied authorities in order to obtain the information and/or action desired :

-Or to set up within the War Crimes Commission a central Inter-Allied Investigation Bureau through which all the Governments would concentrate their particular requests.

The adoption of the latter would result in expeditious and uniform action by an international body dealing solely and authoritatively with such matters both on behalf of all the United Nations and of the particular Government concerned.

C. The following are the other cases not or not fully or satisfactorily covered by the work of the National Offices :

1. The collection of evidence in respect of war crimes the details of which are not available to any particular National Office, but which would be more easily available to an Inter-Allied Investigation Bureau. An example is provided by the present system of interrogating prisoners-of-war which though carried out by the B.B.C. officials, etc. is not carried out by the War Crimes Commission.
2. The collection of evidence in respect of war crimes committed by individuals the responsibility for which is the common concern of all Governments, such as crimes committed by individuals whose responsibility cannot be geographically localised.
3. The collection of evidence in respect of war crimes not covered by domestic legislation of the United Nations Governments.
4. Any supplementary investigation on the basis of evidence already collected by the National Offices.

The above cases not being covered by the work of the National Offices, the creation of an additional Inter-Allied body appears to be not only advisable but necessary.



## II. The Identification of War Criminals.

After the liberation of their respective countries, the Governments of the United Nations will have, and, in fact already have, in their custody a number of war criminals, mostly prisoners of war that have fallen into the hands of their armies. The competent national authorities should then proceed to identify them, in the first place, in order to classify those who are wanted for trial by their own courts.

But, many other wanted war criminals will be outside the boundaries of the respective United Nations territories, among them a number of individuals whose crimes have been established, but whose identity has not yet been fully established. The Governments and National Offices concerned then have to make requests for the identification, detection and eventual apprehension and surrender of such criminals.

Such cases not being suitable for presentation to the War Crimes Commission on account of the lack of identification, here again the Governments would have to decide:

- (a) Either to apply direct to the competent authorities of the territories where it is expected that the criminals will be, according to their nationality or any other indication, in order to obtain assistance in identifying the criminals.
- (b) Or to apply to the War Crimes Commission for the purpose of such identification.

If the latter is considered to be the most suitable way, it would fall within the scope of the proposed Investigation Bureau.

In any case, it is to be assumed that, apart from possible direct action by the Governments, a number of cases will still exist where the help of the Commission itself will be required. For example, there will possibly be a large number of war criminals who will be apprehended by the Allied military authorities, who will require the assistance of a central authority (such as the proposed Bureau) in order to ascertain as to which National Government such criminals should be surrendered.

## III. Contacts between the War Crimes Commission and the Governments and their National Offices.

At present the only permanent agents of contact with the Commission are the delegates of the various Governments acting at the same time on behalf of their National Offices.

Having regard to the above mentioned developments and the increase of activity between the Commission and the Governments and their National Offices, and to the fact that it has been announced by certain Members, whose countries have been liberated, that they will be presenting some thousands of cases to the Commission in the near future, it is a matter for decision whether the Delegate-Members should henceforth be considered as a sufficient and truly practicable link between the Commission and the various Governments and their National Offices.

If one bears in mind that on the one hand, in many instances, the Commission is to be expected to take up action with the National Offices regarding hundreds of very specific and detailed questions and that, on the other hand, the Governments and their National Offices are likely to do the same with the Commission, on the general lines of investigating war crimes, it seems that in addition to the Delegate-Members other agents of contact, such as liaison officers will be found to be, not only desirable, but indispensable.

So here again it is a matter for decision:

-Whether to leave to the Delegate-Members the additional burdens mentioned above;

-Or to envisage the creation of liaison officers to act as links between the Commission and the National Offices.

In deciding the above, it must be borne in mind that the Delegates will remain at the headquarters of the Commission in London, while, in the near future, all the National Offices, apart from that of the United Kingdom, will be established in their own countries.

#### IV. Other Activities.

Apart from the above three chief activities, a number of certain other activities appears to lie within the scope of the War Crimes Commission itself acting on behalf of all the Governments, such as :

-Stimulating and advising the National Offices when necessary.

-Coordinating the activities between the Commission and the National Offices in order to obtain uniform proceedings.

-Recording of war crimes for history, on the lines mentioned by the British Minister of State, Mr. Richard Law, in the House of Commons on November 15, 1944, viz. that the War Crimes Commission is engaged in the compilation of a comprehensive official record of war crimes.

-Creating by intense and constant collaboration between the Commission and the National Offices a firm basis for any future collaboration that may be required.

It is a matter for decision :

-Whether such or similar activities should be dealt with by a special body of the Commission, distinct from the Secretariat General and having its own competence and initiative, such as the proposed Investigation Bureau;

-Or should such or similar activities be entrusted to the Secretariat General in addition to its present work.

In any case, having regard to the expectations of the Governments and peoples of the United Nations in respect of the task entrusted to the Commission, it is difficult to see how the Commission can evade undertaking the additional activities now that the last stages of the war have been reached.



V. Conclusions.

Having regard to the obvious advantages that will result from the establishment of a central Investigation Bureau at the headquarters of the United Nations War Crimes Commission, of Agencies in enemy countries, and of liaison officers with the National Offices, it is my opinion and I move accordingly :

1. That a Central Investigation Bureau at the headquarters of the United Nations War Crimes Commission be established for the purpose of assisting the National Offices at their request in the investigation of war crimes, and of carrying out investigations and collecting evidence in such cases as are outside the jurisdiction of the National Offices.

(Examples are to be found in Section I Para B. and in Section II.)

2. That Agencies be established in enemy countries for the purpose of investigating war crimes committed in those countries and of collecting evidence of crimes committed by nationals of those countries during the course of the war in other countries.
3. That liaison officers of the Commission be attached to the National Offices established in the various Allied countries with a view to acting as links between the headquarters of the Commission and the National Offices for the preparation of the cases and for coordinating such preparation.

Such liaison officers, the necessity for whom is set out in Section III of this report, must be acceptable to the United Nation to which they are attached.

Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/37(1)  
11th December, 1944.

UNITED NATIONS 'WAR CRIMES COMMISSION

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Committee II

AUSTRALIAN PROPOSAL FOR A CHANGE OF METHODS

Conclusions reached on 8th December, 1944.

The Committee considered the Secretary General's summary of its conclusions of 5th December and accepted them in the following revised form:

1. The Committee recognised that the National Offices established by the Governments were the bodies primarily responsible for collecting evidence regarding war crimes.

2. As regards the modification of the internal organisation of the Commission, the following conclusions were reached:

- a). An official with experience of criminal work should be added to the staff of the Commission, for the purpose of examining charges before they go before Committee I. His functions would be to draw the attention of the National Offices to any additional information in the possession of the Commission, to assist the Committee by calling attention to points requiring consideration and generally to help in the work of preparation and consideration of cases and in the drawing up of the Lists.
- b). It would be desirable to provide accommodation in the Commission's office for representatives desiring to work there.

3. It is recommended that in view of the increase in the number of cases which may be expected, and of the further fact that in many cases the work of the National Offices will be carried out in their own countries, and not in London, close contact between the Commission and the National Offices should be maintained, where necessary, by the appointment of special officials for the purpose.



Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/38.  
1st January, 1945.

UNITED NATIONS WAR CRIMES COMMISSION

DECREE OF 6TH DECEMBER DETERMINING THE STRUCTURE AND  
OPERATION OF THE FRENCH "SERVICE FOR THE DETECTION  
OF ENEMY WAR CRIMES".

The following extracts from the above decree, the text of which was kindly supplied by M. Gros, carry further the information regarding the new French National Office which is contained in documents II/34 and II/35.

TRANSLATION

"The Provisional Government of the French Republic

Having regard to ... (quotes relevant ordinances  
and decrees)

Decrees as follows :

Art. 1 - The Service for the Detection of War Crimes comprises a Central Directorate, regional services throughout France, an investigation organisation in foreign countries and liaison officers attached to the big Allied units.

Art. 2 - The Central Directorate consists of the following staff, whose salaries are paid by the Minister of Justice within the limits of the following maximum salaries :

A Director	.....(1)
Two "Chargés de Mission" with the duties of Sub-Directors	.....
Five "Chargés de Mission" of the first class	.....
Eight "Chargés de Mission" of the second class	.....

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(1) The provisions regarding salaries are omitted.

Art. 3 - Each regional service consists of a Regional Delegate, and, where necessary, an Assistant Delegate.

The Regional Delegate is assisted by a Regional Committee composed of persons nominated by the Minister among whom there must be at least one representative of the "Resistance" movement or officer who has been a member of the F.F.I.

The Committee is to give its advice to the Regional Delegate and contribute in all possible ways to the effective operation of the Service.

The members of the Committee are unpaid but are entitled to reimbursement of expenses shown to have been incurred by them.

The Regional Delegates' remuneration is fixed by the Minister of Justice.. (details omitted).

Art. 4 - The operation and composition of the organisation for investigation in foreign countries will be settled by an interministerial order signed by the Ministers of Justice, War and Foreign Affairs, and such other ministers as may be concerned.

Art. 5 - The duty of the Director of the Service for the Detection of War Crimes is to seek out and enquire into all facts constituting an enemy war crime, identify the guilty persons and construct for each case a file embodying the results of the investigation.

The Director has authority to receive complaints and denunciations from victims, witnesses and all other persons having knowledge of an enemy war crime. He may take up any case on his own initiative.

Complaints and denunciations may also be addressed to the commanders of military areas, "Directeur de justice militaire" and Government commissioners attached to military tribunals, who shall immediately transmit them to the Central Directorate of the Service for the Detection of Enemy War Crimes.

Art. 6 - The Director of the Service for the Detection of Enemy War Crimes may do or call upon all officers belonging to the judicial police to do all acts necessary for the detection and recording of offences, for collecting evidence and for identifying the perpetrators.

He may delegate his powers.

Art. 7 - The Regional services are under the authority of the Central Directorate and are its representatives.

Within the regions assigned to them their duty is to contribute to the detection of war crimes, the recording of the facts, the constructing of the files, and the conservation of the evidence of the enemy's guilt, and in all matters to aid the Central Directorate in the accomplishment of its task in accordance with the instructions given to them by it.

They must transmit to the Central Directorate all complaints, denunciations and information collected by them.



Art. 8 - The files constructed by the Service for Detection of Enemy War Crimes shall periodically be submitted to an internal Commission of Investigation composed of the Chairman of the Interministerial War Crimes Committee, the "Directeur de justice militaire" and the Director of the Service for Detecting War Crimes. The French representative on the United Nations War Crimes Commission shall be entitled to sit on this commission. The Commission shall decide the action to be taken on the files - i.e. transmission to the interallied commission in London, further investigation, pigeon-holing, communication to the competent military judicial authorities etc.

Art. 9 - Before the Courts, the files compiled by the Service for the Detection of War Crimes shall be treated as equivalent to an enquiry by the "police judiciaire". They shall, according as the internal Commission of Investigation may think fit, be communicated to the "Directeur de la justice militaire" in order that a prosecution may be undertaken before the military tribunals or, in proper cases, in order that further information may be obtained or the preliminary examination be carried further.

The "justice militaire" shall at all times be in sole charge of such prosecutions, search for information or resumed preliminary examinations.

Art. 10 - The Director of the Service for the Detection of War Crimes and, within their regions, the Delegates of Regional Services, may call upon every competent administration or service to aid them in the performance of their duties.

Art. 11 - The seat of the various Regional Committees, their areas of operation, their composition and all other questions regarding the operation of the Service, shall be settled by an order signed by the Minister of Justice and other ministers concerned.

Art. 12 - The posts provided for in the above articles may be filled by civil or military personnel detailed from other administrations or by direct recruiting. Personnel directly recruited shall be employed on a temporary basis and may be discharged with one month's notice at any time.

Within the limits of the credits provided for the purpose, auxiliary staff may be recruited on salaries at the regional rates....

Art. 13 - Expenses incurred in the detection of war crimes and identification of the criminals and in accumulating evidence shall be refunded as part of the costs of the prosecution.

Expenses occasioned by the necessity of informing public opinion, publishing booklets, taking films, organising exhibitions etc. shall be borne on chapters 15 and 16 of the budget of the Ministry of Information.

A special credit shall be provided for the publication of the Black Book.

Art. 14 - The Keeper of the Seals and Minister of Justice, the Finance Minister and the Minister of War shall, within their respective departments, be responsible for executing the present decree, which shall be published in the Official Journal of the French Republic.

Doc. II/39

May 6th, 1945.

## UNITED NATIONS WAR CRIMES COMMISSION

### PROBLEMS FACING THE COMMISSION

This paper does not suggest any major change in the functions of the United Nations War Crimes Commission, nor does it attempt to lay down a blue-print guide for solution of all of the varying problems which will continue to face the Commission in its work. On the other hand, it raises for discussion certain courses of action which might be taken at this time in order to accomplish the mission assigned.

#### I. Mission of the Commission

For the purposes of discussion, the following functions of the Commission are mentioned:

1. The Commission is to "investigate and record the evidence of war crimes; identifying where possible the individuals responsible".
2. The Commission is to "report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming." In this connection "The Governments concerned would also be specially interested in the treatment of those who might properly be described as the arch criminals."
3. The Commission is vested with advisory powers in respect of all problems pertaining to the broad subject of war crimes and war criminals.

The first two headings are quoted from the minutes of the Diplomatic Meeting of 20 October, 1943, and the third summarizes the assent of the Governments to the recommendation of the Commission that its competence be enlarged to include the advisory powers originally intended for the proposed Technical Committee. (Minutes 8 February 1944, Commission Document H.8).

As pointed out by the Chairman in a press release, 28 April 1945, the practical effect of the approval of the recommendation that the work of investigation be done by the National Offices and the recommendation that such offices should be assisted by agencies to be set up in occupied enemy territories, was to leave the Commission with "no power of investigation and no local investigation officers or machinery in Germany or elsewhere". Nor at this late date would it appear wise to change to any major extent this basic policy so long accepted by all of the Governments. On the other hand, the Commission has been advised by the Governments that its powers, although limited, are not to be construed narrowly. Also, in order intelligently to advise, the Commission must be free to obtain from appropriate sources the necessary information upon which to formulate its recommendations.

#### II. The Problem

In view of these functions, the problem, as suggested in the introduction, is to review the present position of the Commission and to determine the steps, both by way of direct action and by



way of further advice to the Governments, which might well be taken. No reiteration of history is attempted as those matters are equally well known to each representative on the Commission. In the event the proposed discussion results in any additional recommendations to the Governments, the detailed reasons can be developed in the formal recommendations.

### III. Suggestions

For convenience, these suggestions are grouped under three broad topics relating to war crimes, with a final topic covering the internal organization of the Commission.

#### 1. Investigation and Perpetuation of Evidence

As mentioned above the Governments, at the instance of the Commission, in effect, took back and conferred upon their respective National Offices much of the direct power in respect of war crimes investigations and the perpetuation of evidence which they had originally conferred upon the Commission. Similarly, the Governments in setting up agencies to function in enemy territories, in certain respects curtailed the original power of the Commission. It would seem that they reserved to the Commission direct action in those fields only to the extent that the work of the designated agencies need to be complemented and coordinated.

2. The National Offices. The survey of the effectiveness of each National Office, mentioned in the Second Progress Report, should be made forthwith. No member of the Commission or of its staff is fully informed in this field, yet all know that there are areas of coverage which have not been adequately touched by the National Offices. Representatives are aware of inadequate staffing, failure to exchange and coordinate information among National Offices, and failure to report cases to the Commission. This information is needed in order that the Commission may make intelligent recommendations. The alternative is to stand by, knowing that the Commission itself is charged with some responsibility in this field and yet is taking no steps to see that the agencies set up by the Governments perform the functions delegated to them by the Governments.

It may be advisable for the Commission to call and plan a series of regional conferences of the National Officers charged with responsibility in particular areas for the purposes of exchanging views and perfecting administrative techniques. The Commission is obviously the agency which can most readily sponsor such action.

It may also be advisable for the Commission to forthwith recommend to the Governments and in particular to those Governments in which National Offices are not effectively operating, that the offices be strengthened with adequate organizations, staffs, and means to work for it is obvious that if the National Office link in the chain is weak or broken the entire system of war crimes investigation machinery now in use may break down. Such a recommendation may be made even though the Commission has no control over the operation of the National Offices.

It may also be advisable, if the foregoing action is adopted, to follow up such action with a close liaison with each office so that if any deficiencies develop they may be pointed out to the appropriate Government so that the Commission may be of maximum assistance to each office and each office of maximum assistance to the Commission.

2. The Military Agencies in Enemy Territories. The Commission's knowledge as to the existence of these agencies, let alone the details of their operations, is insufficient. Yet there should be at least three such agencies functioning: in occupied Germany; occupied Italy and the Balkan enemies; and for Japan. Information with respect to these agencies should be obtained directly at once. It might be appropriate to send a small committee to military headquarters and to invite officers in charge of field investigations to London. Upon the basis of such information appropriate recommendations should be formulated. Likewise, upon the basis of such information, the Commission could take such action as would be of maximum assistance to the military authorities.

In the meantime the following action may be in order and is raised for discussion:

1. To renew the Commission's recommendation (Dec. 9, 39) that an investigatory agency be set up inside German territory.
2. To recommend that the European Governments send war crimes liaison officers forthwith to each Army Group headquarters inside Germany as requested by the military authorities. Complementary action is the immediate organization of war crimes teams by each Government and the keeping of them in readiness so that if the war crimes liaison officers are notified of war crimes the teams may be speedily dispatched to carry out investigations for their Governments. At present only France and the United Kingdom have furnished such officers to the 12th Army Group.
3. If desired by the military authorities, to organize and send such a team or teams of war crimes investigators, recruited from the National Offices, to concentrations camps inside Germany to investigate war crimes on behalf of Governments which have not furnished liaison officers to the Army Group headquarters and have not organized teams to conduct investigations.
4. To provide a liaison officer with Supreme Headquarters to keep the Commission advised of all developments affecting its work.
5. To recommend that a war crimes agency be set up to investigate war crimes inside Japanese territory.

9. The Commission. In addition to determining the facts concerning the National Offices and the Military Agencies in order that intelligent recommendations may be made, this information is necessary to determine what direct action still should be taken by the Commission itself. For example, what action is being taken to investigate the commission of war crimes in the Philippines, or in Denmark? And in the field of the war criminals whose crimes do not fall within the confines of geographic boundaries, there is a great amount of work remaining to be done by way of identification and documentation. In fact, it has stated that it was doing so in the preface to the Official List Number Seven, which did not purport to be complete or to even touch Italy and the Balkan enemies, or Japan.

Also ..



Also may be considered the advisability of the Commission perpetuating the testimony of witnesses whose evidence may be considered to be of an international character.

## 2. Apprehension of the Accused.

Here the Commission has no direct powers or responsibility. In this case, not even in name. Its action has been to list identified individuals as accused, and to furnish the lists to the Governments and, recently, to the agencies thought to have some possible connection with the responsibility for apprehension. It has also recommended the apprehension of suspects, including members of the Gestapo and S.S., and has recommended certain measures to assist in identification and apprehension such as interrogation of prisoners of war, appropriate Armistice provisions, etc. But it is without up-to-date information as to just what agencies are charged with responsibility for apprehension; nor does it know how effective the machinery is which has been established to do this task.

It may be advisable that immediate and effective steps be taken by the Commission in order that, upon the information obtained, it may make whatever recommendations are appropriate.

## 3. Disposition of the Accused.

Finally, under this heading the Commission's powers and responsibilities are again advisory only. It would appear that the recommendations heretofore made cover the field, and thus no further action on the part of the Commission would appear necessary. It has indicated its readiness to supplement the work already done upon call, and the Governments have not theretofore made such a call nor informed the Commission of the action, if any, taken upon the recommendations at hand. In this connection, the important task of the Commission is to have ready at hand the information and evidence factually necessary for whatever plan for ultimate disposition of the accused is adopted.

## 4. Internal Organization.

To accomplish the responsibilities presently charged the Commission under headings 1 and 2, it is suggested that certain changes in the internal organization of the Commission are essential.

2. The increasing problems of detail, often concerning matters of an administrative nature, would seem to make it imperative for the Commission to appoint an Executive Committee to both plan and carry out matters covered by policies established by the Commission as a whole. A small committee consisting of the Chairman and committee chairmen can function efficiently with frequent meetings to an extent impossible for the Commission meeting as a whole.

3. Committee II and Committee III to the extent necessary, should be reactivated. These committees have functioned satisfactorily, and present a means of reaching effective action without taking up too much time in Commission meetings. The Public Relations Committee appears to be too large. It should have a trained press officer to help it and it should be appropriately publicizing the work of the Commission.

4. The appointment of one or more Vice-Chairmen might

serve to assist the Chairman, and make for a more effective organization.

d. There should be an increase in the Executive Staff under an Executive Officer who will assume the burden of coordination and office administration. A table of suggested additional personnel and duties is attached.

e. There should be adequate office facilities and equipment. This is the subject of the report of a special committee of the Commission.

f. There should be established a Central Information Office. The creation of such a central agency somewhere is essential in order to coordinate information between the National Offices and the Military Agencies. This will enable the Commission to ascertain that there is in fact an investigation of at least all major war crimes, and to compile the evidence necessary for either historical purposes, or for the more immediate task of possible prosecution or other ultimate disposition of the Accused. This would include facilities for exchange of information among agencies concerned, and for assembling in the Commission Offices, available and properly indexed, records covering each offense and each person involved.

g. Consideration should be given to the establishment of a Prosecuting Office charged with the task of preparing cases against the major war criminals.

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The foregoing, as stated at the beginning, is meant only as a basis for discussion. Other problems and courses of action probably occur to other members. It is hoped that they are presented for discussion.

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PROPOSED ...



**PROPOSED EXECUTIVE STAFF.**

To be responsible directly to the Commission under the general control of an Executive Officer. No interference with the present activities of the Secretary is contemplated except to relieve that office of administrative details falling within the scope of the new office.

**I. Administrative Section.** To be headed by a Chief Clerk and adequate staff in order to: Maintain Case Record Files; Maintain Offense Punch-Card File; Index Card Files; and the Registry of Accused and Suspects; and also to control the exchange of information particularly with respect to cases partaking of an international nature.

**II. Legal and Research Section.** This section needs an immediate directing head, as well as substantial augmentation in order to not only check cases as submitted, but to prepare further lists of major Accused, particularly of Japan and Italy, but to perform the necessary research to obtain the evidence required to establish the individuals to be charged. Also to prepare reports and cases involving major types of systematic crime, and to prepare the historical records concerned in Commission Document C.72.

**III. Coordinating Section.** This section should include personnel to establish immediate direct contact with each National Office, each Military Theater, and other interested agencies in order to obtain the information which the Commission must have to function intelligently, and to coordinate the work of the Commission and those agencies.

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Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

II/40  
14th May, 1945.

UNITED NATIONS WAR CRIMES COMMISSION  
USE OF UNRRA FACILITIES IN WAR CRIMES INVESTIGATIONS

Note by Lt.-Col. Hodgson

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In many cases the Displaced Persons Organisation of the United Nations Relief and Rehabilitation Administration will be the first point of contact between the United Nations and persons who have been victims or witnesses of Nazi and Fascist atrocities and other war crimes.

In view of the foregoing it seems advisable that the cooperation of the United Nations Relief and Rehabilitation Administration be obtained in the discovery and perpetuation of evidence concerning war crimes.

It is therefore recommended that the Governments and Supreme Headquarters, Allied Expeditionary Forces, obtain the full cooperation of the United Nations Relief and Rehabilitation Administration in the discovery and perpetuation of evidence concerning war crimes.



SECRET

Note: This is a document intended exclusively for the personal use of members of the Commission and their substitutes.

II/41.  
May 14th,  
1945.

UNITED NATIONS WAR CRIMES COMMISSION

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Notes of Meeting of Committee II  
held on 1st May 1945

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Chairman : Lt. Colonel HODGSON - United States of America

There were also present:

Lord WRIGHT	- Australia, Chairman of the Commission
Mr. OLDHAM	- Australia
accompanying Lord Wright	
Lt. Colonel BEHLE and )	- United States
Captain WOLFF            )	- of America
accompanying Lt. Colonel Hodgson	
M. de BAER	- Belgium
Lord FINLAY	- United Kingdom
Wing/Cr. HOPKINS	- Canada
Mr. Wunsz KING	- China
accompanied by Mr. DAO	
Dr. EGER	- Czechoslovakia
accompanied by Dr. FANDERLIK	
and Dr. MAYR-HARTING	
Professor GROS	- France
Mr. DUTT	- India
Dr. CYPRIAN	- Poland
M. MARKOVIC	- Yugoslavia.

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Colonel HODGSON was elected Chairman.

The CHAIRMAN indicated the following matters for consideration by the Committee :

- (1) Dr. Eger's proposal that the Commission should assist with investigation of the war crimes committed at Buchenwald;
- (2) Establishment of liaison officers and teams to work with Army Group Headquarters in Germany.
- (3) M. de Baer's proposal for a War Crimes Agency in Germany (Doc. C.97);
- (4) The maintenance of relations with SHAEF through liaison officers;
- (5) Establishment of penal sanctions for the threat or use of force;
- (6) The report to be made on Buchenwald camp;

(7) ..

- (7) Despatch of a small committee to SHAEF and other Supreme Army Headquarters;
- (8) Problems facing the Commission as the result of the visit to Buchenwald;
- (9) Co-operation with the U.S.S.R. State Commission;
- (10) Registration and identification of the inhabitants of enemy countries.

Measures to be taken in regard to Buchenwald and other concentration camps.

Priority was given to this subject and it was agreed:

a) That a draft report on the visit to Buchenwald which was under preparation by Mr. Oldham and Wing-Commander Hopkins should be completed by a committee consisting of them and Professor Gros and should be submitted to the Commission.

b)

Dr. EGER made the following speech which, at Mr. Oldham's request, was recorded as fully as possible:

Dr. EGER wished to suggest certain urgent measures to be taken by the Commission. He entirely agreed with M. de Baer's memorandum (Doc.C.97) regarding the general investigation of war crimes committed in Germany, but he felt that at this moment it was dangerous to limit the problems to investigation of crimes in Buchenwald. The recent action by the American troops who captured Dachau and shot the guards in their anger would not serve the cause of justice as the information that these men could have given would now be lost.

He reported that he had conversed with Czech nationals at Buchenwald whose first question was: "What guarantees are there that war criminals will be punished?" to which he had replied that they must help in the investigations. Together they had worked late one night compiling a list of 2662 witnesses which he (Dr. Eger) had brought back with him. Among the prisoners were lawyers, doctors, barristers, judges, police officials, and a special judicial committee had been set up. There was not only this Czech section, for there was an organization for the administration of the camp's accounts representing all the United Nations. He would therefore propose that the task of the Commission should be to send a committee to supervise the work done by the prisoners - first to Buchenwald, later to Dachau and so on. He stressed that this was not a national affair. There was a solidarity among the prisoners who felt very strongly that all the United Nations were involved.

If the Commission agreed that this measure should be taken, his Government were willing to send him with a small staff, at the expense of the Czech Government, but under the auspices of the United Nations War Crimes Commission, to work, if so desired, for other Governments, for the purpose of organising the actual investigations which would be undertaken by the prisoners themselves - there were people in the camps willing to do this. Although it seemed a gigantic task, the Commission should fulfil the expectations of all the United Nations as well as of the people in the camps. For this they needed the full support and collaboration of SHAEF. He had not discussed the matter officially with the latter, but his impression was that they had other important and urgent duties to perform and although some outstanding ..



standing cases were being examined, they were unable to undertake the full investigation necessary. It was felt, however, that the action of General Eisenhower should be followed up by further action, particularly in view of the public indignation aroused. President Truman had said these people must be punished: it was the job of the Commission to do so. Dr. Eder therefore felt that SHAEF would support every effort being done by the Commission with this end in view. The best way, in his opinion, would be through direct contact with SHAEF. He therefore made the following suggestions :

- 1) The Commission should decide in principle to set up a committee of enquiry composed of some members of the Commission who were willing and anxious to go.
- 2) Every member of this committee should have the possibility to take with them a small staff from his National Office, to consist perhaps of a lawyer and a doctor - one of the best doctors was willing to go at the expense of the Czech Government.
- 3) This committee should be properly organised, with a chairman, deputy chairman and secretary. The chairman should be authorised to negotiate with SHAEF on the spot on the general lines of M. de Baer's memorandum, as the work would be regarded as the starting point of the more general scheme outlined therein.
- 4) Their task would be to examine the criminals as well as witnesses, with a view to obtaining information and testimony. The committee should then establish the list of suspects and send it direct to SHAEF who would arrest those suspected and take them into custody. The definite list of criminals would of course come to SHAEF from the Commission in London, but this working committee should be authorised to prepare a temporary list for direct submission to SHAEF.

The British Minister of State, Mr. Law, had said last January, and the warning had been repeated recently by the Prime Minister of Britain, the President of the U.S.A. and Marshal Stalin, that the punishment of crimes was not limited to those committed in occupied territory but extended to crimes committed in Germany. The British Government had said they would ensure this punishment. There were difficulties in regard to the examination of crimes committed in Germany against Germans and stateless persons. Dr. Eder said that he had received an offer from several lawyers exiled in London after spending some years in concentration camps, who would be willing to help the Allied Governments by undertaking this task, should the Commission be unable to do so.

Finally, Dr. Eder said that time pressed. The Americans intended to repatriate the prisoners; the French, the Belgians and the Luxembourgers had left. Valuable time would be saved if an examination could take place in the camps now, before the inmates had been dispersed to their own countries. He thought that the Commission's representatives could, within a fortnight, bring all the necessary evidence and a large collection of cases to London.

A discussion followed, which resulted in a decision to take the matter up in the Commission. If the Commission agreed, steps would be taken to obtain, if possible, authorisation to provide teams to assist the armies in the investigation of war crimes in Buchenwald and other concentration camps and to organise such teams.

Memorandum ..

Memorandum on the integration of Agencies connected with war criminals.

This memorandum was presented by Wing-Commander Hopkins. The Committee adopted it and decided to submit it to the Commission.

War Crimes Agency in Germany.

M. de BAER said he did not for the moment wish his paper to be discussed.

Recommendation concerning penal sanctions for the threat or use of force.

This document was submitted by Colonel Hodgson as a matter of great urgency since it contained recommendations to the member Governments which they were meant to submit to the San Francisco Conference if they approved them.

After discussion it was resolved to adopt the document and submit it to the Commission.

Problems facing the Commission.

Colonel HODGSON submitted a paper on this subject the discussion of which was adjourned to the next meeting.



Members are requested to substitute the present Document for Document II/42.

SECRET

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II/42(1)  
May 18, 1945.

UNITED NATIONS WAR CRIMES COMMISSION

NOTES OF MEETING OF COMMITTEE II

HELD ON 15TH MAY 1945

Present: Colonel Hodgson (Chairman), Lord Wright, Dr. de Moor, Mr. Oldham, Dr. Cyprian, Captain Wolff, M. de Baer, Dr. Mayr-Harting.

Discussion of Colonel Hodgson's memorandum on "Problems facing the Commission".

The following points in the above document gave rise for discussion:

Section III, Paragraph 1.

Sub-paragraph (a).

Colonel HODGSON suggested that this was a question for consideration at the National Offices Conference.

The Commission has since decided that there shall be an exchange of views and consideration of the question at that Conference.

It was agreed that the National Offices Conference should take the place of the first of the series of regional conferences contemplated by this sub-paragraph.

Sub-paragraph (b)

Colonel HODGSON said that the proposal in this sub-paragraph regarding the military agencies in enemy territories need not be considered as information had been provided in the telegram from SHAEF, of which the Commission had been informed.

As regards the proposal for the establishment of agencies in enemy territories, it was agreed that the only action necessary for the moment was the making of a recommendation that a war crimes agency or agencies be set up to investigate war crimes in Japanese territory.

Mr. DAO, who thought that this was a matter which the Sub-Commission at Chungking might have discussed or in regard to which it might be possible for it to act, said he must consult Mr. Wunsz King on the subject.

P.T.O.

Sub-paragraph (c).

It was agreed to accept in principle the proposition that it would be desirable for the Commission to take measures to ensure the perpetuating of the testimony of witnesses whose evidence may be considered to be of an international character.

Part III, Paragraph 2.

Colonel HODGSON considered no discussion to be necessary.

Part III, Paragraph 3.

After some discussion, M. de BAER was asked to write a paper on the question of the disposal of accused persons wanted by several United Nations which was raised in this paragraph.

The Committee adjourned discussion on the remainder of the memorandum.



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SECRET

II/43  
25 May, 1945

UNITED NATIONS WAR CRIMES COMMISSION

SURRENDER OF A WAR CRIMINAL:  
REQUEST BY THE REPRESENTATIVE OF YUGOSLAVIA

The Chairman of the Commission feels that the Commission's competence to grant the requests made in the following communication is sufficiently doubtful to make it desirable for the matter to be examined by Committee II.

Communication from Dr. Zivković  
dated 24 May, 1945

- "1. Giuseppe BASTIANINI, who was charged a few days ago on behalf of the Yugoslav Government (Charge R/It/26) has been put on the list of the War Crimes Commission.
2. Information has reached me that BASTIANINI has been given asylum in Switzerland and I have been instructed by my Government to bring this fact to the notice of the Commission and to make an official request for the surrender of BASTIANINI to the Yugoslav Government.
3. In view of the pledge of all the neutral countries not to grant asylum to war criminals, and having regard to an official statement made by the Swiss Government over the radio, a copy of which is attached, from which it appears that the Swiss Government recognize BASTIANINI's presence in Switzerland, the United Nations War Crimes Commission is requested to inform the Allied authorities concerned of this fact, so that they may take action with a view to obtaining the surrender of BASTIANINI to the Yugoslav Government.
4. In any case, the Swiss Government should be authoritatively informed by the United Nations War Crimes Commission that BASTIANINI is on its list, and that the Yugoslav Government have officially requested his surrender through the channels of the Commission.
5. The matter will also in due course be taken up directly by the Yugoslav Government with the Swiss Government, and the other Governments concerned."

/ ANNEX

ANNEX

"It is officially announced: During the past few days some reports have appeared in the Swiss press with regard to the Bastianini case. The facts, which are simple, are as follows:

On May 11th, the Yugoslav Legation in Berne, during an official visit informed the Swiss authorities that Bastianini was on the Yugoslav list of war criminals and that it was desirable for him to be watched during his stay in Switzerland in order to prevent him from evading a request for extradition by flight.

At the request of the Political Department, the Yugoslav Minister confirmed these views in writing on May 14.

No request for extradition has been made, either verbally or in writing.

It was clearly stated that the Yugoslav Government would make a special enquiry into the case of Bastianini, reserving for itself the right to take the necessary steps according to the results of the investigations. Attention has been drawn on this occasion to the United Nations' declaration on war crimes.

From these facts it can be gathered that the Yugoslav Government has not yet completed its investigations. At any rate, that Government has not yet made a request for Bastianini's extradition.

Swiss Home Service (in French)  
19.5.45. (20.15)"



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SECRET

II/44  
6th June, 1945.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

NOTE ON THE ESTABLISHMENT OF A PROSECUTING OFFICE  
CHARGED WITH THE TASK OF PREPARING CASES AGAINST  
THE MAJOR WAR CRIMINALS

(M. de BAER)

This is not the first time that the question of a United Nations Prosecuting Office is raised before the Commission. It was mentioned namely in documents C.14 of April 25, 1944, II/28 of August 29, 1944 and also in C.111 of May 16th, 1945.

President Truman's proposal of instituting an International Military Tribunal to try the major German Nazis again raises the question whether the prosecution should be conducted by a prosecuting office of one country in the name of mankind, or by each victim-country in its own name, or by the United Nations as a whole with the help and backing of all the Member-States.

It has already been pointed out in Doc. C.111 that individual prosecution by each one of the United Nations in succession before the International Military Tribunal would lead to unnecessary delay. Prosecution by one country alone would rouse susceptibilities, moreover it would lack the unanimous and formal support that is desirable. It may therefore be found preferable that the prosecution of the Nazi leaders who are responsible for the policy of systematic terrorism and whose offences have no geographical localisation should be conducted by a United Nations body acting on behalf of all the Allies.

There are other reasons why the joint action of the United Nations is preferable to individual action by each nation.

If the prosecution is to be done by individual nations each nation will be bound by the terms of its Constitution and by the text of its criminal Statutes. Therefore, prosecution may not only vary according to the country which is conducting it (some countries may refuse to request the death penalty), but two prosecutors acting in the same case may adopt diverging attitudes. Moreover a national prosecutor may find it impossible to prosecute for acts that are not covered by the terms of the criminal Statute of his country, e.g., in some countries it may be found impossible to prosecute for the offence of deliberate starvation (which is sometimes considered as a negative act: abstaining from providing food). Other countries may find it impossible to demand capital punishment.

If, on the contrary, the prosecution is conducted in the name of mankind, then any fundamental violation of the customary laws of humanity may be punished and neither the prosecution nor the court will be bound by any text of law.

In other words, both the prosecution and the court will be in the same position as the courts of olden times when no criminal Statutes existed, custom was applied and judgments of the courts were declarative of such custom.

An international statutory criminal law, in the legal sense of that expression does not yet exist. This is because, although prohibitions have been set up by international treaties and agreements, no court has been declared competent to try the offender and no penalty has been affixed to each crime. In the same way as the British Courts of Common law have built up a practice of law by declaring that acts were a crime by customary law, in the same way it will be for the International Criminal Court to declare what is an offence by international criminal law and to set up precedents for the future.



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SECRET

II/45  
20th June 1945.

UNITED NATIONS WAR CRIMES COMMISSION

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Notes of Meeting of Committee II  
held on 22nd May 1945.

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Present :

Colonel Hodgson (in the Chair), Lord Wright, Major Palmström, Mr. Oldham, Dr. Cyprian, Captain Wolff, Mr. Dutt, Mr. Dao, Dr. Ecer, Dr. de Moor, Lord Finlay, Dr. Mayr-Harting.

USE OF UNRRA FACILITIES IN WAR CRIMES INVESTIGATIONS: NOTE BY COLONEL HODGSON (Doc. II/40):

The Committee considered the recommendation contained in this document. It decided to propose its adoption in an amended form to the Commission.

COLONEL HODGSON'S MEMORANDUM ON "PROBLEMS FACING THE COMMISSION".

Correction in the Notes of the last meeting.

Mr. DAO asked for a correction in these minutes, which has been made in the revised text circulated as Doc. II/42(1).

Paragraph 4 : Internal Organisation:

Point (a) relating to appointment of an Executive Committee was referred to Committee I.

Point (b) relating to Committees II and III and the Public Relations Committee was already in process of being realised.

Point (c) was referred to Committee I.

Point (d) relating to an increase in the executive staff under an Executive Officer and the accompanying plan for such an increase was referred to the Finance Committee but has actually been placed on the agenda of Committee I<sup>+</sup>.

Point (e) relating to new premises for the Commission which had already been dealt with by a special committee was referred to Committee I.

Point (f) suggesting creation of a Central Information Office was referred to Committee I.

Point (g). Colonel Hodgson, Dr. de Moor, M. de Baer and Dr. Ecer were asked to draft a paper on this subject.

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<sup>+</sup>  
Colonel Hodgson agreed to this transfer as Committee I was due to meet sooner than the Finance Committee.

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SECRET

II/46  
20th June 1945.

UNITED NATIONS WAR CRIMES COMMISSION

Notes of Meeting of Committee II  
held on 29th May 1945.

Present :

Colonel Hodgson (in the Chair), Lord Wright, Mr. Oldham, M. de Baer, Captain Wolff, Dr. Zivkovic, Mr. Dao, Dr. Mayr-Harting, Professor Cassin, Lord Finlay.

SURRENDER OF A WAR CRIMINAL : REQUEST BY THE REPRESENTATIVE OF YUGOSLAVIA (Doc. II/43).

Dr. Zivkovic's request was for the Commission's assistance in obtaining the surrender by Switzerland of Guiseppe Bastianini, a person against whom Committee I had found a prima facie case of guilt for war crimes to have been established. After discussion, the Committee decided to recommend the Commission to issue a certificate to the Yugoslav Government to the effect that Bastianini had been placed on its List of War Criminals, and to cause copies of the certificate to be sent to the other member Governments with a view to such action by them as in the premises they might deem appropriate.

It was decided that this decision did not in any way prejudice the question whether the Commission could properly have addressed the certificate to the Swiss Government directly instead of giving it to the Yugoslav Government, and that Committee III should be asked to consider in principle the question of the Commission's right to address communications to Governments other than those represented on it.

ESTABLISHMENT OF AN AGENCY ATTACHED TO THE ALLIED CONTROL COMMISSION IN ITALY (Doc. C.110).

Dr. Zivkovic withdrew his proposal that Albania should be represented in the Agency.

The subject as a whole was adjourned for a week in order that Lord Finlay might seek information from the Foreign Office as to the exact position in Italy.



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SECRET

II/47  
21st June 1945.

UNITED NATIONS WAR CRIMES COMMISSION

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Notes of Meeting of Committee II  
held on 5th June 1945.

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Present :

Colonel Hodgson (in the Chair), Lord Finlay, Professor Gros, Dr. Mayr-Harting, Mr. Wunsz King, Dr. Wang Hua-cheng, Mr. Yang Yun-chu, M. de Baer, Mr. Dutt, Captain Wolff, F/O Bridgland, Cmdr. Mouton, Dr. Zivkovic, M. Stavropoulos.

ESTABLISHMENT OF AN AGENCY ATTACHED TO THE ALLIED CONTROL COMMISSION IN ITALY (Doc. C.110).

Lord FINLAY, having received a communication showing that the Foreign Office was asking the Resident Minister at Caserta for information, requested that this question might be adjourned for a week, and this course was agreed to.

CREATION OF A WAR CRIMES AGENCY TO INVESTIGATE WAR CRIMES INSIDE JAPANESE TERRITORY.

Mr. Wunsz KING explained the reasons why the Sub-Commission in Chungking had been unable to pronounce on this subject, and, having ascertained that this would be agreeable to the Chinese Government, the Committee decided that a parallel study of the question should take place in Committee II and in the Commission and also at Chungking.

Mr. Wunsz King was asked to prepare a draft proposal for an Agency with the assistance of Colonel Hodgson.

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SECRET

II/48  
12th June, 1945.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT RECOMMENDATION REGARDING THE ESTABLISHMENT OF AN  
AGENCY OR AGENCIES INSIDE JAPANESE TERRITORY TO  
INVESTIGATE WAR CRIMES.

The Commission in its recommendation Document C.30 adopted on the 13th June, 1944, proposed that an agency charged with special duties to investigate war crimes and to apprehend the accused, should be created in enemy territory as part of the appropriate section of the Supreme Allied Command. Events which have taken place during the occupation of Germany have fully justified the measure proposed by the Commission.

When the Allied forces land in Japanese territory the conditions obtaining there will no doubt call for the establishment of machinery to deal with the problems of Japanese war criminals. The most practical means would appear to be to entrust the Supreme Allied Command operating inside Japanese territory with the task of setting up a military agency for the purpose. It is felt that to ensure co-ordination between such an agency on the one hand, and the Commission or its Sub-Commission and the National Offices of those United Nations at war with Japan on the other, immediate steps may be taken to devise an agreed scheme along the following lines :

(a) The Supreme Allied Command in question should be invited to create a special military branch or branches for the purpose of collecting evidence, apprehending Japanese war criminals, putting them into custody, and handing them over to the competent courts for trial, and of exercising such other functions as might specifically be entrusted thereto. Such military branch or branches would form part of the appropriate section of the Command.

(b) A representative from each of the National Offices concerned acting as liaison officer should be attached to the Supreme Allied Command. He would be invited to take charge with his own team, and in conjunction with the military agency, of the work of investigation of any war crimes committed against nationals of his country. In general, the liaison officer of a National Office would co-operate with the military agency in all matters affecting the interest of his country in regard to war crimes.

(c) The Commission or its Sub-Commission would forward direct to the Supreme Allied Command lists of Japanese war criminals. The military agency, through the appropriate channel, would keep the Commission or its Sub-Commission informed of any of those persons wanted who have been identified and apprehended. Where evidence of a war crime committed by persons whose names are not yet on the lists, or that of a crime which points to the existence of a general pattern of criminal acts, is available, the military agency would likewise pass on the information to the Commission or its Sub-Commission. It is desirable that the fullest co-ordination of activities of these two bodies should be maintained.



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SECRET

II/49  
21st June 1945.

UNITED NATIONS WAR CRIMES COMMISSION

Notes of Meeting of Committee II  
held on 12th June 1945.

Present:

Colonel Hodgson (in the Chair), Lord Finlay, M. Malezieux, Mr. Wunsz King, Mr. Dao, Mr. Dutt, Captain Wolff, Dr. Cyprian, F/O Bridgland, Mr. Oldham, Cmdr. Mouton, Dr. Zivkovic.

ESTABLISHMENT OF AN AGENCY IN ITALY (Doc.C.110).

Lord FINLAY asked that this question might be adjourned for a further week. The Foreign Office had not received the expected information from Caserta and had sent a telegram there which, Lord Finlay thought, would ensure the information being available by the date of the Committee's next meeting.

This was agreed to.

ESTABLISHMENT OF AN AGENCY OR AGENCIES INSIDE JAPANESE TERRITORY TO INVESTIGATE WAR CRIMES (Doc. II/48).

A draft recommendation on this subject had been prepared by Mr. Wunsz King with the assistance of Colonel Hodgson.

The Committee was unanimous in approving the recommendation, with minor alterations. It resolved to submit it to the Commission for provisional adoption, which would be followed by transmission to the Sub-Commission for its consideration.

ESTABLISHMENT OF A PROSECUTING OFFICE CHARGED WITH THE TASK OF PREPARING CASES AGAINST THE MAJOR WAR CRIMINALS (Doc. II/44).

In the absence of M. de Baer, consideration of this subject was adjourned to the next meeting.

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SECRET

II/50  
22nd June 1945.

UNITED NATIONS WAR CRIMES COMMISSION

Notes of Meeting of Committee II  
held on 19th June 1945.

Present :

Colonel Hodgson (in the Chair), Lord Wright,  
Lord Finlay, Dr. Mayr-Harting, Mr. Dao, M.  
Malezieux, Dr. Zivkovic, Captain Wolff,  
Commander Mouton, Dr. Cyprian.

Mr. Dutt sent apologies for his absence.

ESTABLISHMENT OF AN AGENCY IN ITALY (Doc. C.110).

Lord FINLAY read a telegram from the Minister at Caserta to the Foreign Office, the text of which will be circulated in paraphrase. It indicated that steps had been taken to obtain proposals from the Yugoslav and Greek Governments for operation of Yugoslav and Greek war crimes missions in Italy on certain conditions, but that the proposals had not yet been received.

In view of this information, Dr. ZIVKOVIC said he would communicate with his Government.

It was agreed that the subject should be put again on the agenda if and when Dr. Zivkovic so requested.

LETTERS FROM DR. ZIVKOVIC TO THE COMMISSION SUGGESTING ACTION IN CONNECTION WITH GENERAL FRITZ NEIDHOLT AND DR. GIUSEPPE BASTIANINI (Doc.C.121).

Dr. ZIVKOVIC said that there was no direct liaison between the Yugoslav Government and the military authorities in Italy and the letters in question suggested that certain information in these circumstances should be transmitted by the Commission on the Yugoslav Government's behalf to those authorities. The majority of the Commission's members thought the matter was one to be dealt with directly between the Yugoslav Government and the military authorities, but there was no decision of principle such as Dr. Zivkovic could report to his Government, on record in the minutes.

After discussion it was decided that the Chairman of Committee II should raise the matter in the Commission and report that appropriate action would be for the Commission to amend the minutes of its meeting of June 13th so that they would show that, while the Commission was always ready to assist, it was believed by the Commission that such matters should be taken up directly by the Governments concerned with the military authorities.



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SECRET

II/51  
22nd June 1945.

UNITED NATIONS WAR CRIMES COMMISSION

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Establishment of an Agency in Italy:  
Communication from the Minister at Caserta.  
to the Foreign Office.

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The following is the substance of the telegram from the Minister at Caserta to the Foreign Office, dated 16th June 1945, which was read to Committee II at its meeting of 19th June in connection with the proposals made by Dr. Zivkovic in Document C.110 :

"Committee appointed by Supreme Allied Commander held meeting on March 27th, at which it was decided

(a) respective National missions should investigate themselves, but under Allied Control.

(b) that agency to supervise Missions should be Allied Commander in Italy, but in the case of Celfalonia representatives of British forces in Greece under directives from Allied Forces Headquarters committee.

(c) that respective Governments should be asked to state detailed proposals with regard to scope of their missions

(d) that, when their proposals were received, a meeting, at which the Allied Commission would be represented, would be held to decide questions such as conditions under which missions may be admitted, arrangements with the Greek and Italian Governments for introducing them, procedure, supervision exercised, etc.

Allied Commission were instructed to request Greek and Yugoslav delegates to Italian Advisory Council and Italian Government to submit detailed proposals regarding functions and organisation of missions and to suggest procedure they wish to see adopted and action they proposed or anticipated after enquiries of missions.

Allied Commission have not reported receiving any reply to above.

They have been asked to confirm the actual proposals have not been received from the three Governments. I will investigate further when Commission's answer reaches Allied Forces Headquarters.