

If such an evolution took place in peace time, if this evolution was accelerated by the war, it is clear that the rule so elaborated can be applied with full justification to the Nazi criminals. If it is sufficient for the condemnation of an individual to ascertain that he knew the immorality of his act, not the illegality, why should the public prosecutor be obliged to prove anything further. And if in other cases the mens rea is even presumed, why should this presumption not be applied in cases of crimes committed by professional criminals, members of a criminal association like S.S. and Gestapo?. In other words : the origin, purpose, and activity of the organisations examined in my report, the voluntary character of their membership and the obligation, voluntarily undertaken, to carry out every order, even a criminal order, blindly, are new facts which fully justify the application of the rules developed by English practice and by English criminal legislation in cases, which are nothing in comparison with the Nazi's crimes. The principles explained by Kenny, furnish an excellent means to deal effectively with the crimes committed by the SS., S.A. and Gestapo and other Nazi criminals as well.

Thus, my second legal conclusion is as follows :

Taking into consideration the facts as explained in the first Part of this report,

a) The Allied criminal courts, whether national or international, which will try the crimes committed in connection with the second World War by members of the leading classes of the S.A., the members of the S.S. or Gestapo, are fully authorised to presume mens rea on the part of their perpetrators either as a dolus generalis or as a dolus specialis.

b) Allied legislators, whether national or international, are fully authorised to transform this praesumptio facti into a praesumptio juris, legally binding the criminal courts. The presumption of mens rea on the part of the leading classes of the S.A.<sup>(1)</sup> of the S.S. and the Gestapo, both as a praesumptio facti established by the courts in every particular case or as a praesumptio juris established by law for all cases, is morally justified, juridically admissible and practically needed.

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(1) So far as the S.A. are concerned, I refer to my arguments in Part I. These arguments are valid for the second conclusion as well. By "leading classes of the S.A." I mean, the old members of the S.A. up to June 1934, and the officers of the S.A. from June 1934.

c) CAN A MEMBER OF THE S.A., S.S. OR GESTAPO SUCCESSFULLY RAISE THE DEFENCE THAT HE COMMITTED A CRIME UNDER THE ORDER OF HIS SUPERIOR OFFICER?

This is the exact meaning of the problem known in literature as "plea of superior orders" so far as the members of the above-enumerated formations are concerned. I limit myself to very short remarks of a general nature because the problem in its general bearing is the subject matter of the report now being prepared by Dr. Liang in collaboration with Mr. Hambro.

I see the substance of the problem, not so much in the criminal order itself but in the threat implicitly or explicitly accompanying the order that the subordinate will be punished or even shot if he refuses to obey. Thus the *sedes materiae* lies rather in the question whether the subordinate has been put in a state of irresistible compulsion by this threat. This is in my opinion the right way to approach the problem of superior orders. The criminal courts, either national or interallied, which will try the Nazi criminals will meet the plea of superior orders in the form of the defence that the subordinate had to choose between obedience and death. Thus the court will be obliged to examine the question whether irresistible compulsion was produced by the threat involved in the order. This is pre-eminently a question of fact, not of law. To answer it correctly in the case of the S.A., S.S. and Gestapo one must carefully consider the following facts which were established in the first part of the report:

1. The members of the S.A., S.S. and Gestapo are volunteers. By voluntarily joining these organisations or formations they voluntarily accepted in advance the duty of fulfilling every obligation imposed upon them by their membership.
2. One of the most important of these obligations is to obey blindly and carry out every order without hesitation. They have no right to examine the legality or illegality, or even the morality or immorality, of the orders received.
3. The purpose and the activity of the three organisations are notorious facts which do not need special evidence. Everyone who joins one of them must know and does know that he will be obliged to commit crimes at the order of his superiors. It is legally irrelevant that such criminal orders were not so frequent in the S.A. after 1934, because the S.A., after the failure of the Röhm-revolts were not used for Nazi crimes, at least not as a body and not predominantly. If the S.A. man ought not to be put on trial for merely belonging to the S.A., his position is exactly the same as that of an S.S. man or a Gestapo-man if he is tried for an individual crime committed by order of his superior in the S.A.
4. Finally we must keep in mind the fact that the S.S. men and the Gestapo men were and are committing the most heinous crimes in the invaded countries. This circumstance deprives them, according to the unanimous opinion of all legal experts, of the privilege of defending themselves by the plea of superior orders.

All these facts must be taken into consideration. The legal rules to be applied on them are in my opinion two:

- (i) "Every sane adult is presumed to intend the natural consequences of his conduct". (Kenny p.43). The man who voluntarily joined the organisations S.A., S.S. and Gestapo must bear the conse-



-quences of such conduct.

(ii) The plea of superior orders can only prevail where there was on the part of the subordinate another will opposed to the criminal will of the superior. Only in this case is a state of compulsion or coercion logically possible and conceivable. Blackstone quoted by Kenny (page 55) characterises it as a state "where the will is overborne by compulsion". Now the will of a member of S.A., S.S. or Gestapo is not opposed to the criminal will of his superior. There is no conflict of wills. Consequently there cannot be compulsion.

In my report for the First Commission of the London International Assembly entitled "L'ordre supérieur et les criminels de guerre allemands" (March 29, 1943), I made the suggestion that the plea of superior orders is absolutely inadmissible when the accused was a member of the Nazi Party, S.A., S.S., Gestapo and Waffen-S.S.

After discussion at several meetings the First Commission on June 1, 1943, adopted a Resolution on Superior Orders in the preparation of which I participated as rapporteur and which deals with crimes committed by members of all the criminal German organisations. The Resolution contained the following provision, which was adopted by the London International Assembly on 21 June, 1943:<sup>(1)</sup>

"(iii) The defence<sup>(2)</sup> that the accused was placed<sup>(3)</sup> 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."

Thus my third legal conclusion is:

(a) If a member of the S.A., S.S. or Gestapo raises before an Allied criminal court, either national or international, the defence that he committed the alleged crime by order of his superior, the Court is fully entitled to reject this plea.

(b) Allied States whose criminal law does not cover such cases, are fully entitled to enact a provision such as that quoted above, either in a general form or for particular cases.

(1) The full text adopted by the Assembly is on p 193 of the bound sets of the Assembly's "Reports on Punishment of War Crimes."

(2) The defence was raised in the Kharkov Trial held from Dec. 15th to Dec. 18th, 1943, before the Military Tribunal of the Second Ukrainian Front by the three Germans on trial. The Tribunal sentenced the accused to death in spite of this defence, although it did not deal expressly with the plea in its judgment.

(3) i.e. by the order of his superior.

(d) THE QUESTION OF COLLECTIVE RESPONSIBILITY IN GENERAL AND  
IN THE CASE OF THE S.A., S.S. AND GESTAPO IN PARTICULAR

I was asked by Committee III to report on the question of collective responsibility. I attach this report to my report on the S.A., the S.S. and Gestapo, because that document throws a great deal of light on it.

The question was raised in our Committee on several occasions by MM. Cassin, Gros, Glaser and others. All the members of the Commission who raised this question took as the starting point of their argument the facts, stressed in the letter of M. Gros which was read at the meeting of the Commission of 21st March, 1944, that today Germany confronts the United Nations with organised mass crime, and that such crime cannot be dealt with by methods adopted for a different situation, namely one in which crimes are exceptional and individual. This is a correct and fundamental view of the problem.

This is one aspect of the problem, the sociological, moral and criminological.

The other aspect is the legal one. Is the law, whether international or national, which is now actually in force, able to deal with this new form of crime? If not, to the whole extent are there at least some principles of the existing law which, if rightly interpreted and developed, could form the basis for effective legislative, judicial and administrative measures against the mass crime with which we are faced?

That is the general legal aspect of the problem.

The special aspect is a little more simple. What is the legal basis for applying legislative measures, judicial decisions and administrative measures adequate to the organized mass crime which has materialized in the S.A., S.S. and Gestapo formations.

Meaning of the phrase "collective responsibility"

In order to avoid confusion and confused conclusions, it is necessary to know exactly what we mean in speaking of "collective responsibility".

For the purposes of so much of our work as is within the sphere of criminal law (both international criminal law in its present rudimentary form and national criminal law), I eliminate from consideration the problem of moral or political collective responsibility and measures to be taken on the basis of such responsibility. I confine myself to the collective criminal responsibility which is the consequence - or the converse - of the mass crime in question. The conception is not a new one. A large number of sociologists, psychologists and lawyers have dealt with the problem in the last 20 years. An illuminating work containing the opinion of some 40 eminent experts, with comprehensive bibliography and great creative ideas, is the book of Prof. Vespasian Pella entitled "La criminalité collective des Etats et le Droit Pénal de l'Avenir" published in 1926 by the Rumanian group of the Interparliamentary Union. It is available in the library of the International Law Association. Pella deals with "crimes" of States but the principles underlying his suggestions can with some modification be applied to any corporation. The question is not new



even for international law, for there is the famous provision of Article 50 of the Hague Regulations. Rolin, "Le Droit moderne de la Guerre", page 481, severely criticises this article for establishing the principle of collective responsibility of the civilian population without giving a definition of the constituents of this responsibility, as Garner rightly underlines (Garner, vol. II Par. 410).

In the national criminal law of all countries there are elements of a responsibility which if not called collective responsibility is at least near to collective responsibility.

All these kinds of collective responsibility in the national criminal law have, however, one common basis. Some relation must exist between the men held "collectively" responsible and the particular crime for which they are held responsible. The person must be a "particeps criminis", sometimes in very remote manner, sometimes in a direct manner. But the relation always must exist and is the basis of his responsibility and of his punishment. No civilised national criminal law provides even in a remote manner that an innocent individual can be made and held responsible for the crime of another man, merely because of the fact that both belong to the same national or territorial community (village, town, corporation, association etc.). The idea that innocent members of a community are responsible for the crimes of other members of the same community is an old Germanic idea, (see the old Anglo-Saxon institution of Frankpledge). Our former colleague Prof. Preuss dealt with this problem of influence of Germanic legal ideas on modern legal theories in an article published in 1934 or 1935 in the Journal for Comparative Legislation and International Law. Collective responsibility as conceived by the Germans begins with the family as the cell of each community. The German practice in the present war is exactly the realization of this old cruel rule perhaps necessary at times when there was no organized police and no organized criminal jurisdiction to deal effectively with individual criminals.

But besides this kind of collective responsibility - all members of a family or of a higher social community are criminally responsible for another member or group of members - there is in some national legislations a further form of collective responsibility. An instance is the corporate responsibility in English criminal law of a corporation for crimes committed on its order. It is a very curious sort of criminal responsibility because this corporation has only an imaginary will and personality, the real will is that of directors actively or passively supported by the majority of members. Further the corporation as such cannot be punished by imprisonment or by capital punishment. Thus the penalties imposed to a corporation are limited to fines, and the corporation itself can be prosecuted only for crimes punishable by pecuniary fines. In such cases there are two responsibilities: that of the corporation as such (corporate responsibility as Kenny calls it, page 326) and the individual personal responsibility of the directors who ordered the crime. The latter can be punished by other penalties than fines. (For details see Kenny p. 73 and 74).

Corporate responsibility in this sense cannot operate in the case of crimes punishable by death because it is impossible to hang a corporation. The problem comes back to the ground of personal

individual criminal responsibility which is the normal basis of criminal law. In this respect the Roman maxim "societas delinquere non potest" still holds true. In regard to such crimes a corporation is classed just after lunatics and drunken persons in Kenny's book under the heading "Exemptions from responsibility". From what has been said above follows that we are facing grosso modo three sorts of criminal collective responsibility.

(i) The criminal responsibility of a corporation as such for acts ordered by the corporation i.e. by its directors and authorised representatives. Here a double responsibility arises : that of the corporation, and that of the persons who acted on behalf of the Corporation.

This would be the case of the German Reich. There is no juridical objection against this double responsibility for acts of the German Reich. In this sense the German Reich committed crimes. It is a case of mass crime and of collective responsibility. But besides this corporate responsibility, there must be the personal criminal responsibility of the men governing Germany because otherwise Napoleon's famous bon mot would become fact : "les crimes collectives n'engagent personne". This point of view has hitherto prevailed in international law. Rulers of States enjoyed immunity for criminal acts which they ordered or committed on behalf of their States. On the other hand, the State itself could not be punished being a sovereign corporation. The final result was practically immunity and impunity for the worst crimes. It was a denial of justice, an absence of law, a vacuum juris.

(ii) The second sort of collective responsibility is that based on the fact that a community is a community of criminals either accidental and temporary (complicity or conspiracy) or organised and for longer terms (banditry). This sort of collective crime and collective responsibility for it is recognized in criminal law.

I refer to the provisions of various national criminal codes about complicity, conspiracy and banditry. Here I stress the fact the basis of the criminal responsibility of such temporary or organised "societates scelerum" is either the general contribution to the criminal activity of such bodies made by joining them - (banditry) or the participation direct or indirect, in particular crimes (participes criminis, complicity and conspiracy). But there is in any case a personal connection between the accused and the crime.

iii) Finally we have the Germanic conception of collective responsibility which makes all members of a community personally responsible for the acts of other members or even of men only connected with the community by the accidental fact that they committed a crime on the territory of the community. This principle means in German practice, that all members irrespective of their personal guilt or absence of criminal intention can on account of their not always voluntary membership of the community (village, association, race, nation) be punished with the same penalties as the actual perpetrators, even by death.

All writers both on international and on national criminal law in civilized countries reject this Germanic conception of collective responsibility as conflicting with elementary principles of justice. Even authors who accept without criticism the obscure provision of Article 50 of the Hague Regulations underline that some relation between the community to be punished collectively and the crime committed must be established.

4-17



This sort of collective responsibility as practised now by the Germans is, of course, a thing which is "une injustice criante", which is, "contraire à la justice la plus élémentaire", as Rolin says on page 483.

What sort of collective responsibility can be applied to Germans - and other enemies - especially to the members of the three organisations dealt with in this report?

Here we must distinguish the position de lege lata and suggestions de lege ferenda on the one hand and the judicial and administrative measures on the other.

(i) My opinion is that under the existing law, the Allied Nations can apply to Germany and her leaders in paragraph (i) above the principle of collective responsibility explained, so far as crimes committed by the German Reich or with its authority and in its name are concerned. Against the German or any other enemy State the sanctions provided by international law can be applied. This is a political measure, a capitis deminutio in the political sense. But in addition the leaders are personally and criminally responsible for these acts and can be tried before a national or an interallied criminal court.

(ii) In view of the fact that crime in Germany is a mass phenomenon and has infected great fractions of the German people, the criminal courts of the United Nations are already authorised on the basis of existing law, both international and national, and on the basis also of the general principles of both laws, to interpret existing legal provisions on complicity, conspiracy, and banditry in an extensive sense.

Thus, they have the right for example, on the basis of the existing law to regard as collectively responsible and punishable for a crime committed by a member of the S.A., S.S. or Gestapo all the other members of the unit which executed the crime as accomplices,, or as conspirators or as members of a gang, without examining who of them perpetrated the decisive act.

(iii) The Allied criminal courts should be empowered to punish membership in these and other similar organisations as a "crimen sui generis". This punishment also realizes the collective responsibility of all members (see (v) below).

(iv) If the present state of international and national criminal law is an insufficient basis for fully effective action, the Allied Courts can fill the gaps by extensive interpretation guided by the preamble to the Hague Convention, by the general principles of international law as derived from article 50 of the Hague Regulations, and by the general principles of criminal law relating to accomplices.

(v) In view of the fact that the occupation of Europe by the Germans created practically a vacuum iuris and a justitium in the invaded and occupied countries, there is no logical, moral or juridical objection to the idea of filling up this vacuum by laws having retrospective force, and so extending criminal responsibility to all classes of the enemy population who in any way helped in the commission of the crimes. But I reject the barbarous idea that innocent men should be punished for the crimes of others.

This does not exclude other measures against Germans who, though not guilty of crimes, are dangerous because their mental disposition has been unbalanced by the Nazi ideology. They are probably potential criminals.

The danger must be met. The appropriate means are not penalties imposed by criminal courts, but preventive measures imposed for reason of security as "police measures", by the executive force of the United Nations or of the individual Allied States. They are measures of social protection, measures of self-preservation taken by the international or national communities (States) against men or whole classes of men who by the state of their mind are a social danger.



e) MEASURES OF SECURITY OR PROTECTIVE MEASURES

This chapter is very short. The measures required cannot be enumerated. The United Nations authorities in the occupied enemy states will decide what to do according to the concrete situation and practical needs of the case and their retributive and security policy. The measures of security will be a part of the administration of the enemy countries within the wider framework of the United Nations general policy.

All that I wish to say from the legal point of view is that the United Nations are fully entitled to take every measure to ensure the punishment of criminals, to maintain peace, and to prevent further crimes against public order. The measures recommended by the Commission in regard to the S.S. and Gestapo are not, of course, the only measures required. Similar measures must be taken against the dangerous classes of the S.A. Probably there are still other organisations and formations which will come under the plan of "measures of security" which has to be adopted. It is difficult to foresee and define in advance the action which the United Nations will take, but, whatever it may be, it will be from the legal point of view fully justified and will be fully approved by the oppressed peoples.

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SECRET

C.32  
Errata

UNITED NATIONS WAR CRIMES COMMISSION  
REPORT ON THE GERMAN STURM-ABTEILUGEN (S.A.),  
SCHUTZ-STAFFELN (S.S.) AND GEHEIME STAATS-POLIZEI (Gestapo)

Drawn up for Committees I and III by Dr. Eöer

Errata

P. 1 at 1) and elsewhere: The spelling "Organisation" is to be substituted for "Organization" wherever the latter occurs.

P.13, 4th para. second last line: For "General" read "Special".

P.14, 12th and 24th lines: For "under" and "and" read "und".

P.16, 5th line from bottom: For "character of German activity" read "character of German criminal activity".

P.20 : In para. (4) at the end of each of the conclusions (a) and (b) add the words "and the gestapo".

P.20, 7th line from bottom: For "took over the S.S. But the S.A." read "took over the leading positions in the S.A. and the whole S.A.".

P.23, 23rd line from top: After the words "committing crimes" add "of all sorts".

P.25, in the first line of F: For "U.S.S.R." read "the Russian Soviet Federal Socialist Republic (R.S.F.S.R.)" - the reference being to the state of that name and not to the whole Union of Soviet Socialist Republics.

P.27, 11th line from bottom: For "The fact the" read "The fact that".

P.28, last para. 3rd line: Instead of "crime" read "certain crimes", and for "has" read "have".

P.29, at end of 6th line: Add "in the case of a Nazi criminal?".

P.32, 5th line: "Committee" should be "Commission".



Dupl.

SECRET

C.32 (Part II)  
22 June, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

REPORT ON THE GERMAN STURM-ABTEILUNGEN (S.A.).  
SCHUTZ-STAFFELN (S.S.) AND GEHEIME STAATS-POLIZEI (Gestapo)

Drawn up for Committees I and III by Dr. Ecker.

PART I - Origin, organisation, purpose and activity.

PART II - Legal conclusions on the questions whether:

- a) membership is a crime;
- b) mens rea on the part of their members is to be presumed;
- c) superior orders are a defence, so far as they are concerned;
- d) collective responsibility;
- e) security measures to be taken.

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PART I has appeared as a printed document and is not now reproduced.

SECRET

C.34  
18 July 1944

UNITED NATIONS WAR CRIMES COMMISSION

SURRENDER BY THE AXIS POWERS OF PERSONS WANTED FOR  
TRIAL AS WAR CRIMINALS

SECOND NOTE by the CHAIRMAN  
TO THE GOVERNMENTS REPRESENTED ON THE COMMISSION

In his first Note on this subject submitting to the Governments a draft Article which it was suggested should be inserted in the armistice with Germany (Doc. C.31), the Chairman of the United Nations War Crimes Commission stated that:

"In the Commission's opinion the same text should be suitable for use in the armistice granted to each of Germany's European satellites subject only to:

- "(1) substitution of the name of the State concerned for that of Germany, and
- "(2) insertion in section 2 at (d) of the names of the forces which in that State correspond to the Geheime Staatspolizei (Gestapo) and Schutzstaffel (S.S.)"

The Chairman now begs to place before the Governments the Commission's recommendation that in the armistice with each European satellite the text of section 2 point (d) should make provision for taking and keeping in custody any members or former members of the German Gestapo and S.S. who were found in that country, and also any members of the police forces of that country, whether civil or military, who had served or were still serving as district chiefs in any country occupied by Nazi forces.

As stated in the first Note, different provisions may be necessary in the case of Japan, and the text will be submitted at a later date.



SECRET

C.34  
18 July 1944

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SECRET

C.35(1)  
4 August 1944

UNITED NATIONS WAR CRIMES COMMISSION

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PARAGRAPH 1. (AMENDED TEXT) OF COMMITTEE III'S DRAFT  
RECOMMENDATION REGARDING THE S.A., S.S. AND THE GESTAPO  
(DOCUMENT C.35)

"1. Each of the United Nations has the right, either  
"on the basis of its present criminal law or on the basis  
"of new legislation, to punish its own nationals who  
"became members of the Sturmabteilungen (S.A.),  
"Schutzstaffeln (S.S.) or Geheime Staatspolizei (Gestapo),  
"irrespective of their rank as members and of the  
"territories in which they served.

"Each of the United Nations has also the right to  
"punish German or foreign members of the above-mentioned  
"organisations who have committed crimes in their  
"territories."

SECRET

C.35  
24 July, 1944

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT RECOMMENDATION REGARDING THE STURMABTEILUNGEN (S.A.),  
SCHUTZSTAFFELN (SS) AND GEHEIME STAATSPOLIZEI (GESTAPO)

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Presented by Committee III.

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Committee III submits to the Commission the following  
conclusions

- (a) to be voted as a guiding rule for the work of the Commission and its Committees, and
- (b) to be forwarded to the Governments as legal advice and as a recommendation of the Commission.

1. Each of the United Nations has the right to punish its own nationals who became members of the Sturmabteilungen (S.A.), Schutzstaffeln (SS) or Geheime Staatspolizei (Gestapo), irrespective of their rank as members and of the territories in which they served, and either on the basis of its present criminal law or on the basis of new legislation.

Each of the United Nations has also the right to punish Germans or foreigners who in its territory served as members of the above mentioned organisations and committed crimes there.

2. The United Nations authorities in occupied Germany and her satellite States are authorised by International Law to take any measure admissible by the International Law in order to ensure the safety of their Armies and to maintain public order and peace.

The character and activity of the S.A., SS., and Gestapo are such that in accordance with this principle, it would be justifiable for the United Nations authorities, among other measures, to disband these organisations, intern their members, make membership in them henceforth a crime and punish it as such.



SECRET

C.36  
24 July 1944

UNITED NATIONS WAR CRIMES COMMISSION

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SUGGESTIONS BY COMMITTEE II REGARDING  
CO-OPERATION WITH GENERAL EISENHOWER'S HEADQUARTERS

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Certain quarters in London and even some newspapers in London have been informed that the Nazis are preparing a big organisation for the purpose of helping Nazi war criminals to escape. False documents are already being fabricated and other measures being taken for this purpose.

The United Nations War Crimes Commission had realised this danger. We have recommended two measures to the Governments for the purpose of ensuring the arrest of war criminals: firstly the establishment of a War Crimes Office attached to the Commander-in-Chief's Headquarters, and secondly the internment of the S.S. and the Gestapo. But we must realise that the United Nations Governments are not an executive body authorised and able to carry out decisions. An example is the fate of the enquiry concerning the extermination of Jews which the Commission on May 30th asked the Chairman to address to the Foreign Office. Up to date no reply has been received.

The only body capable of action is the Supreme Command of the expeditionary forces in Europe, i.e. General Eisenhower's Headquarters.

We understand that the Chairman of the Commission, together with Mr. Pell and General de Baer, have had informed informative talks about collaboration between the War Crimes Commission and General Eisenhower's Headquarters. We are all convinced that without direct and close collaboration between the Commission and those headquarters the work of the Commission will be a failure.

We understand that there are already liaison officers at General Eisenhower's Headquarters for all kinds of business but there is no liaison officer for the punishment of war criminals. It is believed that the establishment of collaboration between the Commission and General Eisenhower's Headquarters, and especially the establishment of a War Crimes Office, is possible only through the combined Chiefs of Staffs in Washington. We feel confident that the combined Chiefs of Staffs will accept our offer of collaboration and that they will give appropriate instructions to General Eisenhower. The elaboration of detailed schemes would be the task of General Eisenhower's Headquarters and of our Commission here in London, but General Eisenhower must have at least a general authorisation for the purpose from the combined Chiefs of Staffs.

/ In view

In view of the fact that the war is approaching its end, and especially in view of recent events in Germany, Committee II asks the Commission to take immediate steps to establish direct and close co-operation with General Eisenhower's Headquarters, and to submit through the British Foreign Office to the combined Chiefs of Staffs the Commission's recommendations concerning:-

- a) Establishment of a War Crimes Office;
- b) Internment of the S.A., S.S. and Gestapo;
- c) Establishment of permanent collaboration through a liaison officer between the Commission and General Eisenhower's Headquarters.

SECRET

C.37  
25 July 1944

UNITED NATIONS WAR CRIMES COMMISSION

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CONVENTION FOR THE SURRENDER OF WAR CRIMINALS  
AND OTHER WAR OFFENDERS

Draft presented by Committee II

(Enumeration of the Heads of States)

Having resolved to conclude a Convention with the object of achieving the surrender 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 good and due form, have agreed on the following provisions:

Article I

The High Contracting Parties mutually agree to surrender to each other according to the procedure hereinafter provided, for the purposes of trial or of execution of sentence or judgment, persons found within their jurisdiction who are charged with or convicted of war crimes, including offences against the laws and customs of war, which were 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 High Contracting Parties further mutually agree to surrender to each other according to the procedure provided hereinafter, for the purposes of trial or of execution of sentence or judgment, 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 the 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

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

/ Article IV



Article IV

The request for surrender 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 surrender 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 surrender shall in every case give written assurances to the Government from whom the surrender is requested to the effect:
    - (1) that the trial will be conducted in accordance with legal procedure;
    - (2) that judgment or findings and sentence 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 or findings and sentence given by the appropriate court in respect of the offence and in the presence of the offender.

The term "court" as used in this article shall include a military commission or other military tribunal.

Article V

The High Contracting Parties may decline to surrender to each other their own nationals and former nationals.

A High Contracting Party may refuse to surrender an alleged offender, if the offence for which his surrender is requested was committed within that Party's jurisdiction.

In all cases where two or more High Contracting Parties request the surrender of the same alleged offender, such person shall be surrendered first to the Government of the State whose national legislation 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 VI

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 surrender is requested, that state may decline to surrender him until the proceedings are terminated.

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

A sentence of death shall however be executed notwithstanding that one or more of the High Contracting Parties have requested the surrender of the offender.

When an alleged offender whose surrender 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 surrendered to that state for execution.

#### Article VII

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 Parties to the present Convention to another Party, 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 who is being surrendered and his escort may be accompanied by officials designated by the Governments concerned.

#### Article VIII

The High Contracting Parties agree to produce at the time of surrender all documents, exhibits, or any other thing which may serve as proof of the alleged offence.

#### Article IX

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

#### / Article X

Article X

The present Convention constitutes an exceptional measure and shall not affect the operation of any treaty of extradition between or among the High Contracting Parties 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 and the ratifications shall be deposited as soon as possible with ..... who will notify such deposit to all the 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 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 etc.



SECRET

C.38  
26 July 1944

UNITED NATIONS WAR CRIMES COMMISSION

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ESTABLISHMENT OF THE FAR EASTERN AND PACIFIC

SUB-COMMISSION

LETTER FROM THE CHINESE AMBASSADOR  
TO THE CHAIRMAN OF THE COMMISSION,  
dated 25th July, 1944

Dear Sir Cecil,

I beg to inform you that the Chinese Government has appointed Dr. Wang Chung-hui, former Minister of Foreign Affairs and sometime Judge of the Permanent Court of International Justice, as the Chinese representative on the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission. It will be glad to provide suitable quarters for the Sub-Commission, and wishes to assure this body of a cordial welcome to Chungking. It will also be pleased to call the organizing meeting of the Sub-Commission in due course.

Yours sincerely,

(Signed) V.K. WELLINGTON KOO

SECRET

C. 39  
28 July 1944

UNITED NATIONS WAR CRIMES COMMISSION

NOTE ON THE USE OF THE EXPRESSION "WAR CRIMES"

(By M. de BAER)

It has appeared from our discussions that some members consider that "war crimes" are exactly the same thing as "violations of the laws of war", whereas others believe that the former expression covers a wider field than the latter.

The point which I will try and make in this paper is that "war crimes" do not exactly coincide with "violations of the laws of war", that it is possible to conceive "war crimes" which are not "violations ...." and that therefore the conjunction of the two expressions, used in the Transfer Convention and in the I.C.C. Convention is not a mere redundancy.

I. The expression "war crimes".

"War crimes" is a relatively new expression which is commonly used by the public to describe any sort of crime connected in any way with the war. Before this war it was considered as lacking precision, and many writers on international law avoided using it, preferring the conventional recognised expression "violations of the l. of w.".

Those who did use it gave various meanings to it, ranging from the British Manual of Military Law and Oppenheim, 6th ed., vol. II, pp. 450-459, on one hand, who consider war crimes as the more comprehensive of the two (and violations of the laws of war one of its subsections), to Lauterpacht (Memorandum on Punishment of War Crimes, July 1942), who does the reverse, and considers the violations of the laws of war as more comprehensive (and war crimes as the most heinous of these violations).

The expression "war crimes" has been used with many other meanings. The reader will find two of them (both different) in :  
(a) the conclusions of the British Committee of Enquiry of 1918,  
(b) the Commission on the Responsibilities of the Authors of the War of 1919. Sir Arnold McNair, in his recent paper to our Commission, wisely says that he shall not "embark upon an examination of the meaning of 'war crimes'".

If I point this out, it is merely to make it clear that there is no precise meaning, commonly accepted by publicists of international law, attached to the expression "war crimes". Moreover, is it not a symptom that, in our own Commission, we have been unable to agree on a definition of this expression, and that we have even had to put off discussions of the subject, for lack of agreement on its scope? Therefore it can safely be said, without fear of being contradicted, that the meaning of the word "war crime" is, at the very least, controversial.

Would the conclusion of this then be that it is better to avoid using an expression which is subject to such wide varieties of interpretation? I believe not: the expression has been so universally used during these last years, that it would be difficult to invent another and unwise to depart from the meaning which it has acquired in the common language; this would create

/misunderstanding

misunderstanding, therefore we must accept it as it is. Moreover, I hope to prove by the study of the other expression, that it has a meaning of its own, and that it has come to stay, because new situations need new words to describe them.

## II. Violations of the law of war.

1. It is obvious that violations of the recognised rules of warfare are those acts which are directly connected with warfare such as: refusal of quarter, misuse of the flag of truce, pillage and purposeless destruction, use of forbidden arms, etc..... (cfr. the 20 violations given by Oppenheim on pp. 451-453).

2. It is certain also that "the laws of war" apply to acts committed in time of war and cannot possibly apply to acts committed in time of peace.

Therefore acts such as those mentioned by Prof. McNair on page 4, paragraph 4, of the document III S/C A.1 of 11th July, and committed in preparation of war, are obviously not violations of the l. of w. because there was no war on at that time.

3. There can be no violation of a law if the so-called violator was not subjected to that law. A Moslem who marries a second wife in Egypt cannot be a violator of the law of England forbidding bigamy, because he is not subjected to it.

From this follows that an individual who is not a member of the Armed Forces, who sees an enemy soldier on the road and kills him to rob him or for any other reason, does not commit a violation of the rules of warfare. Nevertheless he does commit a crime which may be visited by punishment. The Courts of his own country may elect not to prosecute him because the victim was an enemy, but he may be punished by the Courts of the other side: it is not a violation of the law of war, but it can be punished as a war crime.

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I shall now take some examples of crimes by Common Law, i.e. crimes which can be committed in time of peace as well as in time of war, and I will try to discriminate when each crime is a violation of the l. of w. and when it is not one.

1. Murder: when murder is committed on a battlefield (such as killing of wounded) or in a zone of military operations, or is directly connected with war (such as killing of prisoners of war), it is a violation of the rules of war.

Let us suppose now an enemy soldier who in an occupied country has a quarrel with civilians in a public house and kills one of them. His superiors, considering that the life of an enemy civilian is of little account, fail to prosecute him. This is certainly not a v. of the l. of w. but it is, in my opinion, a war crime: the offender has escaped punishment merely for the reason that his country was at war with the country of the victim.

Let us now take the shooting of hostages. I believe that all will depend on the time when it is done: if the enemy on capturing a town seizes hostages as a safeguard against attacks from the population against his Forces, it is, in my opinion, a violation of the laws of war but whether the same applies to the taking of hostages in a country that has been occupied for many



months and in which conditions closely resembling those of peace-time are prevailing is at least questionable. In this case, I believe such shooting to be a war crime, rather than a v. of the l. of w.

2. Rape: It is characteristic that neither the British Manual nor Oppenheim-Lauterpacht have included rape among the v. of the l. of w. for it has absolutely nothing to do with the war. In most cases, however, this crime is overlooked or even approved of by the superiors of the criminal. Here again, as the criminal escapes punishment from his own justice, this is a case of a war crime although it is not a violation of the laws of war.

3. Espionage: Espionage is certainly not a v. of the l. of w.; it is, on the contrary, a recognised practice which is highly praised by the country for whose benefit it is done. Nevertheless if the spy falls in the hands of the opponent he may be punished as a criminal. When practised in time of war, this also is a war crime.

4. Ill-treatment of inhabitants: if on entering a captured town the inhabitants are ill-treated by the enemy this is a v. of the l. of w. On the other hand, if outside the zone of military occupation, after order has been restored, inhabitants are segregated in ghettos, improperly arrested and beaten up, this is not a v. of the l. of w. but, as it has been committed during the war, it is a war crime.

There are many other acts which are war crimes and which are not specifically violations of the l. of w. Among these acts are deportation of civilians, starvation of civilians, abduction of girls and women for the purpose of prostitution, internment of civilians in inhuman conditions, forced labour of civilians, attempts to denationalize, exaction of exorbitant contributions and requisitions, debasement of currency, imposition of collective penalties, marauding, etc... etc...

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Perhaps it may appear from what precedes that two of the characteristics of a war crime are:

1. that the perpetrator and the victim belong to countries which are at war - or engaged in hostilities against each other;
2. that the perpetrator was not visited by appropriate punishment by his own judiciary.

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This paper is not meant to be a comprehensive study of what is a war crime, but merely as a basis which may lead to some agreement upon that question.

SECRET

C.40  
1 August 1944.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE I

STATISTICS OF CASES CLASSIFIED AS B 1 DOWN TO 1st AUGUST 1944

	Blg/ Germ.	Czech/ Germ.	Fr./ Germ.	Neth/ Germ.	Norw./ Germ.	Pol./ Germ.	U.K./ Germ.	Fr./ Italy	U.K./ Italy
Total no. of persons accused	14	12	49	17	9	267	49 acc. or gr. of acc.	2	35 acc. or groups of acc.
No. of accused, Class. B.1	14 (all named)	9 (all named)	9 (all named)	16 (all named)	9 (all named)	139 (name of 14 acc.un -known)	35 (name of 24 acc.un -known)	1 (all named)	16 (name of 3 acc.un -known)
Leaders & Min. of Germany or other enemy countries	0	0	0	0	0	0	0	0	0
Gaul. or Governors	0	1	0	1	1	22	0	0	0
Generals & terr. cdrs.	4	2	0	2	0	5	2	0	2
Civ. adm. & Heads of Gestapo	0	5	1	3	4	41	0	1	0
Cdrs. of P.o.W Camps	1	0	5	3	0	26	9	0	5
Other officers	3	1	1	4	4	20	4	0	9
Non-comm. off. & privates	5	0	1	1	0	3	18	0	0
Civilians in sub- ordinate positions	1	0	1	2	0	22	2	0	0

SECRET

C.41.  
11 August, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

PROPOSALS FOR AMENDMENT OF THE DRAFT ON FINANCIAL AND  
ADMINISTRATIVE REGULATIONS

Note by the Secretary-General.

On June 27th the Commission had before it a report by the Finance Committee submitting draft Financial Regulations (Doc. C.26). It adjourned the subject to allow the Finance Committee and the Secretary-General to consider certain amendments which Mr. Dutt wished to suggest. As the result, the following amendments which the members of the Finance Committee have approved, are submitted to the Commission in order that it may resume the consideration of the draft Regulations and adopt them in such form as it may decide ;

Amendments Proposed

Article 3. - Omit the words "and if possible within thirty days of receipt of the notification". The Article will then read as follows :

"After the budget has been adopted by the Commission, the Secretary-General shall determine and notify to each member government the amount due from it, and shall request that payment may be made promptly, in accordance with paragraph 2 of the Resolution. Such notification may be made by telegram".

Article 4. - Omit the last sentence of this paragraph which  
para. 5. was inserted by a drafting error and duplicates  
Article 14.

Article 6. - It is proposed to omit as unnecessary paragraph 2 of this Article which reads as follows :

"In case of doubt as to whether a particular expenditure is provided for in the budget, the Secretary-General may consult the Finance Committee whose decision, if unanimous, shall be final".

Article 9. - The Comptroller and Auditor General of the Public  
para. 2. Accounts of the United Kingdom has consented to audit the Commission's accounts if requested to do so by it. The words "if H.M. Government in the United Kingdom consents" should therefore be omitted.

P.T.O.



Article 11. - It is proposed that this Article be omitted and provisions relating to the staff be embodied in separate regulations.

Article 13, para. 1. - For the words "those member governments which are willing to do so shall pay to the Secretary-General their basic contributions", substitute the words "the members of the Commission shall pay to the Secretary-General their basic contributions. The Article will then read as follows :

"As soon as possible after the adoption of these Regulations and in anticipation of the entry into force of the Resolution, the member governments shall pay to the Secretary-General their basic contributions for the fiscal year 1944/1945, subject to subsequent readjustment if the Resolution is not approved by the governments in its present form. These payments shall be credited to the Working Capital Fund until the amount of £2,000 has been attained".

Article 14. - For the words "the governments which are then members of the Commission", substitute the words "the Governments which are or have been members of the Commission". The Article will then read as follows :

"On the dissolution of the Commission its assets shall be divided among the Governments which are or have been members of the Commission, as nearly as possible in the proportion in which they have contributed to create them".

SECRET

C.42.  
16 August, 1944

UNITED NATIONS WAR CRIMES COMMISSION

REPORT ON THE TASK OF COMMITTEE I, ON THE EXTENSION OF THE  
SECRETARIAT OF THE COMMISSION, AND ON THE NECESSITY OF  
DRAWING UP A MINIMUM PROGRAMME

BY DR. J.M. de MOOR

As is already known, the military operations on all fronts are developing in such a way that we cannot exclude the possibility of a "cease fire" in a very short time.

Under these circumstances the question arises as to how far the activities of the Commission have as yet advanced, and as to whether we may consider ourselves to be ready for such a turn of events. For already before "the cease fire" we will be obliged to lay certain fundamental plans and data before the Governments of the United Nations, whereas after the "cease fire" perhaps the conditions under which the Commission is working now will alter considerably, in view of the fact that several Governments established here will return to their own countries.

When considering the answer to the above mentioned questions we must lay stress on two points :

- 1) The institution of the United Nations War Crimes Commission, which was announced in the speeches of President Roosevelt and Lord Simon of the 9th October, 1942, did not take place until the 20th October, 1943, and
- 2) Only about January, 1944, was the advisory task of the Commission, which in the beginning was intended for the so-called "Technical Commission", put on a firm basis. Since then, the Commission and the Sub-Committees have worked very hard, four or five meetings a week taking place regularly.

In spite of our common effort in the past seven or eight months it appears to me that, now that the day of the armistice is drawing near, a further "supreme effort" by all concerned will be needed, if we are to be able to look forward to the result of our work with moderate optimism.

For how far have we proceeded now with the preliminary task of our Commission: the investigation of War-Crimes?

As we have heard from the Chairman of Committee I the number of cases received from the "National Offices" is approximately 175 and the numbers of war-criminals, provisionally placed on the lists, and the "surrender" of whom by the Germans will be one of the conditions of the armistice, amounts at the present moment to approximately 275.

Concerning Hitler, Himmler, Goebels, Göring, Mussolini and the other Nazi-leaders themselves in Germany or Italy no dossiers have as yet been received.

Even if one takes into consideration that among the mentioned 275 persons many are prominent war-criminals and that as a matter of security



it has been recommended to the United Nations Governments to insert in the armistice conditions a clause concerning "assistance to be given to the authorities of the United Nations in the interning and keeping in custody of any or all members and former members of the Gestapo and the S.S." (Doc. C.31), - 275 is a number that is far below that which world-opinion and world-conscience will expect after all that has been published about mass-crimes in the last years and again in the last weeks.

Also the activities of our recently started Publicity Committee, would, I fear, hardly suffice to abate the general disappointment. One should not underestimate the significance and the consequences of such a disappointment, - especially in connection with the total fiasco suffered in this sphere after the last war. At that time there were approximately 3000 recorded cases and the surrender of about 900 war-criminals, including the most important ones, was then demanded.

It is true that these cases were prepared only after the armistice, by which time all facts and details were available. On the other hand this time it has been stated for more than three years that the cases of the principal war-criminals should be ready before the armistice, and now a far greater number of crimes has been committed.

Therefore, the question arises, what is the cause of this poor result?

In the first place, up till now, only six or seven countries have sent in cases. Moreover we have to state, that China works for the Far Eastern and Pacific Sub-Commission and that some of the Pacific countries are not yet able to complete dossiers.

In the second place, the national offices of the occupied countries are obliged to work with a minimum staff.

In the third place, the exact facts and details necessary for the reconstruction of certain punishable acts are difficult to obtain from the occupied countries. Moreover, to see the matter justly, it should be remembered that the national offices of the occupied countries in England lack the means which they would have had at their disposal in normal times.

In the fourth place, all the preparatory and investigational work has actually been left to the national offices, while the work of the United Nations Commission (Committee I) restricted itself (except for the help that Colonel Wade could give) to an investigation concerning the question as to whether cases sent in were ready to be placed on the list of persons whose surrender will be demanded from the Axis Powers at the time of the Armistice (and later).

Finally, none of the national offices was anxious to undertake the preparation of the cases against the "arch-criminals" in Germany, Italy, etc. owing probably to a large extent to the fact that the intentions of the United Nations Governments concerning those individuals are not yet clear and that the Moscow-Declaration is open to several explanations.

Is it still possible to improve this undesirable situation, and if so, by what means?

Undoubtedly the Commission could draw the attention of the United Nations Governments to the meagre results obtained up till now by the National Offices, and ask them urgently to try their utmost to promote the forwarding of more dossiers during the next weeks and months.



Further, the Commission could smooth the way for the national offices by reminding them that it is permissible for them to send in cases in which the names of the accused are unknown, if the latter can be identified in another way, and the United Nations Commission is willing to help in filling in the gaps in the evidence, if the lacking data are available to the Commission.

In the third place the activities of the United Nations Commission should also comprise - (as has been discussed at the meeting of Committee I of the 2nd of August) - the composing of general reports concerning special kinds of criminality, special important facts, etc.

I do not think that we can reasonably ask our Secretary-General, who has already done wonders with his small staff, to undertake this additional labour with his present equipment and it would therefore seem necessary that his staff be enlarged.

Fourthly, a decision will have to be taken as soon as possible as to what is to be done with the Arch-Criminals in the Axis Countries. In fact their deeds are directed against all the United Nations. It is therefore the task, I think, of the United Nations Commission itself to prepare the dossiers against those criminals. This is of consequence to humanity as a whole. This work would also require an increase in staff. Here again there is "periculum in mora".

In the fifth place it would be advisable to draw the attention of the national offices to the importance of sending in lists containing the names of the principal Nazi-functionaries and of the occupation-authorities in their respective countries, even if no specific accusations are made against them. Only a few of the national offices have so far done this.

None of these proposed activities is beyond the legitimate competence of our Commission.

In my opinion, whatever the results of these proposals may be, the Commission should - in view of the development of military operations - approve the first preliminary list of Committee I within say one or two months, and submit this list to the United Nations Governments and the Supreme Command. The correct procedure for the said approval will need further consideration.

At this juncture it would seem fit to consider the second part of the United Nations War Crimes Commission's task, namely: to advise the United Nations Governments concerning the manner in which the punishment of war criminals should be organised.

In this respect the Commission has done important work. The following account of this work will perforce have to be restricted to the main features, as the number of the papers received is well over a hundred.

So far as the organisation and machinery of the trials and punishments are concerned, several reports on the institution of an International Criminal Court have been produced.

On the basis of the Preuss-project several difficult points have been discussed in Committee II such as: competence, the law to be applied, the persons to be tried, the punishment to be inflicted. (Doc. II / 11, 13, 16, 17, 21, 23, 24, 27).

Concerning the measures to be taken to procure the arrest of War Criminals the Commission has probably made the greatest progress.

For the surrender of war criminals by the Axis Powers to the Allies elaborate recommendations have already been forwarded to the United Nations Governments (Doc. C.18, 27, 31, 34) with a view to being inserted in the Armistice conditions.

Closely connected herewith are "the Recommendations to the Governments on measures to ensure capture of War-Criminals", (Doc. C.17, 21), and the "Recommendations regarding the establishment in enemy territory of an appropriate agency to assist the Commission in its work". (Doc. C.24, 28, 30).

Furthermore, on the basis of a project of a number of Ministers of Justice of the Occupied Countries for the mutual surrender of war criminals and quislings between Allied Countries a "draft convention for the surrender of war criminals and other offenders" has been drawn up. (Doc. C.37). This has recently been discussed in the United Nations Commission.

The extradition by neutral states has been a subject of discussion in Committee II, and the conclusion has been reached that an agreement in the form of a treaty is not likely to be obtained. If necessary the last word in this matter will probably be left to political measures. This conclusion, however, is not final.

On several other subjects and legal questions reports have been produced by Committee III, such as the ones referring to the "S.S., S.A. and Gestapo" (Doc. C.29, 32, 35) and to the "Scope of retributive action of the United Nations" (Doc. C.20, 23), etc. etc. ---

Naturally, in this connection the activities of the Far Eastern Committee and the Finance Committee are not mentioned.

In spite, however, of the extensive work done by the United Nations War Crimes Commission we have not succeeded in drawing up one comprehensive report covering the trial and the punishment of war criminals (not even in outline) which could be placed before the United Nations Governments and the Supreme Command.

Moreover the Commission has so far failed to reach a definite conclusion on certain points which ought to be decided.

This failure is partly due to the vagueness of the Commission's original Mandate, and partly to the fact that the Commission, instead of dealing with the whole matter systematically, has tackled the different problems as they cropped up. Finally, the difference of opinion concerning a number of principal questions has had its influence. Some members, for instance, would like to give to the concept of "war-crime" a wider application than has been so far attributed to it. Others are sceptical with regard to any innovations, even such as seem to me unavoidable.

Howbeit, as time presses and we can soon expect an end to the military operations, a minimum programme, on which the majority can agree, should be drafted without delay.

As to the procedure, we shall have to emphasise that the trial of war crimes is primarily the concern of the national courts, provided they are competent and their Governments wish them to undertake this task. This principle has always been tacitly assumed, although it has never been submitted in definite terms to the United Nations Governments.



For the remaining cases other fora will have to be designated. In connection with this it may be remarked that discussions have been in progress for nearly four months concerning a plan for an International or a United Nations Criminal Court, but here again no final decision has even been made about the preliminary question whether such a Court will in fact be established.

Now, however, the moment has come when this decision can no longer be postponed, even if it should have to be made by a majority vote only. The same applies to the question whether the so called arch-criminals in the Axis Countries are to be tried or subjected to measures determined by a political decision. Continuing uncertainty about these questions would hamper the pursuance of our task.

With regard to the capture and surrender of war criminals we have been more successful. The work done by the Commission on this question forms an almost complete plan. Nevertheless here too a short précis of the material will be necessary.

Finally, general directives will have to be given concerning some questions of legal principle on a minimum basis of agreement. For instance some members of the Commission are of the opinion that war crimes are to be defined as acts contrary to the rules and customs of the law of war. Others hold that this definition does not include all war crimes.

Even if the first definition were to be accepted as a minimum, (viz. as a compromise between, on the one hand, the definition of Committee II which lately mentioned war crimes as including offences against the laws and customs of war (Doc. II (21), and Doc. C.39) and, on the other hand, the principle laid down in Doc. II/11 and the lists-principle accepted in the letter of the 13th December, 1943, it would still be necessary to give some directives concerning the contents of the rules and customs of war.

Certain acts, formerly regarded as illegal, may now, as a result of changes in weapons and methods of warfare, be considered as vitally important to the winning of the war, and thus a Court may refuse to punish individuals who sink ships without warning and without saving lives, or who drop projectiles from above, or perhaps those who engage in wanton destruction as part of a "scorched earth" policy. Other acts, such perhaps as the murder of hostages and unoffending civilians, or rape, or wholesale theft of articles having no military value, could not be excused on the ground that they contribute to victory. Criteria can be found and should be agreed upon.

Consensus on these questions could to a certain extent be obtained by the institution of a United Nations Criminal Court.

Maybe this is one of the strongest arguments in favour of the institution of such a Court, stronger than the circumstance that the national jurisdictions of the different Allied Nations do not cover all war crimes.

Even if such a United Nations Court were instituted, however, some more general directives would nevertheless be desirable. The same applies i.a. to the plea of superior order.



I therefore propose :

- a) that the contents of this report be brought to the knowledge of the Governments concerned and the National Offices; further that, as soon as possible, the first provisional list of war-criminals be drawn up and sent to the National Governments and the Supreme Command, (naturally as a matter of the greatest secrecy).
- b) that there be instituted :
  - 1) a small special commission to report at short notice on the measures to speed up the registration of war criminals and war crimes and on the enlargement and reorganisation of the Commission's Secretariat.
  - 2) a small commission which, basing itself on the work already done by the Commission and the Sub-Committees, shall compose a minimum report on the punishment of war criminals, to be presented to the Governments of the United Nations and to the Allied Supreme Command.

Meanwhile our Commission can proceed with its work, which may ultimately result in a more elaborate report (notably on the measures against those guilty of the preparation and waging of an aggressive war, against "crimes" based on religious or racial prejudice, and against crimes against the maintenance of the peace (Doc. C.20). But a general minimum regulation is needed forthwith.

Here as elsewhere: Le mieux est l'ennemi du bien.

SECRET.

C.43.

18th August, 1944.UNITED NATIONS WAR CRIMES  
COMMISSION

Note by Sir Arnold McNair on the questions submitted, namely, whether (i) the preparation for and the launching of the present war by individuals, and (ii) preparatory acts by individuals which are themselves criminal acts, can or ought to be treated by the Commission as "war crimes".

1. Preliminary. In attempting to answer these questions I have tried to place myself in the position of a lawyer sitting on a court, municipal or international, which is being asked to accept and exercise jurisdiction in respect of such acts. I shall use the word "criminal" as a legal term and not as a vituperative epithet. I am not concerned with the question whether a political tribunal should be established to deal with them or the question of how it would act, and I shall not embark upon an examination of the meaning of "war crimes". Nor shall I discuss the question of the immunity of Heads of States or the defence of superior orders.

In approaching the questions submitted, we must bear strictly in mind that we are dealing with the lex lata and not with the lex ferenda. It may well be that after the present war States will agree by treaty to stigmatize as criminal a number of the acts which prepare for and launch an aggressive war and to punish those acts by means of municipal courts or an International Criminal Court. But for the purposes of the present war we must confine ourselves to the lex lata, for I propose to assume that the United Nations intend to adhere to the view that retrospective criminal legislation, whether it may take the form of a multi-partite treaty or of municipal statutes, is contrary to accepted principles of law. Much has been written upon the desirability of creating machinery, both national and international, for punishing acts by individuals which threaten or disturb the peace of the world, and a recent paper by Dr. George Weis on Transactions of Grotius Society, Vol. 28, read in 1942, describes some proposals that have already been made for the protection of peace by the criminal law.

2. Crime in relation to International Law.

(a) It becomes necessary to consider whether a State can become the subject of criminal liability, not because it is proposed to indict and punish any enemy State but because a State can only act through human agents, and if it could be shown that a State has committed a criminal act the human agents responsible for it could properly be indicted for having procured that act. What judicial or literary authority is there for saying that a State can be the subject of criminal liability? I do not think that anyone can produce any judicial or arbitral decision to that effect. The breach by a State of a rule of customary international law or of a treaty has hitherto been regarded



as analogous to a breach of contract or to a delict but not to a crime, as is evidenced by the general rule that only compensatory damages, and not penal or vindictive damages, can be awarded against a State - see the Lusitania Case decided by the American-German Claims Commission, Annual Digest, 1923-24, Case No. 113, and Portugal v. Germany in Annual Digest, 1929-30, Case No. 126, cited by Lauterpacht in Oppenheim, Vol. 1. (5th ed.) p. 286 (note). Lauterpacht in the same note and in Vol. II (6th ed.) p. 138, contests the view that States cannot be the subject of criminal liability. In Les Nouvelles Tendances du Droit International (1927 at p. 79) Politis, whom no one can call a reactionary, said:

"Tant que le droit a été le droit des Etats souverains (as it still is) il n'a pu avoir un système pénal propre". Sir John Fischer Williams, who quotes this observation by Politis, has much to say on the criminality of States in a chapter entitled "International Criminal Law" (Chapters on Current International Law and the League of Nations, (1929) p.p. 232-256, from which it is clear that as a matter of lex lata there is in his opinion no such thing as a criminal State. In the Draft Treaty of Mutual Assistance of 1923 and the Geneva Protocol of 1924 aggressive war is described as an "International crime", but they contain no machinery for the punishment of this crime.

It is true that in English Law corporations can be held criminally liable for certain acts, but I do not think that this fact helps us. A foreign State is not a corporation: the British Crown cannot be held criminally liable; and a corporation cannot be indicted for treason or for any felony, e.g. murder or even involuntary manslaughter.

I am, therefore, forced to the conclusion that a judge would not at present be justified in holding that a State can be the subject of criminal liability.

The question whether the Peace Pact of Paris of 1928 has altered the situation is discussed later in paragraph 3 of this Note.

(b) The codes of some States contain lists of "crimes against the Law of Nations". English law contains no such precise category, but will punish as a misdemeanour an act which "endangers the relations of the Crown with foreign Powers and so tends to the public mischief", or (s. 1) is of a nature to discredit the international good reputation of our country (Fischer Williams, op. cit. at p. 245; Rex v. Peltier, 28, Howell's State Trials, 617). Dr. Weis in the paper referred to above mentions a number of similar English decisions.

(c) Certain crimes are called "International Crimes", and they may be crimes by customary International Law or crimes by conventional International Law. It is believed that piracy is the unique example of the former category. The peculiar characteristic of piracy is that it may be punished by any State into whose hands the pirate may fall regardless of



his nationality and of the nationality of his victim. Consequently, it is not surprising that attempts have been made by treaty to attach this peculiar characteristic to acts made criminal by treaty, e.g. illegal submarine activity by the abortive Treaty of Washington of 1922, by labelling them as "piracy".

The English common law treats piracy jure gentium as criminal and punishable by a British Court just because it is piracy jure gentium (see In re Piracy Jure Gentium (1934) A.C. 586). But when Great Britain agrees by treaty to prohibit a particular act or to regard it as criminal and punishable by a British Court, legislation is required to make it so, e.g. Treaties of Washington Act, 1922, s.4., as to illegal submarine activity, and the Geneva Convention Acts of 1911 and 1937 as to the misuse of the Red Cross emblem.

### 3. Germany's Preparation and Launching War against Poland.

The most glaring example of a breach of international law by Germany in connection with the outbreak of the present war is her breach of the Peace Pact of Paris of 1928 (1) to which Germany and Poland were both parties. Articles 1 and 2 are as follows:-

1.

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

2.

"The High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means".

This Pact, which has been signed and ratified, or adhered to, by more than sixty Governments, undoubtedly creates legal engagements. It is the most solemn and radical treaty to which the overwhelming majority of Governments have ever assented, and for all practical purposes may be regarded as universal international law. It renders illegal most, though not all, initiations of war, and it makes them illegal both against the victim and against all the other parties to the Pact. The Pact provides no sanctions for its breach, unless

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(1) For a careful discussion of the Pact, see Lauterpacht in Oppenheim vol.ii (6th ed.) s.g. 52 g. - 52 g.

it be the statement in the Preamble that "any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by the treaty", with the result that Great Britain was at once freed, when Germany launched a war upon Poland, from any obligation in the Pact restricting the right of one signatory to resort to war against another. But Germany's breach of the Pact, and of the rule of law compelling the observance of treaties, cannot be called "criminal", because as a term of law the word is not relevant to a State. Her action was certainly the result of the action of one or more German Ministers, for a State cannot itself act. Can it be said that those Ministers committed an act which international law either regards as a crime or permits a British Court to regard as a crime?

Legally- however desirable it may be de lege ferenda to take steps which will enable Governments in future to punish the procuring of aggressive war as a criminal act - I do not consider that de lege lata a judge would hold that the effect of the Peace Pact was to make it a criminal act. At any rate, I submit that such a ruling would be contrary to English and (I think) American conceptions of international law, and I cannot believe that an English or an American judge would concur in such a ruling. Politically, I merely refer to the grave inconvenience of discussing whether those responsible for the Russian invasion of Poland or of Finland in 1939 committed crimes.

Some Treaties, expressly, or by implication, require the high contracting parties to punish their subjects for the commission of acts forbidden by it, e.g. the North Seas Fisheries Convention of 1882 (and Act of 1883), the Geneva Red Cross Convention of 1929 (and Act of 1937), and I find it difficult to believe that, at any rate, an English or an American lawyer would hold that a treaty, which, like the Peace Pact of Paris, provides no sanctions and makes no reference to the criminal law, can impose upon a party any duty to punish its nationals for procuring a breach of that treaty or authorise one party to punish the nationals of another party for doing so. Moreover, the conception of acts which are unlawful but not criminal is familiar, at any rate, to the English and the American lawyer.

Even if my view is wrong, and the procuring of aggressive war by individuals is a crime, it is certainly not a war crime.

It is, moreover, a mistake to think that the launching of a war which is illegal because it is a breach of the Covenant of the League of the Peace Pact of Paris or a Treaty of Non-aggression or, for instance, the Treaty of 1839 for the permanent neutralization of Belgium, ipso facto converts the guilty State into a caput lupinum and its citizens into outlaws. During the last war it was argued that Germany's illegal invasion of Belgium, in breach of treaty, deprived her of any rights of a military occupant, but the general opinion upon that controversy was emphatically against that view (see Oppenheim in 33 Law Quarterly Review (1917) 266-286 and 363-370). Professor Lauterpacht holds that a war waged in breach of the Peace Pact of Paris is nevertheless regulated by the accepted rules of warfare (see Oppenheim, International Law, vol. ii. (6th ed.) s. 52 j.).



Even if it can be maintained that the Pact has become an irrevocable part of international law and, in the words of Professor Lauterpacht, op.cit. § 52 o., has acquired "a degree of permanency comparable to that appertaining to rules of customary International Law", it has not abolished war as an institution regulated by rules of law and, I submit, it has not enlarged the category of acts which international law permits States to punish as criminal.

4. Acts by Individuals which are in preparation of war and are per se criminal.

This is the second question. We are not concerned with the question whether these acts are punishable by the municipal law of the enemy States whose nationals commit them, but whether they are punishable by the opposing State into whose hands the perpetrators may fall on the ground that they are "war crimes". (This comprehensive expression is usually employed to denote all breaches of the laws and customs of war, by land, sea and air, and whether recognized by customary law or by treaty, but it should be noted that there are certain "war crimes" which involve no moral turpitude but which, nevertheless, a belligerent is entitled to punish -(see Oppenheim, vol.ii, 251)

In my opinion an act done in preparation or contemplation of war which after the outbreak of war has the effect of procuring a "war crime" is in itself a "war crime". The mere fact that at the time of the pre-war act there was no state of war does not exclude it from this category. It was intended to result, in the event of the out-break of war, in the commission of a war crime, and unless it is effectively countermanded after the outbreak of war the act has a continuing effect. This view accords with the principles of English law which make a person who counsels, procures or commands a crime, an accessory to that crime when committed at a later date, e.g. a person who before the birth of a child procures or counsels the mother to murder it when it is born. (This is sometimes called "continuing procurement"). Moreover, the accessory is deemed to have committed the crime which he counsels, procures or commands, at the place where it actually takes place: I do not know to what extent these rules find a place in the laws of other countries but they are in clear accord with the principles of justice, and I cannot believe that a tribunal dealing with war crimes would hesitate to apply them.

Let us consider some illustrations of pre-war acts:-

a) Before the outbreak of war a German official signs an order authorising the taking of no prisoners or the sinking of passenger ships by submarines without warning. War breaks out, and these war crimes are committed in reliance upon his order. Copies of the orders are captured, or the orders are otherwise proved. A Tribunal should have no hesitation in holding that the pre-war act of the German Official had a continuing effect, and was a war crime punishable by the belligerent into whose hands he fell as being a breach of the laws and customs of war.



b) Before the outbreak of war between Germany and Poland a German Official signs an order for, or otherwise authorises, the massacre of Polish Jews in Warsaw, and upon the capture of Warsaw this order is carried out. There can be no doubt that this order, if it can be proved, is punishable as a war crime.

c) Before the outbreak of war a German Official orders the manufacture of lethal gas for the sole purpose of the extermination of the inhabitants of territory which German forces hope to occupy. The extermination of the inhabitants is a war crime, and a tribunal should have no difficulty in holding that this preparatory act was also a war crime, though committed before the war broke out.

d) Before the outbreak of war a German Official procures the assassination of a statesman or army official belonging to one of Germany's probable enemies for the purpose of weakening the resistance of that country to her designs in the event of the outbreak of war. This is murder, and the official and the actual assassin can be punished for an ordinary crime by the tribunals of the State in whose territory the crime was committed. The same consideration would apply to the destruction of an armaments factory or an important bridge. But these crimes are not war crimes.

e) Before the outbreak of war between Germany and Poland a German official procures and incites a violent press campaign in Germany against Poland in order to inflame public opinion in Germany. It is unlikely that this is criminal by German law. If war ensues I do not see how it can be called a war crime.

f) Before the outbreak of war between Germany and Poland groups of German soldiers raid Polish frontier posts and shoot Poles in order to provoke "Incidents" and increase tension. The soldiers and those who command them to make the raids have not committed "war crimes".

There remains, however, another aspect of this question. We have hitherto considered preparatory acts from the point of view of war crimes. But many of the United Nations - at any rate Belgium, China, Czechoslovakia, France, Greece, Holland, Luxembourg, Norway, Poland and Yugoslavia - claim, as part of their normal peace-time machinery, criminal jurisdiction over aliens who commit acts abroad against the security or integrity of the State exercising jurisdiction (see Harvard Research volume on "Jurisdiction with respect to Crime") but this has nothing to do with war crimes. Great Britain and the United States of America would not admit this claim, but that would not prevent any of these States from giving effect to it.

5. The Legal Discussion in 1919

In American Journal of International Law, vol. 14 (1920) at p.95 will be found a Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The following conclusions arrived at by the Commission should be noted:-

a) (p.117) "All persons belonging to enemy countries however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."

b) After considering the acts which provoked the war and accompanied its inception, the Commission (at p.119) advised against any attempt to make these acts the subject of proceedings, and stated the following Conclusions:-

- "1. The Acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal
2. On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.
3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with authors of such acts.
4. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law"

The American members of the Commission, Dr. James Brown Scott and Mr. Robert Lansing, while signing the Report, attached a closely reasoned Memorandum of Reservations, which will be found on p. 127. The main points of their dissent, so far as relevant here, may be summarized as follows:-

- a) they objected to a proposal to use a judicial tribunal for the trial of offences of a moral nature and, in particular, for the offences against the "laws of humanity".
- b) they objected to the trial of the Head of a State (or the former Head of a State) for breaches of law by any tribunal other than those of his own country to which alone he is responsible;
- c) they objected to the creation of a "special organ" for the trial of such acts as brought about the war and accompanied its inception, particularly the violation of Belgium and Luxemburg, on the ground that if these acts were legal crimes there was no need to create a "special organ" to try them, and that if they were "moral crimes" a judicial tribunal would not be the appropriate organ.

#### 6. The Treaty of Versailles, 1919.

The provisions of this and certain others of the Peace Treaties are well known. By article 227 of the Versailles Treaty:

"the Allied and Associated Powers Publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties",

and they proposed to set up a "special tribunal" which would 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".

The attempt to classify aggressive war and its preparatory and contemporaneous acts, such as the violation of countries neutralized by treaty, as legal crimes was abandoned, and the Note addressed by those Powers to Holland requesting the surrender of the ex-Kaiser referred to "the special character of their demands, which contemplate, not a juridical accusation, but an act of high international policy".

The precedent of 1919 is definitely against any attempt to bring within the sphere of criminal law acts by individuals involved in preparing for and launching an aggressive and treaty-breaking war. If it could be shown that the relevant law has been changed, for instance, by the Peace Pact of Paris of 1928, a point already referred to, that precedent would lose its value.



Articles 228 and 229 relate to the punishment of violations of the laws and customs of war by military tribunals, either those of a single Power or mixed tribunals constituted by several Powers.

## 7. Conclusion.

For the United Nations to accuse any offender, however guilty in point of morals, before a professedly legal tribunal, whether international or municipal, without being certain that, if the facts are established, a conviction will almost certainly follow, would in my judgment be a profound mistake. It must be remembered that when a lawyer - at any rate any lawyer worthy of the name - is placed in a judicial position, he ceases to be a citizen of his country or a politician and becomes conscious of his duty to administer justice according to the principles of law, just as a medical practitioner placed in charge of a patient will do his best to save the life of his patient, however criminal, however worthless he may be. Accordingly, a judge must be expected to listen to, and, if substantiated, to give effect to, any plea that may be recognized by the system of law which he is administering - be it nullum crimen sine lege, the non-retroactivity of enacted law, the defence of superior orders, the immunity of the Head of a State, the inability of a law-making treaty to bind a State which has not assented to it, pleas to the jurisdiction and so forth. A conviction which was secured from a legal tribunal in violation of the principles of law would in the long run damage the countries which were responsible for it and would discredit rather than strengthen the rule of law upon which alone international society must rest.

Accordingly, my answer to the questions put to us would be as follows:-

i) acts committed by individuals merely for the purpose of preparing for and launching the present war and not falling within Sub. paragraph (iii) of this paragraph are not "war crimes";

(ii) acts committed by individuals in preparation for the present war which are themselves criminal by the law of the State of which the perpetrators were then nationals or by the law of the State on whose territory they were committed are legal crimes and justiciable by the tribunals of either State, as the case may be, but some States only exercise jurisdiction over their nationals for a limited category of crimes when committed abroad (See also the last eleven lines of 4 above);

iii) acts committed before the outbreak of war which command or procure the commission of "war crimes" after the outbreak of war, such as a pre-war instruction that no prisoners should be taken, are themselves "war crimes" and punishable as such.

(Sgd) ARTHUR D. McNAIR.

3rd August, 1944.

SECRET

C.44.  
25 August, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

CONVENTION FOR THE SURRENDER OF WAR CRIMINALS AND  
OTHER WAR OFFENDERS.

DRAFT EXPLANATORY MEMORANDUM

(Prepared by Dr. Yuen-li Liang and the Secretary-General)

The draft "Convention for the surrender of War Criminals and other War Offenders" which the United Nations War Crimes Commission presents to its member Governments is an adaptation of a draft made by the Ministers of Justice of five of those Governments - those of Belgium, France, Luxembourg, Netherlands and Norway. This original draft was brought before the competent committee of the Commission (Committee II) by Dr. de Moor (Netherlands) and was accepted by it as a basis of discussion. The present draft differs from the older draft in certain points, both as regards its purpose and as regards its details.

PURPOSE OF THE DRAFT

The Ministers of Justice draft was intended to operate both between the United Nations themselves and between them and neutral states. The present draft is only intended to provide for the surrender by one of the United Nations to another, of persons accused or convicted of war crimes or other war offences. It is not considered that it would be possible to obtain, or wise to attempt to obtain, adherence of neutrals to any formal general agreement regarding surrender of such persons.

A second difference is that the present draft provides for surrender as the result of an executive or administrative procedure, not a judicial procedure as was the case under the Ministers of Justice draft.

Like the Ministers of Justice draft, the present draft covers nationals of the United Nations who have aided the enemy against their own countries - the so-called Quislings. It distinguishes their case from that of war criminals and deals with it in Article II. The term "other war offenders" in the title and in the pre-amble of the Convention refers to them.

The purpose in view is to make it certain that the United Nations will reciprocally transfer to one another persons in their power who are wanted for trial as war criminals or Quislings, or have already been convicted on such charges, and to secure this result in the simplest possible way, avoiding the complications and delays of normal extradition procedure and, in particular, excluding the possibility of refusing surrender on the ground that the acts charged have the character of political offences. Several, if not all, of the United Nations will require to enact legislation in order to accept the Convention. It was urged by one member of Committee II that, for practical purposes, since the persons wanted would be prisoners of war in the hands of the armed forces of the requested state or refugees present in its territory without legal authorisation, all that was required could be done by executive action and there was no need for complicated treaty provisions. This view was not accepted by the

P.T.O.



Committee. Moreover, even if not acceptable to, or not needed by some of the United Nations, the Convention can operate between the other United Nations, and, as stated above, it has been considered desirable by the Ministers of Justice of five of the Governments represented on the Commission.

#### PROVISIONS OF THE DRAFT

Articles I and II provide respectively for the surrender of war criminals and of Quislings.

The description of the offences referred to in Article I as "war crimes, including offences against the laws and customs of war" implies that there are offences which are war crimes without being violations of those laws and customs.

The definition of Quislings in Article II is based on the Ministers of Justice draft.

The expression "execution of sentence or judgment" is a recognition that the offenders in question may be tried by military commissions as well as by civil courts (Cf. Article IV. last paragraph).

Article III is intended to prevent surrender being denied on the ground that the offence was political.

Article IV specifies that surrender is to be effected by the executive or administrative authorities and prescribes how the request for surrender is to be made and the particulars to be given in the request.

Articles V and VI show the cases in which surrender may be refused or postponed; they also provide for the same offender being transferred successively to several states and punished successively by several states, and they regulate these processes.

Article VII regulates transit of surrendered persons through the territories of third states which are parties to the Convention.

Article VIII requires production at the time of surrender of documents etc, needed for the trial.

Article IX places all the costs on the requesting state.

The purpose of Article X is to meet in advance possible objections to the Convention on the ground that it may prejudicially affect the operation of extradition treaties. To mark the difference between the Convention and an extradition treaty, it was also at one time proposed to use the word "transfer" instead of the word "surrender" in the title and throughout the text, but the latter word was ultimately preferred, on the ground that its implications were well known.

Article XI. It is proposed that a provision be inserted here under which the Convention will go out of force at a particular date

Articles XII and XIII need no comment.



OPENING OF THE DRAFT FOR SIGNATURE

The draft is the work of the Government representatives sitting as members of an advisory body, and not of persons empowered to negotiate an international convention and open it for signature. To bring it into operation (with or without amendments) this further process must be gone through and be followed by the deposit of ratifications. Before these steps can be taken, the competent departments of the Governments may require time to examine carefully the somewhat novel provisions of the draft.

It is for this reason that the Commission is sending the draft at the present time to the Governments represented on it, notwithstanding that it has not yet concluded its examination of the question of setting up a joint United Nations tribunal for the trial of war criminals and that it may be desirable for the same meeting of plenipotentiaries to deal with both schemes.

WHAT STATES MAY BECOME PARTIES TO THE CONVENTION?

It has been said above that the Convention is intended to operate only as between the United Nations, and not as between those states and neutral states. What precisely are the states which should be admitted to become parties to the Convention can only be decided by the meeting of plenipotentiaries which opens it for signature. The same question will arise in regard to any convention which may be drafted to provide some form of joint United Nations tribunal to try war criminals. The Commission reserves the right to make a recommendation regarding this matter at a later date.

SECRET

C.33.  
23 June 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMUNICATION FROM MR. PELL TO THE CHAIRMAN

DATED 22nd JUNE, 1944

Dear Sir Cecil,

Recently Brigadier General E.C. Betts, Judge Advocate, European Theatre of Operations, United States Army, addressed me concerning whether the conventional protection of a prisoner of war, respecting imprisonment and punishment, may lawfully be denied a prisoner of war who is charged by a responsible accuser as a war criminal?

A copy of his letter, dated 14 June, 1944, together with the enclosure mentioned therein, is enclosed.

The mentioned question is of concern to the military authorities, due to the Commission's recent request to the military to apprehend, detain and investigate war criminals, and in view of the concluding paragraph of the letter I am calling the same to your attention in order that it may be considered by the Commission.

I am, etc.

Signed: HERBERT PELL

Enclosure: Letter dated 14 June, 1944, to Mr. Pell from Brigadier General Ed. C. Betts, Judge Advocate for the European Theatre of Operations, U.S. Army.

.... As you are aware, the Geneva Prisoners of War Convention provides, inter alia, that:

"Prisoners of war ---- may not be confined or locked up except as an indispensable measure of safety or sanitation, and only while the circumstances which necessitate this measure continue to exist." (Art. 9; par. 82, U.S. WD, FM 27-10); and

"Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining power." (Art. 45; par. 118, U.S. WD, FM 27-10); and

"Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining power." (Art. 46; par. 119, U.S. WD, FM 27-10); and

/"Preliminary

"Preliminary judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit. Imprisonment pending trial shall be restricted as much as possible.

"In all cases the period of imprisonment pending trial shall be deducted from the disciplinary or the judicial punishment inflicted, in so far as such deduction is allowed for national soldiers." (Art. 47; par. 120, U.S. WD, FM 27-10); and

"Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war should be punished summarily or judicially." (Art. 52; par. 125, U.S. WD, FM 27-10); and

"In no case may prisoners of war be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) there to undergo summary punishment." (Art. 56; par. 129, U.S. WD, FM 27-10); and

"At the opening of a judicial proceeding directed against a prisoner of war, the detaining power shall advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial ---- at least 3 weeks before the opening of the trial." (Art. 60; par. 133, U.S. WD, FM 27-10); and

"Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power." (Art. 63; par. 136, U.S. WD, FM 27-10); and

"Sentences pronounced against prisoners of war shall be communicated to the protecting power immediately." (Art. 65; par. 138, U.S. WD, FM 27-10); and

"If the death penalty is pronounced against a prisoner of war, a communication setting forth in detail the nature and circumstances of the offence shall be sent as soon as possible to the representative of the protecting power for transmission to the power in whose armies the prisoner served.

"The sentence shall not be executed before the expiration of a period of at least 3 months after this communication." (Art. 66; par. 139, U.S. WD, FM 27-10); and

"No prisoner of war may be deprived of the benefit of the provisions of article 42 of the present convention as a result of the sentence or otherwise." (Art. 67; par. 140, U.S. WD, FM 27-10). (Art. 42 provides the right of complaint to the protecting power.)

It will be important to the military authorities responsible for aiding your Commission in performance of its functions to know what authority they may lawfully exercise, in the light of the foregoing provisions, respecting (a) the confinement, and (b) the trial and punishment of persons charged with war crimes who are taken into custody and originally detained by them as prisoners of war - as distinguished from persons apprehended and detained originally as war criminals.

/It



It is recognised that the question as to whether such military authorities should undertake the trial of war criminals may involve considerations other than military - and consequently may be decided on different levels. Nevertheless, there remains the immediate problem of whether such military authorities may confine (imprison), pending trial, persons charged with war crimes by responsible agencies (as, for instance, the United Nations War Crimes Commission) irrespective of such persons having been first taken into custody as prisoners of war.

In short, there remains the very practical question, of concern to such military authorities who may be called upon to apprehend and detain persons charged with war crimes -

May the conventional protection of a prisoner of war, respecting imprisonment and punishment, be denied a prisoner of war who is charged by a responsible accuser as a war criminal?

These problems are of special concern to our military authorities because of the agreement between the United States and Germany - on the one part "to apply the provisions of the Geneva Prisoners of War Convention to any civilian enemy aliens that might be interned in so far as the provisions of that Convention may be adaptable thereto"; and, on the other part, "to treat American civilian internees according to the principles of the Prisoners of War Convention, in so far as those principles apply to civilians." (in this connection see copy of letter of January 25, 1943, from Matthews to Hartle, attached). (1)

Accordingly, so far as concerns the United States, civilian war criminals will enjoy the same protection against confinement and limitations upon trial and punishment as do military prisoners of war who are war criminals.

It will be greatly appreciated if you will advise me what, if any, views your Commission holds respecting these questions.

ED. C. BETTS,  
Brigadier General, U.S.A.,  
Theatre Judge Advocate

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(1) Not reproduced.

SECRET

C.45  
26 August, 1944

UNITED NATIONS WAR CRIMES COMMISSION

FINANCIAL AND ADMINISTRATIVE REGULATIONS

Adopted by the Commission on 22 August, 1944.

General Provision

Article 1

The present regulations are made in execution of the Commission's Resolution on Financial Administration of 21 March, 1944 (hereinafter called the Resolution) and their application is subject to the provisions of that Resolution.

The Budget

Article 2

The Secretary General shall prepare the draft budget for each fiscal year and after submitting it for examination and revision to the Finance Committee (Article 5) shall present it to the Commission with the Committee's report.

Allocation of Expenses

Article 3

After the budget has been adopted by the Commission the Secretary General shall determine and notify to each member Government the amount due from it, and shall request that payment may be made promptly, in accordance with paragraph 2 of the Resolution. Such notification may be made by telegram.

Working Capital Fund

Article 4

1. Until otherwise decided by the Commission, the amount of the working capital to be accumulated in accordance with paragraph 2 of the Resolution shall be £6,000. It shall be administered as a separate fund, known as the "Working Capital Fund" in the manner set out in the following paragraphs.
2. Until the full amount of the fund has been provided, the following rules shall apply :

- i) An amount for working capital shall be included in the budget for each fiscal year.
- ii) If in any fiscal year the sum voted for the Commission's expenses is less than the total amount payable annually as basic contributions under the Resolution, the balance shall be collected as a contribution to working capital, without prejudice to the voting of an additional sum for that purpose.
- iii) Any surplus realised on the budget shall automatically be paid to the Working Capital Fund.

P.T.O.

3. As soon as a contribution is received from a member Government, the Working Capital Fund shall be credited with a part thereof corresponding to the ratio between the amount voted for the fund in the fiscal year in question and the total amount voted for that year.
4.
  - i) The Working Capital Fund may be drawn upon by the Secretary General to meet expenditure which is authorised by the budget of the current year but cannot be met out of the contributions hitherto received. The amounts so withdrawn shall be reported at once to the Finance Committee, and shall be repaid to the Fund as soon as possible.
  - ii) The Commission, by vote of two thirds of its members, may apply part of the working capital for purposes not provided for in the budget. The budget of the next fiscal year shall make provision for the repayment to the fund of the amounts so withdrawn from it.
5. No part of the Working Capital Fund may be repaid to any Government until the Commission's assets are liquidated, except with the assent of all the member Governments.

#### Financial Control

##### Article 5

1. There shall be a Finance Committee of not less than three nor more than five persons appointed by the Commission from among its members. It shall have power to nominate not more than two financial experts to sit as members, but without the right to vote.
2. The Finance Committee shall perform the functions given to it by these Regulations and any other functions relating to the Commission's administration which may be conferred on it by the Commission, and shall supervise the administration of the Commission's affairs, reporting thereon, when necessary, to the Commission.

##### Article 6

The Secretary General is authorised to incur expenditure and to make or authorise payments for the purposes and within the limits fixed by the budget. All payments, as made, shall be appropriated to the proper item of the Budget and a record of such appropriations and of liabilities incurred shall be kept, showing at all times the amount available under each item.

##### Article 7

The amount of all salaries and professional fees shall be fixed by the Commission, or in accordance with rules made by it.

##### Article 8

1. The Commission's bankers shall be Messrs. Barclays Bank Ltd., 19, Fleet Street, E.C.4. It may change them at any time.
2. Payments exceeding £10 shall be by cheques signed by two persons authorised by the Finance Committee.

##### Article 9

1. The Secretary General shall be responsible for keeping the Commission's accounts.



2. The accounts shall be audited annually by the Comptroller and Auditor General of the Public Accounts of the United Kingdom. The first accountancy period shall run from the establishment of the Commission down to 31 March, 1945.

3. The audited accounts, after examination by the Finance Committee, shall be laid before the Commission by the Secretary General, with the Committee's report.

#### Article 10

A fidelity guarantee insurance shall be taken out in respect of each official dealing with the Commission's funds or keeping its accounts.

#### Transitional Provisions

##### Article 11

Pending the entry into force of the Resolution, and the adoption of its first budget, the Commission will from time to time determine the expenditure which the Secretary General is authorised to incur on its behalf.

##### Article 12

1. As soon as possible after the adoption of these Regulations, and in anticipation of the entry into force of the Resolution, the member Governments shall pay to the Secretary General their basic contributions for the fiscal year 1944/1945, subject to subsequent readjustment if the Resolution is not approved by the Governments in its present form. These payments shall be credited to the Working Capital Fund until the amount of £2,000 has been attained.

2. When the Commission, on the advice of the Finance Committee, decides that its financial position justifies its doing so, it will assume responsibility for meeting its expenditure out of the contributions of the member Governments and terminate the existing arrangements with H.M. Foreign Office.

#### Liquidation of Assets

##### Article 13

On the dissolution of the Commission its assets shall be divided among the Governments which are or have been members of the Commission, as nearly as possible in the proportion in which they have contributed to create them.

#### Amendment of the Regulations

##### Article 14

These Regulations may be amended by the Commission; provided always that the proposal to amend any provision, and the text of the amendment proposed, shall be communicated to the Secretary General

in time to enable him to give at least one clear week's notice to the representative of each member Government, or, if the amendment is proposed at a meeting of the Commission, that the decision shall be taken at the next meeting after notice given by the Secretary General to all representatives of member Governments not present when the amendment was proposed.

Provisional application and final entry  
into force of the Regulations

Article 15

Pending entry into force of the Resolution, these Regulations shall be applied provisionally, so far as is appropriate. They shall enter finally into force at the same time as the Resolution.

SECRET

C.46  
31 August 1944

UNITED NATIONS WAR CRIMES COMMISSION

TRIAL OF WAR CRIMINALS BY MIXED INTER-ALLIED MILITARY TRIBUNALS

Memorandum by the Office of the United States  
Representative  
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Two related questions are treated in this paper. They may be stated as follows:

- a. May an allied commander upon his own authority empower mixed allied military courts to try and adjudge punishment of war criminals who fall into the hands of the allied forces?
- b. Does this power extend to the trial and punishment of war criminals irrespective of where the crime was committed?

These questions are discussed and answered in the order stated.

- a. May an allied commander upon his own authority empower mixed allied military courts to try and adjudge punishment of war criminals who fall into the hands of the allied forces?

It is a fundamental principle of international law that states may do those things which are not prohibited by the established principles and rules of that law, and that restrictions upon their independence of action may not be presumed. It follows that a state may punish any war criminal which falls into the hands of its armed forces unless there is a rule of international law which prohibits it. No such international prohibition exists, and long-established practice of states makes it clear that there are no restrictions in the matter upon the jurisdictional competence of states.

So far as the freedom of action of states is concerned, under international law the various states may exercise this jurisdiction to try and punish in any manner they choose, consistent with established principles of justice. Thus they may set up special civilian courts to administer the law applicable to such cases; they may specially empower their regular courts to take cognizance of them; or they may authorize their military courts to apply the law in this type of case. As Priorly says in his article on "The Nature of War Crimes Jurisdiction" in the May-June 1944 issue of the *Norseman*:

"The laws of war ... do not establish any international machinery for the exercise of this jurisdiction; they leave a wide discretion to belligerent states, without giving any precise indication as to the kind of court (e.g., whether military or civil), the forms of procedure, or the definition of particular offences, which they should adopt. Hence in exercising its right a state is free within wide limits, which may be defined as the limits set by natural justice, to adopt its own policy in these matters. There is, for example, no reason why a state, if it thinks fit, should not use its courts of ordinary criminal jurisdiction, though in that event those courts would be exercising not their ordinary, but a special war jurisdiction."

/ Inasguch



Inasmuch as offences against the laws and customs of war are usually committed in close connection with military operations or occupation, it has been the general practice of states to permit national military tribunals to try such offences. Familiar examples of such courts are councils of war, military courts, military commissions, and courts-martial. Thus we find, from ancient Greece down to the present time, military courts trying spies. From a somewhat later period down to date they have punished pillage, marauding, and crimes of all sorts which have had some substantial connection with the conditions created by war.

The foregoing statements refer exclusively to the competence of a state to establish and maintain courts to try war criminals under the laws and customs of war. Any jurisdictional limitation on the power of a particular state in this regard, which may be found in its law, is a limitation which has been self-imposed by that state and which that state, under international law, is free to remove if it chooses to do so.

In a war between only two nations, one belligerent may thus try and punish offences against the laws and customs of war by military courts. But the further question remains: When belligerents are allied, and a supreme allied commander is appointed, may he, upon his own authority, appoint mixed allied military courts to try war criminals?

Each of the Allies could do this if they acted separately, and there is no rule of international law which prohibits them from doing jointly what they could do separately. The familiar rule of international law, that for many purposes allies in a war constitute a single side, is applicable here. However, the fundamental consideration, which goes to the very basis of international law, is that there is no accepted international rule which precludes allied governments or their military commanders from jointly establishing and maintaining military courts. Whether or not an allied commander appoints such a mixed court for such cases is purely a matter of allied policy. No treaty or legislative act of any kind is needed in order to exercise the power or to define the procedure or rules of evidence to be applied, because the power to establish such courts is an incident of command. The Supreme Court of the United States has stated this fact as follows:

"An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." - (Ex parte Quirin, 317 U.S.1, 28-29 (1942).)

Again in 1865, the Attorney General of the United States held that "the commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war." - (11 Ops. A.G., 297, 305 (1865).) As Cowles says in his article in the June 1944 issue of the American Bar Association Journal entitled the "Trial of War Criminals by Military Tribunals", "a decision as to what type of court or personnel is to be used is simply a matter of policy. A military tribunal with mixed inter-allied personnel may properly be established by the commanding general of co-operating co-belligerent forces." (p.331).

Such courts, in the trial of such cases, are, of course, subject to the established substantive and procedural principles of justice which are common to civilized countries, and the military convening commander may not properly preclude their application. Thus Winthrop, the outstanding American authority on military law during the last century, says:

"As the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will - like a court-martial - permit and pass upon objections interposed to members, as indicated in the 88th Article of war, will formally arraign the prisoner, allow the attendance of counsel, entertain special pleas if any are offered, receive all the material evidence desired to be introduced, hear argument, find and sentence after adequate deliberation, render to the convening authority a full authenticated record of its proceedings, and, while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied." - (William Winthrop, Military Law and Precedents (1896), 1920 reprint pp. 841-842.)

The following propositions summarize the basic rights of the war criminals before military tribunals in the United States. These propositions are taken mostly from holdings by the Judge Advocate General of the United States Army. They represent the general practice in the United States:

The accused has the right to have charges signed by a commissioned officer; he is entitled to a copy of the charges against him, and of any amendments thereto; and he has a right to have the members of the commission and the Judge Advocate sworn in his presence. The general charges of violating the laws and customs of war, the specifications thereof and the order convening the commission are to be in writing and be read aloud to, or within hearing of, the accused; he is given an opportunity to challenge the members of the commission; he must be allowed to plead to the charges and specifications as recited in the order convening the commission; he need not respond to questions; he has a right to be confronted with the witnesses against him; the witnesses must be sworn before they testify; all testimony should be fully set forth in the record; it is fatal error for the military commission to refuse to admit evidence of the defence material to the issues; and the guilt of the accused must be proved beyond a reasonable doubt. It is error to reject testimony that the accused was insane at the time of the offence. The accused is allowed defence counsel with the usual rights of such counsel as found in civilian courts. - (From 30 Am. Bar Assn. Journal at 333)

Any policy jointly to try by military tribunals may be decided by the allied policy-making officers and it may be carried into effect forthwith without other governmental formality. As a practical matter, however, such policy-making military officers would presumably not decide to try cases which arose before their military operations or occupation began without receiving advice from the highest authorities of their respective governments.

Precedent strongly supports the establishment of mixed inter-allied military courts. In Article 228 of the Treaty of Versailles the Allies asserted, and Germany recognized, the right to bring to trial, by "the Allied and Associated Powers", persons accused of having committed acts in violation of the laws and customs of war. Again, the next Article (229) stipulates that certain German war criminals might be brought before courts "composed of members of the military tribunals of the (Allied and Associated) Powers concerned." Further, in Article 227, the Allies asserted, and Germany agreed to, the right to establish a special tribunal to try the Kaiser. This tribunal was to be composed, not of judges of any one of the Allies, but of judges from all the principal Allied and Associated Powers.



Similar provisions are contained in the other 1919 peace treaties. The parties to all these treaties either asserted or recognized the right of joint allied military tribunals to try war criminals. They include all the present enemy countries. The fact that these provisions are inserted into peace treaties is of no significance for war-time or an armistice period. They were inserted in the treaties for post-war purposes - to make it clear that military courts might operate not only during time of war and through the armistice period but after the conclusion of peace as well. These treaties afford unimpeachable evidence of the right of military tribunals to try war criminals when the personnel of such courts consist of members of various allied forces.

In the light of the foregoing facts and considerations it is clear that an allied commander may, upon his own authority and without more, appoint mixed allied military courts and empower them to try and adjudge punishment of war criminals who fall into the hands of the allied forces.

b. Does this power extend to the trial and punishment of war criminals irrespective of where the crime was committed?

It is fundamental in considering this question to bear in mind that for the past century at least war crimes have been considered as "crimes against society" and war criminals as "enemies of mankind". Thus an Attorney General of the United States has spoken of them as "*hostes humani generis*" - (11 Opinions of the Attorney General 297, 307 (1865)); war criminals have been spoken of as "outlaws" by United States military commissions (United States v. Gumban, General Order No 197, Division of the Philippines, 27 July 1901; United States v. Ferrer et al., General Order No. 120, Division of the Philippines, 13 June 1901); and certain it is that war crimes have such a moral taint as to outrage common justice, and that they should not go unpunished even though, through some circumstances, the country having primary interest is unable to lay hands on such individuals.

While the state whose nationals are directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes. Thus, although the nationals of only comparatively few of the thirty-three United Nations had been subjected to German atrocities, in the Moscow Declaration the three allied powers stated that they spoke in the interest of every member of the United Nations; and the Lord Chancellor (Viscount Simon), on October 7, 1942, stated in the House of Lords: "I take it to be perfectly well established International Law that the laws of war permit a belligerent commander to punish by means of his military courts any hostile offender against the laws and customs of war who may fall into his hands wherever be the place where the crime was committed." (Parliamentary Debates, House of Lords, vol. 124, no. 86 (Oct. 7, 1942), p. 578, Emphasis supplied).

There is much support for this position both in the literature of authoritative writers and in practice. Nearly a century ago we find Francis Lieber taking the position that where a prisoner of war had committed a crime before his capture he might be punished by the detaining power if he has not already been punished by his own authorities. - (Par. 59, General Order No. 100, 24 April 1863). Flory, in his work on *Prisoners of War*, states generally that prisoners of war "having committed violations of the laws of war prior to their capture and not tried by their state of origin were, and are, subject to trial and punishment by the detaining state" - (p. 89-90). Brierly has recently stated that jurisdiction over war crimes "has no territorial basis, and it may therefore be exercised without any reference to the *locus delicti*" ("The Nature of War Crimes Juris-



diction", 2 The Norseman, No. 3, May-June 1944). Glueck too states that "the jurisdictional question presents little difficulty, because the territorial principle does not govern military tribunals in time of war." - ("By What Tribunal Shall War Offenders be Tried?" 56 Harvard Law Review 1059, 1065 (1943)). McNair in his note for the United Nations War Crimes Commission of 3 August 1944 likewise speaks of punishment of war crimes "by the opposing State into whose hands the perpetrators may fall" - (p.7). Again, A.N. Sack, in his article on the "Punishment of War Criminals and the Defence of Superior Order" (60 L.Q.R. 63, 67 (1944)) says that "the question whether a given killing is a legitimate act of warfare or a war crime is determinable by International Law, which required punishment for war crimes in the interest of the entire community of civilized States and, of course, not by the 'law' of the lawless belligerent government which authorized or ordered it." (Emphasis supplied). A committee of the American Bar Association, consisting of Edwin D. Dickinson, Chairman, and George A. Finch and Charles Cheney Hyde, reporting to the Section of International and Comparative Law of that Association in 1943, held that most war crimes in the present war had been committed "against the security of the United Nations."

In the military commission case of United States v. Hogg et al., decided in 1865, the reviewing authority made the following statement pertinent to that case:

"Military courts are not restricted in their jurisdiction by any territorial limits. They may try in one State offences committed in another, and may try in the United States offences committed in foreign parts, and may try out of the United States offences committed at home. They have to do only with the person and the offence committed; all else is simply a matter of convenience, of witnesses, of the means of assembling a court, etc." - (8 Reb. Rec. II 674, 678. Emphasis supplied).

The 1912 Digest of Opinions of the Judge Advocates General of the United States Army contains the following holding: "A military commission, whether exercising a jurisdiction strictly under the laws of war or as a substitute in time of war for the local criminal courts, may take cognizance of offences committed during the war, before the initiation of the military government or martial law, but not then brought to trial." - (p.1067). Again, the Italian Wartime Penal Military Code, of 6 May 1941, provides that the laws and customs of war are applicable to military and civilian members of the enemy's armed forces whenever an offence against the law of war is committed against the Italian state or an Italian citizen, "or against an allied state or a subject thereof." - (Sec. 13, Book I, Title I, Supp., Gazzetta Ufficiale, No. 107).

Two United States cases will be noted, abstracts of which are now set forth:

In 1864 an enemy soldier murdered several persons in enemy territory beyond the military lines. He was thereafter captured by the United States forces. The Judge Advocate General of the United States Army was asked whether the prisoner-of-war might be tried by a military commission. The Judge Advocate General held that a military commission would have jurisdiction over such an enemy soldier irrespective of "whether such crime were perpetrated within or beyond the ordinary field of occupation of our armies." - (8 J.A.G. Record Book 529-530)

A celebrated case of this sort arose in 1900 during the war in the Philippine Islands between the United States forces and the Filipino Insurrectionists. From 1896 to 1898, prior to the Spanish-American War of 1898, a Filipino revolution took place against the authority of Spain. During the course of that revolution the Filipino forces captured a large number of Spanish soldiers, which they held as prisoners-of-war. In 1900, although United States forces occupied Manila and Northern Luzon, a large area of Southern Luzon was under the de facto sovereignty of the Filipino Insurgents. It had never been occupied by the United States forces. In that year the United States forces on Luzon proceeded south from Manila to take over the area.

The particular facts of a war crime's case which arose at that time are well summarized as follows in the opinion of Major-General Chaffee, Military Governor of the Philippines, who was the confirming authority of the military commission which later tried the case:

The accused was Major Francisco Braganza of the Filipino army. He "had been a lieutenant of police of San Fernando and recently appointed a major in the insurgent forces. That at Minalabag, a party, by roll-call, of one hundred and seventy-three Spanish prisoners, were delivered to him for the ostensible purpose of being conducted to a place of greater security from the approaching American troops. It appears that from high sources orders had been given to prevent their rescue by the Americans.

"At the time the accused took charge of these prisoners, they were footsore, weary and half-starved, their hurried marching and large number apparently overtaking the available means of support which the presidentes of the pueblos through which they passed, had at their ready disposal.

"Apprehension of the sudden appearance of the American troops caused confusion and disorder among the guard and police, which composed the escort under the orders of the accused, who, on the 23rd day of February 1900, the morning following the day he assumed charge of the escort, proceeded to have the arms of his prisoners bound at the elbows with cords drawn across their backs so as to render them comparatively helpless. This was the first act of unmistakable indignity imposed upon the prisoners, who, up to this time, had been treated with some kindness. Knowing the habits of the people in whose hands they were, to bind and make helpless one doomed to death, the prisoners must have readily interpreted its sinister meaning. The next act of the accused was to cause the prisoners to be searched for money and valuables and to appropriate the lion's share for himself. The prisoners were then told off in detachments of ten men, more or less, with a suitable guard placed over each. They were then conducted to the rice fields, a short interval being preserved between the detachments. At a pre-concerted signal the blowing of a whistle by accused, the guards fell upon their victims and slaughtered them with daggers, bolos, clubs and spears; the accused standing by, encouraging, directing and urging on the barbarous assault.

"Those of the victims, who were strong enough, bound as they were, made a break for liberty and accused ordered them to be pursued and killed. On the following morning it was reported to accused that thirty of the escaped prisoners had been recaptured at Lapi, whereupon he proceeded there, ordered them bound, conveyed to the woods, and again the scenes of the



preceding day were enacted. Returning to Lurí, accused found another party of his recaptured victims and these, in turn, were bound and led to death ....

"From official records it appears that about one-half of the prisoners escaped and, after devious wanderings under cover of the tropical vegetable growth and wooded lands, in small parties and after much suffering, finally reached safety within the American lines."

Braganza was later captured by the United States forces. Upon the request of the Spanish Government he was put on trial before a United States military commission and sentenced to be hung. Three general charges were made against him, together with detailed specifications apprising him of the exact nature of the charges. The style of the general charges are worth noticing as they indicate clearly the law which was being applied. It was not Filipino law, not Spanish law, not United States law, but the international law of war. The general charges read verbatim as follows: Charge I - "Murder in violation of the laws of war" Charge II - "Violation of the laws of war" Charge III - "Robbery, in violation of the laws of war"

It will be noted that the war crimes in this case were not against nationals of the United States but against Spaniards. Nevertheless the Spanish Government requested the United States to punish Braganza who was in United States custody, and this was done by a United States military tribunal.

A photostatic copy of the record in this case is now available in London at the Offices of the United States Representative of the United Nations War Crimes Commission. It consists of 283 folio pages. The testimony of all witnesses is set forth verbatim. The four-square analogy of the facts of this case to the present invasion of the Continent and to military jurisdiction over captured war criminals whose acts were committed before D-day is quite apparent. Presumably similar support would be found in the records of other countries if the source material were gathered and studied.

Francis Lieber took the position that war-time marauders might be treated as "pirates" (Par 82, General Orders No. 100, 24 April 1863). Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate judicial system operating on the spot where the crime takes place - in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fundamental fact, hoping thereby to commit their crimes with impunity. It is not generally appreciated that the military jurisdiction which has been exercised over war crimes has been of the same non-territorial nature as that exercised in the case of the pirate, and that this broad jurisdiction has been assumed for the same fundamental reason that both are against the interests of the whole civilized world.

Summary: Jurisdiction to punish offences against the laws



of war may be concurrent. An offence against the laws of war is a violation of the law of nations, and a matter of general interest and concern. War crimes are now being especially recognized as of general concern to the United Nations, which states in a real sense represent the civilized world. Whether committed by their own forces or those of the enemy, all civilized belligerents have an interest in the punishment of offences against the laws of war.

Conclusion: Both on principle and in practice allied military courts are empowered to try and adjudge punishment of war criminals in allied custody no matter where or against whom the offence was committed.

SECRET

C.47  
4 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

CONVENTION FOR THE SURRENDER OF WAR CRIMINALS AND

OTHER WAR OFFENDERS

DRAFT EXPLANATORY MEMORANDUM

The draft "Convention for the surrender of War Criminals and other War Offenders" which the United Nations War Crimes Commission presents to its member Governments is an adaptation of a draft made by the Ministers of Justice of some of those Governments, - notably those of Belgium, Luxembourg, the Netherlands, Norway and Poland. This original draft was brought before the competent committee of the Commission (Committee II) by Dr. de Moor (Netherlands) and was accepted by it as a basis of discussion. The present draft differs from the older draft in certain points, both as regards its purpose and as regards its details.

PURPOSE OF THE DRAFT

The Ministers of Justice draft was intended to operate both between the United Nations themselves and between them and neutral states. The present draft is only intended to provide for the surrender by one of the United Nations to another, of persons accused or convicted of war crimes or other war offences. It is not considered that it would be possible to obtain, or wise to attempt to obtain, adherence of neutrals to any formal general agreement regarding surrender of such persons.

A second difference is that the present draft provides for surrender as the result of an executive or administrative procedure, not a judicial procedure as was the case under the Ministers of Justice draft.

Like the Ministers of Justice draft, the present draft covers nationals of the United Nations who have aided the enemy against their own countries - the so-called Quislings. It distinguishes their case from that of war criminals and deals with it in Article II. The term "other war offenders" in the title and in the pre-amble of the Convention refers to them.

The purpose in view is to make it certain that the United Nations will reciprocally transfer to one another persons in their power who are wanted for trial as war criminals or Quislings, or have already been convicted on such charges, and to secure this result in the simplest possible way, avoiding the complications and delays of normal extradition procedure and, in particular, excluding the possibility of refusing surrender on the ground that the acts charged have the character of political offences. Several, if not all, of the United Nations will require to enact legislation in order to accept the Convention. It was urged by one member of Committee II that, for practical purposes, since the persons wanted would be prisoners of war in the hands of the armed forces of the requested state or refugees present in its territory without legal authorisation, all that was required could be done by executive action and there was no need for complicated treaty provisions. This view was not accepted by the

/ Committee

Committee. Moreover, even if not acceptable to, or not needed by some of the United Nations, the Convention can operate between the other United Nations, and, as stated above, it has been considered desirable by the Ministers of Justice of five of the Governments represented on the Commission.

#### PROVISIONS OF THE DRAFT

Articles I and II provide respectively for the surrender of war criminals and of Quislings.

The description of the offences referred to in Article I as "war crimes, including offences against the laws and customs of war" implies that there are offences which are war crimes without being violations of those laws and customs.

The definition of Quislings in Article II is based on the Ministers of Justice draft.

The expression "execution of sentence or judgment" is a recognition that the offenders in question may be tried by military commissions as well as by civil courts (Cf. Article IV, last paragraph).

Article III is intended to prevent surrender being denied on the ground that the offence was political.

Article IV specifies that surrender is to be effected by the executive or administrative authorities and prescribes how the request for surrender is to be made and the particulars to be given in the request.

Articles V and VI show the cases in which surrender may be refused or postponed; they also provide for the same offender being transferred successively to several states and punished successively by several states, and they regulate these processes.

Article VII regulates transit of surrendered persons through the territories of third states which are parties to the Convention.

Article VIII requires production at the time of surrender of documents etc., needed for the trial.

Article IX places all the costs on the requesting state.

The purpose of Article X is to meet in advance possible objections to the Convention on the ground that it may prejudicially affect the operation of extradition treaties. To mark the difference between the Convention and an extradition treaty, it was also at one time proposed to use the word "transfer" instead of the word "surrender" in the title and throughout the text, but the latter word was ultimately preferred, on the ground that its implications were well known.

Article XI. It is proposed that a provision be inserted here under which the Convention will go out of force at a particular date.

Articles XII and XIII need no comment



#### OPENING OF THE DRAFT FOR SIGNATURE

The draft is the work of the Government representatives sitting as members of an advisory body, and not of persons empowered to negotiate an international convention and open it for signature. To bring it into operation (with or without amendments) this further process must be gone through and be followed by the deposit of ratifications. Before these steps can be taken, the competent departments of the Governments may require time to examine carefully the somewhat novel provisions of the draft.

It is for this reason that the Commission is sending the draft at the present time to the Governments represented on it, notwithstanding that it has not yet concluded its examination of the question of setting up a joint United Nations tribunal for the trial of war criminals and that it may be desirable for the same meeting of plenipotentiaries to deal with both schemes.

#### WHAT STATES MAY BECOME PARTIES TO THE CONVENTION?

It has been said above that the Convention is intended to operate only as between the United Nations, and not as between those states and neutral states. What precisely are the states which should be admitted to become parties to the Convention can only be decided by the meeting of plenipotentiaries which opens it for signature. The same question will arise in regard to any convention which may be drafted to provide some form of joint United Nations tribunal to try war criminals. The Commission reserves the right to make a recommendation regarding this matter at a later date.

#### CONVENTION FOR THE SURRENDER OF WAR CRIMINALS AND OTHER WAR OFFENDERS

(Enumeration of the Heads of States)

Having resolved to conclude a Convention with the object of achieving the surrender 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 good and due form, have agreed on the following provisions :

##### Article I

The High Contracting Parties mutually agree to surrender to each other according to the procedure hereinafter provided, for the purposes of trial or of execution of sentence or judgment, persons found within their jurisdiction who are charged with or convicted of war crimes, including offences against the laws and customs of war, which were 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 High Contracting Parties further mutually agree to surrender to each other according to the procedure provided hereinafter, for the purposes of trial or of execution of sentence or judgment, 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 the 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

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

/ Article IV

Article IV

The request for surrender 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 surrender 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 surrender shall in every case give written assurances to the Government from whom the surrender is requested to the effect:
    - (1) that the trial will be conducted in accordance with legal procedure;
    - (2) that judgment or findings and sentence 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 or findings and sentence given by the appropriate court in respect of the offence and in the presence of the offender.

The term "court" as used in this article shall include a military commission or other military tribunal.

Article V

The High Contracting Parties may decline to surrender to each other their own nationals and former nationals.

A High Contracting Party may refuse to surrender an alleged offender, if the offence for which his surrender is requested was committed within that Party's jurisdiction.

In all cases where two or more High Contracting Parties request the surrender of the same alleged offender, such person shall be surrendered first to the Government of the State whose national legislation 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 VI

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 surrender is requested, that state may decline to surrender him until the proceedings are terminated.

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

A sentence of death shall however be executed notwithstanding that one or more of the High Contracting Parties have requested the surrender of the offender.

When an alleged offender whose surrender 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 surrendered to that state for execution.

#### Article VII

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 Parties to the present Convention to another Party, 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 who is being surrendered and his escort may be accompanied by officials designated by the Governments concerned.

#### Article VIII

The High Contracting Parties agree to produce at the time of surrender all documents, exhibits, or any other thing which may serve as proof of the alleged offence.

#### Article IX

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

#### / Article X



The present Convention constitutes an exceptional measure and shall not effect the operation of any treaty of extradition between or among the High Contracting Parties 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 and the ratifications shall be deposited as soon as possible with..... who will notify such deposit to all the 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 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 etc.

SECRET

C.48(1)  
19 September 1944.

UNITED NATIONS WAR CRIMES COMMISSION

PROGRESS REPORT

Adopted by the Commission on 19th September 1944.

This paper is intended to give an outline of the work which the War Crimes Commission has accomplished up to date, an explanation of the need for an inter-allied tribunal for the trial of war criminals to supplement the national tribunals, together with a description of the reports which the Commission proposes to issue at a later date.

HISTORY

The intention to set up a Commission for the Investigation of War Crimes was announced by the Lord Chancellor of the United Kingdom, Lord Simon, in a speech in the House of Lords on 7th October, 1942, and by President Roosevelt in a declaration of the same date.

The Commission, which has assumed the name of United Nations War Crimes Commission, was brought into being on October 20th, 1943, by a meeting at the Foreign Office, London, attended by representatives of the Governments of Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, Poland, South Africa, United Kingdom, United States, Yugoslavia. Of these Governments all except those of South Africa and Canada are represented on the Commission.

The function conferred on the Commission by the Foreign Office meeting was that of investigating war crimes committed against the United Nations. It was to examine the available evidence and where such crimes appeared to have been committed was to report the perpetrators to the Governments in order that their surrender for trial might be enforced on the Axis Powers. Six days after its creation (October 26th, 1943) the Commission held its first meeting and a sub-committee was at once appointed to advise on the methods to be followed in the discharge of its task. This Committee reported at the Commission's second meeting on December 2nd, 1943, and the plan which it suggested was adopted.

This plan was simple in character. The Commission did not attempt to draw up an exhaustive list of war crimes. It decided to proceed upon the footing that international law regards as a war crime any offence against the laws and customs of war, and that for this reason the right of the United Nations to put on trial as a person who has committed a war crime any hostile offender who might fall into their hands whatever may have been the place in which the war crime was committed cannot be questioned, and further that it was for the United Nations to determine the forum before which the war criminal should be brought to justice. The Commission further decided, however, that it would be convenient for the purposes of its own work to adopt the list of war crimes prepared by the Responsibilities Commission of the Paris Peace Conference 1919, so that the National Offices might know the various headings under which war crimes should be grouped. Each Government was asked to establish a National Office for the work of preparing charges against alleged war criminals and transmitting them with the relevant information and material for the substantiation of the charges for examination by the Commission. These National Offices were to be in close touch with the Commission. Finally the Chairman and Secretary General were authorised to inform the Governments that the Commission was ready to commence work and to invite them to transmit cases as soon as possible. A letter in this sense was addressed to the Governments on 13th December, 1943.



Although the Commission was thus ready to perform its functions by the beginning of December, 1943, no cases of war crime were transmitted to it until 1st February, 1944. From January 4th, 1944, however, it has held regular weekly meetings at which it has discussed various aspects of its task. An important result of these discussions was that the Commission's terms of reference were extended to include reporting to and advising the member Governments on legal questions and questions of method and policy. At the Foreign Office meeting it had been contemplated that such matters would be referred to another body of Government representatives entitled the "Technical Committee", and some appointments to this body were made but it was never formally constituted. The United Nations War Crimes Commission became convinced that such a division of the work between two separate bodies would be unfortunate and with the consent of the member Governments the Commission itself assumed the functions of the projected Technical Committee.

The Commission's work thenceforth fell under two heads:- investigation of war crimes with a view to the trial of the authors of these crimes and an examination of questions of law, method and policy. It will be described under these heads in the remainder of this report.

#### INVESTIGATION OF WAR CRIMES

The crimes investigated by the Commission have up to the present time been crimes committed in the European and North African theatre of operations. Their number has been small in comparison with the number of crimes which have been committed in those regions. This is no doubt due to the difficulty of obtaining precise information while the Allied territories are still in enemy occupation and while prisoners of war are still in enemy hands. Evidence sufficient to raise a prima facie case against an alleged offender cannot always be expected at the present stage. What the Commission requires is that the material before it should show that there is reason to believe that a war crime of reasonable importance has been committed, and that there is good reason to think that the alleged offender, if and when he is put on trial for the offence, will be convicted. It is not, therefore, essential that the name of the accused should be known, if it is reasonably certain that it can and will be obtained in due course; nor is it essential that the evidence should be complete if it is reasonably clear that further evidence can and will be available on the spot when the country where the crime was committed is liberated.

#### RECOMMENDATIONS SUBMITTED.

The work of Committee II of the Commission (dealing with Enforcement) and of Committee III (Legal Questions) has resulted in the adoption by the Commission of the following recommendations which have been transmitted to the Governments of the United Nations represented in the Commission.

- (a) a Recommendation adopted on May 16th, 1944 (C.21) that the Governments through their national offices should communicate to the Commission lists of the enemy military and civil persons in authority in each occupied district and particulars, so far as known, of war crimes committed in those districts;
- (b) this Recommendation also advocated that the military authorities should put and keep under control all persons whom they found to be or to have been members of the S.S. or the Gestapo.



- (c) a later Recommendation adopted on July 18th, 1944 (C.34) provided in the case of the states which were satellites of the Axis that members of the German S.S. or the Gestapo found in those countries and the members of the police force of those countries, whether civil or military, who had served or were still serving as district chiefs in any country occupied by Nazi forces should also be put and kept under control;
- (d) a Recommendation adopted on June 13th, 1944 (C.31) as to the type of clause which might with advantage be inserted in the armistice to ensure the surrender of persons who were wanted in connection with war crimes by the Governments of the United Nations;
- (e) a Recommendation adopted on June 13th, 1944 (C.30) in favour of the establishment as part of the Supreme Allied Command in enemy territory of a group or agency to help the War Crimes Commission in its work.

#### TRANSFERS OF WAR CRIMINALS

In order to facilitate the transfer by one of the United Nations of war criminals who are in its custody to another of the United Nations desirous of placing the individual war criminal in question on trial before its national courts, the Commission has framed and is transmitting to the Governments of the United Nations the draft of a treaty for this purpose. The draft is based upon a text which was prepared under the auspices of the Ministers of Justice of some of the United Nations. The draft submitted by the Commission is accompanied by an explanatory memorandum (C.47).

#### EXTRADITION BY NEUTRAL STATES

The Commission has not made any recommendation with regard to war criminals taking refuge in neutral territory. This matter has already formed the object of diplomatic representations by the United Kingdom, United States and Soviet Union.

#### TRIBUNALS FOR THE TRIAL OF WAR CRIMINALS

The principle laid down in the Moscow Declaration that the authors of the German atrocities are to be sent back to the countries where their crimes were committed, there to be tried by the laws and in the courts of those countries, has formed the basis of the work of the Commission. The majority of the cases which have been transmitted to the Commission can and will be brought to trial in the national courts of the United Nations. There is, however, a difference between the legal principles adopted by the Continental countries and those which obtain under the Anglo American system. Under the latter the ordinary courts of the country do not in the absence of special arrangements to the contrary have jurisdiction over the acts of an enemy in time of war; consequently war crimes are not in general cognizable by the ordinary courts: they are dealt with by military tribunals or military commissions. On the Continent the position is different. An act committed by an enemy in time of war is cognizable by the ordinary courts, and an offence charged against an enemy must be dealt with in accordance with the laws enforced by those courts. It follows that a war crime, i.e. a violation of the laws of war only falls within the jurisdiction of such courts if it is also an offence against the law of the country.

The laws of the United Nations on the Continent are not uniform in this respect. In the case of some states the criminal law of the country does not cover all violations of the laws of war. What is the case a war crime committed in that country or against one of its nationals, may not constitute a crime and would go unpunished unless some other jurisdiction can be set up competent to deal with the offence.

To meet this situation the Commission is satisfied that an inter-allied tribunal competent to exercise jurisdiction in any case of a violation of the laws of war should be set up. The Commission is now engaged in the preparation for consideration by Governments of a draft treaty or convention for the establishment of such an inter-allied court, and hopes to submit this draft at an early date.

An alternative and more rapid method of setting up such a court would be by an order of the Supreme Commander in the field. A draft recommendation for this purpose is also in course of preparation.

The institution of such an inter-allied tribunal or tribunals would be useful in other cases as well as those where the criminal law of the country may not render a particular war crime punishable at all. There will be cases in some Continental countries where an act which might constitute a serious violation of the laws of war might if dealt with under the ordinary criminal law of the country be subject only to a penalty which would be quite inadequate.

Such a tribunal might also be useful to the Allied Powers for dealing with the authors of some of the atrocities committed by the enemy which were not committed in any one particular country.

Whatever application may be given by the Allied Governments to the passage in the Moscow Declaration that the treatment to be meted out to the authors of war crimes which have no particular geographical location is reserved for a decision of the Allied Powers, there will be some cases where the brutalities committed in countries occupied by the enemy on the Continent of Europe have been directly based upon decrees or ordinances issued by some Minister or functionary in Berlin. The public will not readily understand why the Nazi official at the head of the administration in a particular occupied country is to be put on trial for a war crime such as the issue of a local ordinance ordering the compulsory deportation of a large number of the local inhabitants to Germany to work there, if the Minister or functionary who issued the decree on which the local ordinance was based is not also to be put on trial. For the latter purpose, however, some inter-allied tribunal will be advisable.

#### REPORTS ON SPECIAL CLASSES OF WAR CRIMES

The Commission has in view the preparation of reports on some of the classes of war crimes which have been committed in the course of the present struggle.

Many of the brutalities which have been committed by the enemy cannot be understood if they are regarded as mere criminal acts of individual or groups of individuals such as have occurred in previous wars. Some of course have this character, but they are not the most characteristic. The special feature which has marked and rendered so horrible the struggle of the Axis Powers for world domination has been the constant recurrence in pursuance of a policy which was dictated by Berlin of crimes of well-marked types, each calculated to secure a particular object or objects and deliberately ordered or encouraged for that purpose. Examples are the campaign against the Jews, the



campaign against the Polish intelligentsia, the horrors of the concentration camps, the mass execution of hostages, destruction of villages and other forms of terrorism aimed at breaking the spirit of a population.

The Commission feels that the policy of systematic punishment of war crimes which the United Nations have adopted may fail of its purpose and even produce a revulsion of popular feeling in certain countries, if this essential fact which is the chief reason for the policy is not brought home to the public.

The reports which the Commission has in mind would be prepared with a view to publication at the appropriate moment and would show the connection between the individual crimes of each type and the common policy which they expressed, thereby making it easier for the general public to comprehend the justification for and the necessity of the severity which had been shown towards their perpetrators.

An additional reason for the preparation and eventual publication of such reports under the authority of the Commission is the need for correcting the idea which is all too prevalent that the stories of the horrors perpetrated by the enemy are untrustworthy exaggerations designed for propaganda purposes.

The reports would therefore be framed so as to demonstrate in a readable form which might be expected to be of interest to the public at large not merely the general policy pursued by the Axis powers, and the particular application of that policy in each of the occupied countries, but also the facts disclosed in the cases of war crimes brought to trial and the punishments inflicted.

#### FAR EASTERN SUB-COMMISSION

The work of the Commission has hitherto been devoted almost entirely to war crimes committed in the European and African theatres of war, but war has now been in progress for many years between China and Japan and for a shorter period between Japan and the Western Powers.

To cope with the war crimes committed by Japan in the Far East, the Commission has adopted a proposal made by the Government of China for the establishment of a sub-commission at Chungking. This sub-commission will function as a branch of the Commission in London. It may eventually be found necessary to set up other sub-commissions in the Far East.



SECRET

C.49  
22 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT CONVENTION FOR THE ESTABLISHMENT OF A UNITED  
NATIONS JOINT COURT

Memorandum by the Drafting Committee

Note 1

The Preamble has been designed to provide an appropriate setting for Article A 14 which Committee II decided should figure in the Preamble.

Note 2

Article 1 is a re-draft covering articles: A (Preuss 1), A 1 (Preuss 3), C (Preuss 2) and a new article of which the text was accepted by the Committee on September 14th. These articles had not all been dealt with on the same lines. It is believed that this new article covers the same ground without change of substance.

Note 3

In Article 3 "Members of the Court" has been substituted for "Judges" for the reason that if the judges are to be elected from the members of the Court it is useless to have a member of the Court who does not possess the qualifications necessary for election as a judge.

Note 4

Article 5. The text submitted by the Drafting Committee is identical with that adopted by Committee II, but the Drafting Committee wishes to draw attention to the fact that the effect of inserting the phrase "resulting from any cause other than election as judge of the Court", will be to limit the number of divisions which it will be possible to create. For instance, if ten Powers ratify the Convention and if six judges is regarded as the appropriate number to be available for each division there would, after enough judges have been elected to constitute five divisions, be no members of the Court left, and consequently no power to expand the Court so as to create a sixth division. This result was probably not observed when the amendment introduced on September 14th was adopted.

Note 5

Article 9. Paragraph 1 is new. The draft as it left Committee II had no provisions with regard to the resignation of a judge. The paragraph introduced by the Drafting Committee is intended to ensure that an entire division may not be paralysed owing to the resignation of a judge as might happen if there were not five other judges available on the spot. This might well occur if there were only one division functioning in the Far East.

Note 6

Article 12. The second sentence has been added to obviate constant repetition in the draft of "The Court and its Divisions".

Note 7

Article 13. Some words have been added to prevent the necessity of convoking the entire Court in public session to enable the judges to take the oath before entering on such duties as the election of the President or the preparation of the Rules of Court.

Note 8

The Protocol clauses submitted by the Drafting Committee make provision for a point which was not covered by the text considered by Committee II, namely, the winding-up of the Court when its work has been completed and the bringing of the Convention to an end.

Note 9

The other changes are purely verbal or concern only the order of the articles.

SECRET

C.50  
22 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

CONVENTION FOR THE ESTABLISHMENT OF A UNITED NATIONS  
JOINT COURT

Draft Presented by Committee II

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(Names of the High Contracting Parties .....)

desirous of ensuring that the perpetrators of war crimes committed by the enemy shall be brought to justice,

Recognising that in general the appropriate tribunals for the trial and punishment of such crimes will be national courts of the United Nations,

Mindful of the possibility that cases may occur in which such crimes cannot be conveniently or effectively punished by a national court,

Have decided to set up an Inter-Allied Tribunal before which the Governments of the United Nations may at their discretion bring to trial persons accused of an offence to which the Convention applies in preference to bringing them before a national court, and

For this purpose have appointed as their plenipotentiaries:-

(names of the plenipotentiaries)

who - having communicated their full powers found in good and due form -

Have agreed as follows :-

ARTICLE 1

1. There shall be established a United Nations War Crimes Court for the trial and punishment of persons charged with the commission of an offence against the laws and customs of war.

2. The jurisdiction of the Court shall extend to the trial and punishment of any person - irrespective of rank or position - who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfil a duty incumbent upon him has himself committed, an offence against the laws and customs of war.

3. The jurisdiction of the Court as defined above shall extend to offences committed by the 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 any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties.

## ARTICLE 2

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

- (a) Within thirty days after the coming into force of the Convention, each of the High Contracting Parties shall appoint three persons as members of the Court. 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 communicate them forthwith to the other High Contracting Parties.
- (b) Within fifteen days after the communication of the said names to the High Contracting Parties, His Britannic Majesty's Principal Secretary of State for Foreign Affairs shall call a conference of representatives of the High Contracting Parties to meet in London at such time and place as he may direct.
- (c) The conference shall proceed to the election of the judges of the Court from among the members of the Court. The election shall take place by secret ballot and by such method of voting as the conference may determine. The number of judges to be elected shall be determined by the conference.
- (d) Any state which becomes a party to the convention after it has come into force, shall appoint three members of the Court as provided in para.(a). These names shall in the same manner be communicated to the other High Contracting Parties.

## ARTICLE 3

The members of the Court shall be nationals of the High Contracting Parties and shall possess the highest legal qualifications. They shall be conversant with either English or French.

## ARTICLE 4

The date of the first meeting of the Court shall be set by the conference referred to in Article 2, para.(b) - this first meeting shall be in London. The Court shall thereupon decide upon its seat, which it may change at any time. The Court may decide to meet elsewhere than at its seat.

## ARTICLE 5

1. In the event of a vacancy among the judges, the Court shall proceed to the election of a judge from among the members of the Court.
2. In the event of a vacancy among the members of the Court resulting from any cause other than election as a judge of the Court, the High Contracting Party who appointed the member whose place is vacated shall designate his successor.

ARTICLE 6

Judges of the Court may not exercise any political or administrative function, or engage in any activity of a professional nature so long as they are judges of the Court.

ARTICLE 7

Judges of the Court as well as the Registrar of the Court and the Officer appointed under Art. 11, para. 2 to conduct prosecutions, shall enjoy diplomatic privileges and immunities.

ARTICLE 8

The Court shall elect its President and Vice-President, appoint its Registrar and otherwise perfect its organisation and that of its Divisions.

ARTICLE 9

1. A judge of the Court who desires to resign his post shall arrange with the President as to the date on which his resignation shall take effect.
2. The Court, with the concurrence of not less than three-fourths of the judges, may retire a judge who has ceased to be able adequately to perform the functions of his office.

ARTICLE 10

The Court shall establish rules for the administration and procedure of the Court and its Divisions. The Court shall have authority to amend or to supplement these rules from time to time.

ARTICLE 11

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. 2, para.(b) 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.

ARTICLE 12

1. For the trial of cases the Court shall sit in Divisions. Each of the Divisions shall in the trial of cases assigned to it exercise the powers conferred upon the Court.

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 13

Every Judge of the Court shall, at the commencement of the first public session of the Court which he attends, make a solemn declaration in open Court that he will exercise his functions, and duly administer justice without partiality or favour according to law.

ARTICLE 14

The Court may :

- (a) Order any witness to attend and be examined before the Court;
- (b) Summon any person with expert knowledge to give evidence in any case;
- (c) Order the disclosure and production of any document, exhibit or any other thing connected with the case;
- (d) Issue letters of request;
- (e) Appoint commissioners for the taking of evidence.

ARTICLE 15

Subject to the provisions of this Convention, an accused person appearing for trial before the Court shall, in addition to any specific rights which he may enjoy under the convention or under the rules be entitled :

- 1. To be informed in writing of the charges against him, which shall be set forth in sufficient detail to give him a reasonable opportunity to prepare his defence.
- 2. To have a reasonable opportunity to prepare his defence.
- 3. To have the benefit of qualified legal counsel chosen by himself. If the accused is not represented by counsel of his own choice, the Court shall assign qualified legal counsel for his defence.
- 4. To be present during the conduct of the proceedings.
- 5. To make such pleas and defenses as are generally recognised by civilised nations.
- 6. To produce evidence upon his behalf.
- 7. To decline to give evidence against himself.



ARTICLE 16

Hearings shall be public unless the Court for reasons which it states directs that the hearing shall take place in camera.

ARTICLE 17

1. No person shall be prosecuted before the Court if he has already been convicted or acquitted of the same offence before a Court of one of the High Contracting Parties.

2. No trial or sentence by a Court of an enemy or former enemy state shall bar trial or sentence by the Court. If a sentence has been imposed by a 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.

ARTICLE 18

The Court shall apply :

- (a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing laws of war parties thereto;
- (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) The principles of criminal law generally recognised by civilised nations;
- (e) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

ARTICLE 19

- 1. The Court shall sit in private to consider its judgment. The judges shall observe secrecy as to the nature of their deliberations.
- 2. Every judgment or order shall be pronounced at a public session and shall state the reasons on which it is based.
- 3. The decisions shall be by a majority of the judges participating.

ARTICLE 20

The Court shall have power to adjudge appropriate punishments including death or any lesser punishment.

ARTICLE 21

Sentences shall be executed as directed by the Court.

ARTICLE 22

The expenses incurred in connection with the establishment and functioning of the Court, the salaries and expenses of the judges and officials of the Court and of their staff, and by the execution of sentences imposed by the Court, shall be defrayed in such manner as the High Contracting Parties may determine.

ARTICLE 23

The High Contracting Parties undertake severally to adopt such measures as may be necessary to give effect to the provisions of the Convention.

ARTICLE 24

The Convention shall be ratified.

The ratifications shall be deposited in London with the Government of the United Kingdom of Great Britain and Northern Ireland.

A procès verbal shall be drawn up recording the receipt of each ratification and a copy duly certified shall be sent through the diplomatic channel to each of the High Contracting Parties.

ARTICLE 25

As soon as the number of ratifications deposited with the Government of the United Kingdom is deemed by that Government sufficient to justify the establishment of the Court, His Britannic Majesty's Principal Secretary of State for Foreign Affairs shall address a communication to that effect to the other High Contracting Parties, and the Convention shall enter into force on the tenth day after the dispatch of such communication.

ARTICLE 26

Members of the United Nations who are not signatories of the Convention are allowed to adhere to it.

For this purpose they must make their adhesions known to the High Contracting Parties by means of a written notification addressed to the Government of the United Kingdom, and by it communicated to all the other Contracting Parties.

ARTICLE 27

As soon as the President of the Court can fix a date by which the Court will have completed the trial of persons who are brought before it for offences within its jurisdiction, he shall address a notification to His Britannic Majesty's Principal Secretary of State for Foreign Affairs to that effect.

Copies of this notification shall be communicated by him through the diplomatic channel to all the other High Contracting Parties, and he shall propose a date on which the Court shall be wound up and the Convention shall cease to operate.

ARTICLE 28

Unless an agreement is arrived at between the High Contracting Parties for the variation of the date referred to in the last paragraph of Article 27, the said date shall be communicated to the President and arrangements shall be made by him for winding up the Court by the said date.

ARTICLE 29

Without prejudice to the validity and the completion of any sentences imposed by the Court which may not have expired at the date fixed for the winding up of the Court, and without prejudice to the distribution between the High Contracting Parties of such expenditure as it may be necessary to incur after the date fixed for the winding up of the Court in connection with uncompleted sentences imposed by the Court, or in connection with the winding up of its affairs or the preservation of its archives or with other matters and subject to any further agreement which may be concluded between the High Contracting Parties, the Convention shall cease to have effect on the date fixed for the winding up of the Court.



SECRET

C.50(1)  
30 September 1944

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT CONVENTION FOR THE ESTABLISHMENT OF A UNITED NATIONS WAR CRIMES  
COURT

(Names of the High Contracting Parties ....)

desirous of ensuring that the perpetrators of war crimes committed by the enemy shall be brought to justice.

Recognising that in general the appropriate tribunals for the trial and punishment of such crimes will be national courts of the United Nations,

Mindful of the possibility that cases may occur in which such crimes cannot be conveniently or effectively punished by a national court,

Have decided to set up an Inter-Allied Court before which the Governments of the United Nations may at their discretion bring to trial persons accused of an offence to which the Convention applies in preference to bringing them before a national court, and

For this purpose have appointed as their plenipotentiaries:-

(names of the plenipotentiaries)

who - having communicated their full powers found in good and due form -

Have agreed as follows:-

ARTICLE 1

1. There shall be established a United Nations War Crimes Court for the trial and punishment of persons charged with the commission of an offence against the laws and customs of war.

2. The jurisdiction of the Court shall extend to the trial and punishment of any person - irrespective of rank or position - who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfil a duty incumbent upon him has himself committed, an offence against the laws and customs of war.

3. The jurisdiction of the Court as defined above shall extend to offences committed by the 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 any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties.

#### ARTICLE 2

The Judges of the Court and Members of the Court shall be chosen in accordance with the following provisions:

- (a) Within thirty days after the coming into force of the Convention, each of the High Contracting Parties shall appoint three persons as members of the Court. 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 communicate them forthwith to the other High Contracting Parties.
- (b) Within fifteen days after the communication of the said names to the High Contracting Parties, His Britannic Majesty's Principal Secretary of State for Foreign Affairs shall call a conference of representatives of the High Contracting Parties to meet in London at such time and place as he may direct.
- (c) The conference shall proceed to the election of the judges of the Court from among the members of the Court. The election shall take place by secret ballot and by such method of voting as the conference may determine. The number of judges to be elected shall be determined by the conference.
- (d) Any state which becomes a party to the convention after it has come into force, shall appoint three members of the Court as provided in para. (a). These names shall in the same manner be communicated to the other High Contracting Parties.

#### ARTICLE 3

The members of the Court shall be nationals of the High Contracting Parties and shall possess the highest legal qualifications. They shall be conversant with either English or French.

#### ARTICLE 4

The date of the first meeting of the Court shall be set by the conference referred to in Article 2, para. (b) - this first meeting shall be in London. The Court shall thereupon decide upon its seat, which it may change at any time. The Court may decide to meet elsewhere than at its seat.

#### ARTICLE 5

1. In the event of a vacancy among the judges, the Court shall proceed to the election of a judge from among the members of the Court.
2. In the event of a vacancy among the members of the Court the High Contracting Party who appointed the member whose place is vacated shall designate his successor.

ARTICLE 6

Judges of the Court may not exercise any political or administrative function, or engage in any activity of a professional nature so long as they are judges of the Court.

ARTICLE 7

The Court shall elect its President and Vice-President, appoint its Registrar and otherwise perfect its organisation and that of its Divisions.

ARTICLE 8

Judges of the Court as well as the Registrar of the Court and the Officer appointed under Art. 11, para. 2 to conduct prosecutions, shall enjoy diplomatic privileges and immunities.

ARTICLE 9

1. A judge of the Court who desires to resign his post shall arrange with the President as to the date on which his resignation shall take effect.
2. The Court, with the concurrence of not less than three-fourths of the judges, may retire a judge who has ceased to be able adequately to perform the functions of his office.

ARTICLE 10

The Court shall establish rules for the administration and procedure of the Court and its Divisions. The Court shall have authority to amend or to supplement these rules from time to time.

ARTICLE 11

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. 2, para. (b) 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.

ARTICLE 12

1. For the trial of cases the Court shall sit in Divisions. Each of the Divisions shall in the trial of cases assigned to it exercise the powers conferred upon the Court.



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 13

Every Judge of the Court shall, at the commencement of the first public session of the Court which he attends, make a solemn declaration in open Court that he will exercise his functions, and duly administer justice without partiality or favour, according to law.

#### ARTICLE 14

The Court may :

- (a) Order any witness to attend and be examined before the Court;
- (b) Summon any person with expert knowledge to give evidence in any case;
- (c) Order the disclosure and production of any document, exhibit or any other thing connected with the case;
- (d) Issue letters of request;
- (e) Appoint commissioners for the taking of evidence.

#### ARTICLE 15

Subject to the provisions of this Convention, an accused person appearing for trial before the Court shall, in addition to any specific rights which he may enjoy under the convention or under the rules be entitled to:

- 1. To be informed in writing of the charges against him, which shall be set forth in sufficient detail to give him a reasonable opportunity to prepare his defence.
- 2. To have a reasonable opportunity to prepare his defence.
- 3. To have the benefit of qualified legal counsel chosen by himself. If the accused is not represented by counsel of his own choice, the Court shall assign qualified legal counsel for his defence.
- 4. To be present during the conduct of the proceedings.
- 5. To make such pleas and defenses as are generally recognised by civilised nations.
- 6. To produce evidence upon his behalf.
- 7. To decline to give evidence against himself.

ARTICLE 16

Hearings shall be public unless the Court for reasons which it states directs that the hearing shall take place in camera.

ARTICLE 17

1. No person shall be prosecuted before the Court if he has already been convicted or acquitted of the same offence before a Court of one of the High Contracting Parties.
2. No trial or sentence by a Court of an enemy or former enemy state shall bar trial or sentence by the Court. If a sentence has been imposed by a 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.

ARTICLE 18

The Court shall apply:

- (a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing laws of war between the parties thereto;
- (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) The principles of criminal law generally recognised by civilised nations;
- (e) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

ARTICLE 19

1. The Court shall sit in private to consider its judgment. The judges shall observe secrecy as to the nature of their deliberations.
2. Every judgment or order shall be pronounced at a public session and shall state the reasons on which it is based.
3. The decisions shall be by a majority of the judges participating.

ARTICLE 20

The Court shall have power to adjudge appropriate punishments including death or any lesser punishment.

ARTICLE 21

Sentences shall be executed as directed by the Court.

ARTICLE 22

The expenses incurred in connection with the establishment and functioning of the Court, the salaries and expenses of the judges and officials of the Court and of their staff, and by the execution of sentences imposed by the Court, shall be defrayed in such manner as the High Contracting Parties may determine.

ARTICLE 23

The High Contracting Parties undertake severally to adopt such measures as may be necessary to give effect to the provisions of the Convention.

ARTICLE 24

The Convention shall be ratified.

The ratifications shall be deposited in London with the Government of the United Kingdom of Great Britain and Northern Ireland.

A procès verbal shall be drawn up recording the receipt of each ratification and a copy duly certified shall be sent through the diplomatic channel to each of the High Contracting Parties.

ARTICLE 25

As soon as the number of ratifications deposited with the Government of the United Kingdom is deemed by that Government sufficient to justify the establishment of the Court, His Britannic Majesty's Principal Secretary of State for Foreign Affairs shall address a communication to that effect to the other High Contracting Parties, and the Convention shall enter into force on the tenth day after the dispatch of such communication.

ARTICLE 26

Members of the United Nations who are not signatories of the Convention are allowed to adhere to it.

For this purpose they must make their adhesions known to the High Contracting Parties by means of a written notification addressed to the Government of the United Kingdom, and by it communicated to all the other Contracting Parties.

ARTICLE 27

As soon as the President of the Court can fix a date by which the Court will have completed the trial of persons who are brought before it for offences within its jurisdiction, he shall address a notification to His Britannic Majesty's Principal Secretary of State for Foreign Affairs to that effect.

Copies of this notification shall be communicated by him through the diplomatic channel to all the other High Contracting Parties, and he shall propose a date on which the Court shall be wound up and the Convention shall cease to operate.



ARTICLE 28

Unless an agreement is arrived at between the High Contracting Parties for the variation of the date referred to in the last paragraph of Article 27, the said date shall be communicated to the President and arrangements shall be made by him for winding up the Court by the said date.

ARTICLE 29

Without prejudice to the validity and the completion of any sentences imposed by the Court which may not have expired at the date fixed for the winding up of the Court, and without prejudice to the distribution between the High Contracting Parties of such expenditure as it may be necessary to incur after the date fixed for the winding up of the Court in connection with uncompleted sentences imposed by the Court, or in connection with the winding up of its affairs or the preservation of its archives or with other matters and subject to any further agreement which may be concluded between the High Contracting Parties, the Convention shall cease to have effect on the date fixed for the winding up of the Court.

SECRET

C.51  
22 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

RECOMMENDATION IN FAVOUR OF THE ESTABLISHMENT BY THE  
SUPREME ALLIED MILITARY COMMAND OF INTER-ALLIED  
TRIBUNALS.

Draft Memorandum prepared by the Committee  
appointed on September 19th.

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

The following recommendations, however, are submitted by the Commission because it believes that, if adopted, they would help to render such Tribunals effective organs for carrying out the policy adopted by the Allied Nations.

1. The judges of the Inter-Allied Tribunals should be nationals of the United Nations, possessing the highest legal qualifications and conversant with French and English. It is assumed that it is one or other of these two languages that proceedings before such Tribunals, at any rate in the European theatre of war, will be conducted.
2. The judges of the Tribunals should be chosen so as to afford, so far as may be, fair representation to the various United Nations.
3. The jurisdiction of the Tribunals should comprise violations of the laws of war committed by any members of the enemy forces, or civilian authorities, or other persons acting on behalf of the enemy, together with their accomplices; such jurisdiction being set out in comprehensive terms. The law to be applied by the Tribunals will be the laws of war: i.e. the international law to be found in treaties, in custom, and in the unwritten law of war.
4. The Tribunals should be allowed to sit wherever they can most effectively deal with the cases brought before them; for the trial of cases divisions of not less than five judges should be constituted.
5. The Tribunals should be allowed to frame their own rules of procedure, but should be obliged to provide all the guarantees for ensuring a fair trial which are usual in civilised countries.
6. The prosecution of offenders before the Tribunals should, in general be left to the individual United Nation concerned, but in cases where the latter cannot conveniently undertake the prosecution, there should be an officer of the Tribunal to whom the duty can be entrusted.

P.T.O.

7. The Tribunals should have power to oblige persons to give evidence and to produce documents; and also to obtain evidence from other sources.

8. Trial before an enemy court should not bar proceedings before an Inter-Allied Tribunal, but any penalty imposed by an enemy court in respect of the same offence should be taken into account by the Tribunal.

The Commission is satisfied that Inter-Allied Tribunals constituted in accordance with the above recommendations would enable the trial of war criminals who cannot conveniently be brought before national tribunals to be initiated without loss of time, and thereby obviate inconvenience resulting from the delay that must ensue before any Inter-Allied Court set up by treaty could be brought into being.



SECRET

C.52  
22 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

RECOMMENDATION IN FAVOUR OF THE ESTABLISHMENT BY THE  
SUPREME ALLIED MILITARY COMMAND OF INTER-ALLIED  
TRIBUNALS.

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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 recognised 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 recognised 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 recognises 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.

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.

P.T.O.

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.

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.



SECRET

C.52(1)  
26 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

RECOMMENDATION FOR THE ESTABLISHMENT BY SUPREME  
MILITARY COMMANDERS OF MIXED MILITARY TRIBUNALS  
FOR THE TRIAL OF WAR CRIMINALS.

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 recognised 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 or incident to the operations of the enemy or persons aiding or assisting the enemy. It is recognised 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 war criminals. However, it recognises 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 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.

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.

P.T.O.

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.

C. 53

Never issued



Never circulated to Commission

SECRET

C.54  
26 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT RECOMMENDATIONS REGARDING THE STURMABTEILUNGEN (S.A.),  
SCHUTZSTAFFELN (S.S.) AND GEHEIME STAATSPOLIZEI (GESTAPO)  
PRESENTED BY COMMITTEE III (DOC. C.53).

Minority Report by Dr. Eöer as regards  
Paragraph 2.

I suggest accepting the following recommendations in respect of  
the plea of superior orders :

- 1) An order given by a superior to an inferior to commit a crime is  
not in itself a defence;
- 2) The Court may consider in individual cases whether the accused  
was placed by such an order in a state of irresistible compulsion,  
and acquit him or mitigate the punishment accordingly;
- 3) 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.

This text was voted by the London International Assembly, on June  
21st, 1943.

I recommend this text because it is in accordance with the modern  
criminological theory and judicial practice of almost all United Nations  
in matters of necessity or irresistible compulsion as reasons for  
exemption from criminal liability.

In addition, this text takes into account the fact that there are  
in Germany and the occupied countries, organisations such as the  
Gestapo, S.S. and S.A. and similar, with voluntary membership, the purpose  
and the means of which are of a clearly criminal nature.

SECRET

C.55  
27 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

REPORT OF THE SUB-COMMITTEE APPOINTED TO CONSIDER  
WHETHER THE PREPARATION AND LAUNCHING OF THE PRESENT  
WAR SHOULD BE CONSIDERED "WAR CRIMES"

Adopted by Committee III on 18th September, 1944.

On 6th June, 1944, the Commission had before it a resolution proposed by Committee III on the subject of the "Scope of the Retributive Action of the United Nations" (Doc. C.20). This resolution contained inter alia the following statement :

"From this general point of view the United Nations War Crimes Commission considers that the following categories of crimes are within the scope of its work:

"1. The crimes committed for the purpose of preparing or launching the war, irrespective of the territory where those crimes have been committed."

The Commission referred this statement back to the Committee for further consideration and the Committee invited Dr. Eder, Lieut.-Col. Hodgson, Dr. de Moor, and Sir Arnold McNair (if he were willing to serve) to form a sub-committee to consider whether the crimes mentioned in the above extract, and the preparation and launching of the war itself should be considered as war crimes.

Lieut.-Col. Hodgson, Dr. de Moor and Sir Arnold McNair have met and considered a note which the latter has been good enough to prepare, (Doc. C.43). As the result of their discussions, Lieut.-Col. Hodgson and Dr. de Moor recommend Committee III to adopt the following conclusions:\*

- (I) Acts committed by individuals merely for the purpose of preparing for and launching aggressive war and not falling within the next paragraph are, lege lata, not "war crimes".
- (II) Acts committed before the outbreak of war which command or procure the commission of "war crimes" after the outbreak of war, such as a pre-war instruction that no prisoners should be taken, which was followed and resulted in a refusal to take prisoners after the outbreak of war, are war crimes.
- (III) However, such acts as mentioned sub.(I) and especially the acts and outrages against the principles of the laws of nations and against international good faith perpetrated by the responsible leaders of the axis powers and their satellites in preparing and launching this war are of such gravity that they should be made the subject of a formal condemnation in the peace-treaties.
- (IV) It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.

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\* Dr. Eder has prepared a separate report (Doc. C.56).

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SECRET

C.56(a)  
6th October, 1944

UNITED NATIONS WAR CRIMES COMMISSION

Supplement to the Minority report presented by Dr. B. Ecer on the question whether the preparation and launching of the present war should be considered as crimes being within the scope of the United Nations War Crimes Commission

On page 11, I referred to the memorandum of the French members of Commission II of the London International Assembly. To be precise, I should like to point out that it was not a memorandum but "Observations personnelles présentées par le professeur René Cassin" on 26th September, 1942.

I quote from these documents:

- (a) "La 'guerre totale' que les puissances totalitaires ont entreprise contre l'indépendance des nations et contre les libertés les plus sacrées de l'homme, se manifeste - en dehors des combats eux-mêmes - par une 'criminalité totalitaire'.

Les crimes ainsi commis sur une échelle effrayante suscitent l'horreur, et appellent un châtiment ayant à la fois un caractère de rétribution et un but exemplaire de prévention pour l'avenir."

- (b) "En réalité, la création immédiate d'une juridiction Internationale Criminelle pour punir les chefs responsables d'avoir recouru à la guerre interdite par le Pacte de Paris du 27 août 1928 est pleinement justifiée. La guerre d'agression étant hors la loi, comment ceux qui l'ont déclanchée seraient-ils qualifiés pour invoquer la loi? Il ne faut pas oublier du reste que l'Assemblée de la Société des Nations a condamné unanimement la guerre d'agression comme 'crime international', dès 1924, donc à une époque où l'Allemagne, l'Italie et le Japon, tous trois signataires du Pacte Briand-Kellogg, étaient aussi tous trois membres de la Société des Nations. L'incrimination légale existe d'ores et déjà et elle est opposable à tous les Etats civilisés qui ont été, soit membres de la Société des Nations, soit signataires du Pacte de Paris, soit signataires des deux Pactes. Dans ce cas, beaucoup d'infractions aux lois de la guerre, se présenteraient pour les responsables du crime initial de la guerre d'agression, comme une circonstance aggravante."

Professor Cassin expresses the opinion that the "aggressive war" in itself is the fundamental crime to be punished by an International Jurisdiction because it is a "total war" which manifests itself in "total criminality" and because it has been denounced as crime by the Briand-Kellogg Pact in connection with the legal conviction of the League of Nations. Professor Cassin has obviously in his mind the Geneva Protocol.

2. To the list of experts in international and criminal law who regard "aggressive war" (irrespective of the circumstance whether or not it is at the same time a "total war") as crime, I should like to add:

- (a) Belcourt (Chairman of Canadian Branch of the Interparliamentary Union). In his opinion "aggressive" being an illegal war is nothing but a series of crimes, i.e. murders, arsons, robberies, etc.

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- (b) Garofalo (Italy), regards "aggressive war" as a crime.
- (c) Garraud (France) indicates as a type of international crime "aggressive war".
- (d) La Fontaine (Belgium) quoted Lloyd George "la guerre est un crime punissable par la loi internationale" and adds his own opinion that "aggressive war" is an international crime.
- (e) Lanza (Catane), says that war is a phenomenon of collective criminality.
- (f) Lapradelle (France) says that before, there were only two types of international crimes: traffic in women and children and piracy, now it is "aggressive war" as well.
- (g) Mercier (Switzerland) regards "aggressive war" as a crime.

All these men are quoted in the Introduction to the book "La criminalité collective des Etats et le droit international", written by Professor Vespasie Pella, edition Bucharest 126, who holds the same opinion.

3. To the list of experts who regard the present war as a crime because it is a total one, and who think that the political and military leaders of the States who launched it must be punished for this fundamental crime, I should like to add Professor Trainin of the University of Moscow, who said in an article in the "Soviet War News" of September 4th, 1944:

(a) "Specifically this category of worst offenders against international and criminal law include first and foremost the head and members of the German Government, Hitler and his cabinet ministers. This is the first, most dangerous, most vicious body of international offenders.

They took the lead in preparing, organising and perpetrating the most heinous crime in the history of the human race, the perfidious attack on the Soviet Union, accompanied by the flagrant violation of all human standards and all the canons and regulations of international law."

(b) "The German Army Command organising and directing the operations of this army of plunder is also to be classed with these criminal leaders of the Party and Government. And finally, immediately associated with this group are the numerous officials and deputies, commissioners and Gauleiters who are putting into practice the policy of terror, plunder and violence in the occupied territories and in Germany itself."

SECRET

UNITED NATIONS WAR CRIMES COMMISSION

C.56

27th September 1944.

Minority report presented by Dr. B.Ečer, on the question whether the preparation and launching of the present war should be considered as crimes being within the scope of the United Nations War Crimes Commission.

I.

Committee III voted on May 15th unanimously a resolution /Doc.20/, as a result of the discussion of my report on the "Scope of the Retributive Action" /Doc.III-4/. This resolution was sent back by the Commission on June 6th to Committee III for "further consideration" of its first point.

The report Doc.III/9 is the result of this "further consideration" in which the authors /Dr. de Moor and Lt.Col. Hodgson/, were helped by Sir MacNair's paper /Doc.C.43/ /. Committee III at the meeting of 18th September, accepted the report and voted for its conclusions against my dissenting vote. I announced a minority report and I am presenting it in accordance with Article III, rule 2 of the "Rules".

First of all I wish to clarify the position of the problem.

a/ In my original report /Doc.III-4/ I did not examine whether an abstract "aggressive war" is or is not a "war crime". My report deals with the present war, i.e. the second World War, which is not only an "aggressive war" but moreover, a "total war", or, as the French say, "la guerre biologique".

b/ My report deals with the question, whether the preparation and the launching of the second World War are crimes being within the scope of the retributive programme of the Allies - I used the word "crimes" established by the general principles of criminal law. The "preparation and launching of the second World War" means in criminological language:

a/ the decision of the Axis Chiefs of States, Governments and High Commands to prepare and launch the present aggressive war as a "total war", without respect for any

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law, either international or national, i.e. as a series of crimes.

b/ the order given in 1938 and subsequent years, by the Axis Chiefs of States, Governments and High Commands, to their armies to invade foreign countries and to commit crimes against the "laws and customs of war" and against the national criminal law.

Owing to this, my fundamental point of view, I disagree with the report, Doc.III/9, for the following reasons:-

a/ conclusion 1 is not right even if limited to the preliminary presupposition that an "aggressive war" is not a crime and that consequently the acts preparing it are not "war crimes".

b/ the report entirely neglects the fact that the present war is a "total war", not only an "aggressive war".

A.

"Aggressive War" and its legal consequences.

Although I think that we must tackle the problem not from an abstract point of view as a problem of "aggressive war" in abstracto, but as a problem of specific and concrete aggressive war, i.e. the total war 1938/44, I should like to deal with the arguments of the report concerning the criminality of simple "aggressive war", because I regard them as not convincing.

I admit that I have not the same authority and experience in the sphere of international law as Prof. MacNair and both my colleagues who are authors of the report. Thus, I will quote in support of my opinion, some authors of equal authority and competence as Prof. MacNair, Dr.de Moor and Lt.Col. Hodgson.

1/ The Covenant of the League of Nations.

I admit that the Covenant did not denounce the "aggressive war" as a crime in a manner prescribed by the rules concerning penal legislation. But we must keep in mind that the language



of International Law and of its instruments is something other than the language of national criminal laws and of criminal codes. What is important in my mind is the fact that the Covenant of the League of Nations is the first positive attempt to transform into legal provision the moral condemnation of aggressive wars as expressed for instance, by Vattel.

The fallacy of the right of a sovereign state to wage an "aggressive war" was recognised although not in a satisfactory manner. The Covenant stopped short half way it is true. It lessened the possibility of war but did not forbid war absolutely and did not declare the "aggressive war" to be an international crime. We all know the notorious gap in the Covenant through which even an "aggressive war" could slip, the famous provision of Article 15, paragraph 7.

The "public conscience" was not satisfied by the Covenant. The "public conscience" was much further ahead than the authors of the Covenant.

If we accept the opinion of a great English criminologist, Professor Ottley, quoted by Kenny in his "Outlines of Criminal Law" 1935, p.29, that criminal legislation must only aim at expressing "the judgment of the average conscience as to the minimum standard of right" and when we apply this general principle to the problem of "aggressive war" then the judgment of the "average conscience", or "the public conscience" /both expressions mean the same thing/, was admirably described by the late Dr. Bishop, Secretary of the Grotius Society, in his paper on "Criminality of war and its prevention", read before the Grotius Society on May 5th 1943, as follows:-

"It has dawned upon the nations that war is not only illegal but that he who makes war or rather who disturbs the peace and who thereby becomes or threatens to become

responsible for the wanton sacrifice of human lives, is a criminal, and as such is punishable for a crime committed against mankind".

The Covenant remained beyond "judgment of the average conscience".

2/ The Geneva Protocol.

The Geneva Protocol was an attempt to satisfy the "public conscience", and to stop up the famous gap in the Covenant. It has been voted by the League of Nations but it has not been ratified. This lack of ratification does not deprive the Geneva Protocol of its great importance as an instrument with the help of which, we are able to interpret rightly the texts of other instruments, as for instance, the Briand-Kellogg Pact, or the various Pacts of non-aggression.

The importance of the Geneva Protocol lies in the fact that it expressed clearly, without reservations and without clauses confusing the sense of the words, the legal conviction of the League of Nations -- which was the legal conviction of the whole of civilised humanity -- that a war of aggression is an international crime. And it did it at a time when the plans for a total warfare were not publicly known.

The language of the Protocol is clear and leaves no room for sophist misconstruction. In its preamble it says:

"Recognising the solidarity of the members, asserting that a war of aggression constitutes a violation of this solidarity and an international crime...."

Is it possible to maintain after this that the words "International crime" only mean "moral crime"? Politis, one of the rapporteurs, answered this question in his speech to the Assembly of the League of Nations. He declared that a war of aggression "se trouve non seulement condamnée, non seulement considérée comme un crime international, mais encore entourée des sanctions, accompagnée du châtiement

nécessaire pour la prévenir et au besoin pour la réprimer".

This is the language of criminal law: crime, penalty, prevention, repression. The Assembly of the League of Nations approved this interpretation.

### 3/ The Briand-Kellogg Pact.

What is its bearing on the question whether aggressive war is a crime? Compared with the Geneva Protocol its importance is, of course, less. It does not declare "aggressive war" to be a crime as the Geneva Protocol did, or determine sanctions for originating a war against the aggressor State, nor personal punishment against its leaders. But is the Briand-Kellogg Pact, therefore, merely a platonic, practically valueless, condemnation of aggression?

There is an extensive literature dealing with the meaning and significance of the Briand-Kellogg Pact. The first, quasi authentic interpretation of the Pact was made by Briand himself. According to the account of the ceremony of signature, when signing the Pact he declared, with the enthusiastic agreement of all the assembled delegates of the contracting parties, literally as follows: ".... une pareille guerre ~~/agressive/~~ est enfin destituée, juridiquement, de ce qui constituait son plus grand danger: sa légitimité. Frappée désormais d'illégalité, elle est soumise au régime conventionnel d'une véritable mise hors la loi qui expose le délinquant au désaveu certain, à l'inimitié probable de tous ses contractants",

Another quasi authentic interpretation of the Pact is the speech of the United States Secretary of State for Foreign Affairs, Stimson /the present U.S.A. War Minister/, who succeeded the coframer of the Kellogg Pact in this office. In 1932, speaking of the wars condemned by the Pact, Stimson declared: "It is an illegal thing. Hereafter when two nations engage in armed conflict, either one or both of them must be wrongdoers - violators of this general treaty law".



In another part of his speech he describes such States as law-breakers and recommends jurists to re-examine various laws and treaties, because numerous legal precedents will have become obsolete owing to the Pact. What good advice for 1944.

From the many opinions on the Pact expressed by experts on International Law, I will quote that of the Belgian, Descamps, member of the Legal Committee which drew up the Statute of the Court, and author of a proposal for an International Criminal Court: "Le Pacte aboutit à une condamnation radicale, intégrale et absolue de la guerre comme institution". The author means war of aggression, which is the only kind forbidden by the Pact.

The Frenchman, Georges Soelle, said that the Briand-Kellogg Pact abolished the right to make war /except defensive war or military action determined by the League of Nations or sanctions/, and that the theory generally agrees with the view that to start a war of aggression "is an international crime".

The most interesting attempt at a scientific interpretation of the Pact was undertaken by the International Law Association in London. In September 1934 this Association convened a conference of its members in Budapest with the agenda: Interpretation of the Briand-Kellogg Pact. The outcome of the work of the conference was the adoption of the so-called "articles of interpretation" in which the meaning, scope, aim and effect of the Briand-Kellogg Pact was expounded. The discussion was very interesting.

a/ Mr. Wyndhan A. Bewes stated "When our Oxford Conference took place in 1932, we were fortunate indeed to meet perhaps on the very day when the American Secretary of State, Mr. Stimson, made his famous oration". /See page 5/.

b/ Mr. C.G. Dehn stated: In the view of the Committee, the phraseology of the Pact enables us to accept the view which

Monsieur Briand expressed on the day the Pact was signed. "War", he said, "is branded with illegality. It is by mutual accord truly and regularly outlawed". That is the fundamental change in International Law which the Committee have recognised, and if the Conference takes that view, and then proceeds to draw the inevitable consequences and set them out in clear language which the public can understand, we shall be doing useful work. The position is, therefore, that whereas previously these rights and duties sprang up automatically as a matter of law as soon as war broke out, now, since the Pact, when war breaks out, these rights and duties do not spring up, they are not there; the violator can claim nothing, he has been deprived of his rights. That, in view of the Committee, is the position at the outbreak of war, and of course, I agree with that view. It is fundamental!

c/ Mr. Campbell Lee /American delegate/ stated: "As a citizen of the country whose Government initiated the Pact of Paris and as a member of the Committee, I rise to second the Report in principle.

The Pact is a part of the supreme law of the United States, on a par with the Constitution itself, which says: "This Constitution..... and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land! Today it is accepted that a new and revolutionary principle was adopted in 1928. The violator of this common treaty must be taken into consideration. His acts have been declared illegal by the whole world".

d/ Dr. Thorvald Boye stated: "The State which in contravention of the Pact of Paris begins a war must be branded an offender against the Law of Nations, as a criminal against humanity".

e/ Mr. Ake Hammarskjöld agreed with Mr. Campbell Lee that Art.2 of the Kellogg Pact constitutes the most important part of that diplomatic instrument and that this



so-called outlawry of war contained in Art.1, is the consequence of this obligation to seek the solution of international difficulties only by pacific means.

f/ Dr. Žourek stated: "on voit par là que le premier membre de phrase de l'article 1 comprend une norme du droit international pénal, protégeant l'ordre public et l'intérêt général. La violation de cette norme doit être considérée comme un délit international.

Le recours à la guerre étant ainsi devenu un crime international, l'Etat qui aide le délinquant se rend également coupable de la violation du Pacte Briand-Kellogg".

I could quote plenty of other names.

Thus the Axis Chiefs of States, members of their Governments and High Commands were aware, when they started this war, that they were committing an act which had been declared by an international instrument, binding upon them, to be illegal, an unlawful act. This is sufficient for criminal guilt. More is not demanded, even in the case of an ordinary criminal, to establish the mens rea of a criminal act.

In a paper entitled "Trial and punishment of war criminals" which is a report of a Special Committee of the Section of International and Comparative law of the American Bar Association, three American lawyers, Messrs. Edwin D. Dickinson, Georges A. Finch and Charles Cheney Hyde, stated that "the principles of criminal law generally accepted among civilised nations are also a proper source of international law". /Article 5 of the paper/ And in Article 7 of the same paper, these three experts say: "As regards the element of intent, broadly conceived, there should be no difficulty. The Axis leaders have long since warned us of the kind of war which they intend to wage".

In fact: they warned us, they stated publicly that they will launch and wage a total war, i.e. a war in which law will not be respected. Thus, a criminal war./I come to this important point in paragraph B of my paper/.



I sum up the legal position of the "aggressive war" according to the Briand Kellogg Pact interpreted in the spirit of the Covenant, of the Geneva Protocol and of numerous Pacts of non-aggression, as follows:

A Chief of State, members of the Government and of the High Command of a State, who started a war forbidden by international law thereby gave the order for the perpetration of a whole chain of most serious crimes punishable by the criminal law of all States. As soon as international law, as law of a higher order, deprived "aggressive war" of its legality, it was seen in its original, true likeness: a chain of crimes punishable by the heaviest penalties in the criminal law of the countries affected.

But let us suppose that the Briand-Kellogg Pact and the Pacts of non-aggression concluded by the Axis Powers are not a sufficient legal basis for the incrimination of an "aggressive war" and for the personal criminal responsibility of its authors, then the United Nations are entitled to apply the view of a classical German jurist of world reputation, Ihering, who wrote /quoted by Mérignac/ that the man guilty of a monstrous crime never imagined before, must be punished even though the law has so far pronounced his act to be a crime. Can we imagine a more monstrous crime than modern total war? But this brings me to the last and in my mind, to the most important aspect of the problem overlooked by the report: to the criminality of total war.

B.

The Criminal Character of the total second World War.

The second World War is not only an "aggressive war" but at the same time, a total war. What is a total war? The best definition was given by its author Adolf Hitler according to the teaching of the "great" theorist of "total war", Ludendorff. Hitler stated:

a/ "I shall shrink from nothing. No so-called international law, no agreements will prevent me from making use of any

advantage that offers" /Schwarzenberger "International Law and Totalitarian Lawlessness", London 1943, page 16/.

b/ "My behaviour in war-time will be no different. The most terrible warfare is the kindest. I shall spread terror by the surprise employment of all my measures. The important thing is the sudden shock of an overwhelming fear of death" /Schwarzenberger, p.16-17/.

And he and his satellites acted on the lines of these statements. The second World War was planned, prepared and launched by the Axis rulers and military leaders not only as an aggressive war but as a total one. And this is, from the criminological point of view, a very important fact. A total war as conceived, planned, prepared and launched by the Axis rulers and military leaders in accordance with their gangster - and pirate - philosophy is a criminal war because of its criminal aims and of its criminal means. The purpose is the subjugation and extermination of whole nations and races, that is, mass enslavement or mass murder. This means: the war was planned, prepared and launched intentionally as a series of crimes ordered in advance, crimes not in the moral sense only but in the sense of the criminal law of the invaded countries. The order to launch such a war is a criminal order because it is an order to commit mass crimes, in the majority, ordinary crimes of the most heinous nature.

And the Allies confirmed in various declarations the criminal character of the present war. I am quoting some of them:

a/ The Czechoslovak and Polish Governments in their common declaration of November 11th 1940, stress the criminal purpose of the German aggression which is "aiming at the destruction of our two ancient nations". The same fact is stressed in the declaration of the Polish Government of December 20th 1940.

b/ The Soviet Government in the note of April 17th 1942 enumerates the individual criminal purposes of the German



aggression as parts of a general criminal plan, and continues: "With such villainous plans the German fascist hordes invaded our country". The note stresses the planned character of the atrocities and denounces the German attack as a criminal attack. Surely not criminal in the sense of "moral crime" which it would be enough for history or posterity to judge.

c/ Marshal Stalin stated in his speech on November 6th 1943 that it is necessary to take measures against "those criminals who are responsible for this war".

d/ Mr. Churchill stated in his speech in the House of Commons, thus on behalf of the British Government: "The miscreants who set out to subjugate first Europe and then the world must be punished, and so must their agents who, in so many countries, have perpetrated horrible crimes and who must be brought back to face the judgment of the population, very likely in the very scenes of their atrocities."

Mr. Churchill distinguishes very well the fundamental crime of launching this second World War, from its derivative, the "war crimes".

Other Allied Governments took the same view /see their various declarations in the collection submitted to the Commission, as Doc!C.29/.

This view, that the second World War is a criminal war is shared by a great number of experts in international and criminal law. I quote some of them:

a/ The memorandum of the French members of Commission II of the London International Assembly, laid before this Commission at the beginning of 1942, adopts the clear view that the war started in 1939 is a crime in the legal sense of the word, independently of the violation of the "laws and customs" of those at war.

b/ Professor Lauterpacht in his "memorandum" to the Cambridge Committee presided over by Prof. MacNair says on



page 10: "The law of any international society worthy of that name must reject with reprobation the view that between nations can be no aggression calling for punishment, and it must consider the responsibility for the premeditated violation of the General Treaty for the Renunciation of war as lying within the sphere of criminal law. That responsibility embraces such clearly warlike acts as that perpetrated in the form of the invasion and proclaimed annexation of Czechoslovak in March 1939".

c/ Dr. Jaroslav Stránský, Professor of Criminal Law at the Masaryk University and Minister of Justice in the Czechoslovak Government in London, when introducing a lecture by our colleague, M. de BAER, at the Czechoslovak Institute on January 9th 1943, declared that the fundamental crime from which all "war crimes" originate is the war of aggression started by the Axis powers, and that this war of aggression is an international crime crying out for punishment.

d/ Dr. Bishop, Secretary of the Grotius Society, also upholds the view that to start a war is in itself a crime.

e/ M. de BAER himself does not think that the present "aggressive war" is formally a crime on the part of the Axis States or their statesmen and leaders, because it has not been declared a crime and thus, no penalty for it was fixed and no court appointed to try it. He proposes the following procedure in his exposé entitled: "Is the waging of an aggressive war a crime which can be punished judicially?" /London 1943/: in whatever kind of arrangement is made with Germany, whether it is called "unconditional surrender" or otherwise, "a condition should be included by which the German nation recognise that their leaders have, by waging an aggressive war, committed a crime against humanity punishable by death", and that the question who are the individuals responsible for that crime, shall be decided by a special court. M. de BAER seeks in this way to get rid of formal doubts and objections. However we judge his view, it comes to the same in the end: that the authors of this war

should be treated as criminals who deserve the death penalty for their crime.

f/ Professor Kelsen, Professor of Law at the Universities of Vienna, Cologne and Prague, member of the Austrian Court of Constitution etc., founder of the famous normative theory, actually lecturer at the University of California, wrote in the issue of December 1943 of the "California Law Review" p. 546: "Any inquiry into authorship of the second World War does not raise problems of extraordinary complexity. Neither the questio juris nor the questio facti offers any serious difficulty to a tribunal. Hence, there is no reason to renounce a criminal charge made against the persons morally responsible for the outbreak of World War II.

Public opinion entirely approves all these declarations, statements or views. "Public conscience" an important source of law in general and of international law in particular /the Hague Preamble/ is unanimous in regarding the preparation and launching of the present total war as a crime, as malum in se. This opinion of some hundred million men and women, must be taken into consideration at least with the same respect as the opinion of some isolated experts who consider this war as a legal thing. Therefore, I come to the following conclusions :

1/ the preparation and launching of the present war are crimes not only in moral or historical sense but in the sense of and according to the criminal laws of the invaded countries, and at the time, crimes against the whole of mankind according to the general principles of international law.

2/ Chiefs of the Axis States, members of their Governments and High Commands, who prepared and launched this second World War have committed crimes for which they are justiciable before the Criminal Courts of the invaded countries.

3/ the Countries who have the jurisdiction over them can transfer their jurisdiction to an Inter-allied Criminal Court.

But the basis of the jurisdiction of this Inter-allied Criminal Court established in order to try these "hostes

RB-30

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- 14 -

humani generis", is not exclusively the national jurisdiction of the Countries who would be signatory parties to it. The Court would be authorised to act as an instrument of International Justice according to the general principles of International and Criminal law.

4/ the whole problem is within the scope of the United Nations War Crimes Commission which is authorised to put the authors of the present war, on the list of war criminals for this fundamental crime of "total war", 1938/1944.

5/ If there be any doubts in this respect, the Commission should recommend to the United Nations Governments to enlarge its competence in this fundamental question and to authorise it to put the authors of the present war, on the list of war criminals.

I suggest that the Commission should adopt the conclusions 1 - 5.

London, September 27th 1944.

Dr. B. Eder.



SECRET

C.57  
30th September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT CONVENTION FOR THE ESTABLISHMENT OF A UNITED  
NATIONS JOINT COURT.

Report by Committee II

The Committee proposes to the Commission that the following letter should be addressed by the Chairman to His Britannic Majesty's Principal Secretary of State for Foreign Affairs in the United Kingdom :

Sir,

I beg leave to transmit to you herewith the Draft of a Convention for the establishment of a United Nations War Crimes Court, unanimously adopted by the War Crimes Commission at its meeting on the 26th September, 1944.

2. The Draft is being submitted to the Governments represented on the Commission.

3. The Commission expresses the hope that you will be so good as to take the necessary steps to convene in the near future the diplomatic conference for the examination of the Draft and the signature of the Convention.

4. The Draft of the Convention is self-explanatory. But, during the discussion of the Draft there emerged from time to time certain points which, in the opinion of the Commission, would require elaboration. A number of these have been settled or clarified in the text of the Convention as it gradually took its definite shape. There remain, however, certain matters which, as they have not found their way into the final text, have to be specifically dealt with in this communication :

(a) During the preparatory work on the Convention certain drafts were submitted in which a detailed list of war crimes was included in Article 1. The list was not meant to be exhaustive and, after considerable discussion, the Commission found it appropriate not to include a detailed list but to confine itself to the terms of the first paragraph of Article 1 - "an offence against the laws and customs of war". It is considered that this will give the Court the necessary latitude of action to carry out the intention of the Allied Governments as expressed in numerous public statements, notably the Declaration in Moscow dated the 1st November, 1943.

(b) The Commission has considered the question of "Superior Orders". It finally decided to leave out any provision on the subject for the same reason as that for which it left out the detailed list of war crimes. The Commission considers that it is better to leave it to the Court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it perfectly clear that its members unanimously agree that in principle this plea of itself does not exonerate the offender.

P.T.O.

(c) It will be noted that the only clause in the Convention which deals with the question of languages is Article 3 of the Draft, where it is stated that the members of the Court "shall be conversant with either English or French". The Commission fully realises, however, that in the Far East, for instance, it is to be assumed that the Chinese language will be the one used by witnesses and perhaps by other persons participating in the work of the Court. It is also probable that the Russian language or other Slavonic languages may have to be used in some of the divisions of the Court. In addition, the German language will certainly be the one used in numerous documents and also in pleading before the Court. Obviously, the language question implies the necessity of quite considerable interpreting and translating work. The accused persons will be entitled to have documents translated into a language which they understand and will likewise be entitled to have oral statements interpreted into such language. The Commission has therefore considered it desirable that the Court itself should be left free to establish under Article 10 the necessary rules with regard to the language or languages in the sense that the official languages of the Court shall be English and French and/or any other language of the country in which the Court may sit.

I have the honour to be,  
Sir,  
Your most obedient servant,

SECRET

C.58  
6th October, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

EXPLANATORY MEMORANDUM

TO ACCOMPANY THE DRAFT CONVENTION FOR THE ESTABLISHMENT  
OF A UNITED NATIONS WAR CRIMES COURT

The draft of the Convention is self-explanatory. But, during the discussion of the Draft there emerged from time to time certain points which, in the opinion of the Commission, would require elaboration. A number of these have been settled or clarified in the text of the draft Convention as it gradually took its definite shape. There remain, however, certain matters which, as they have not found their way into the final text, have to be specifically dealt with in this memorandum.

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SECRET

C.59  
6 October 1944

UNITED NATIONS WAR CRIMES COMMISSION

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

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

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

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

SECRET

C.60  
6 October 1944

UNITED NATIONS WAR CRIMES COMMISSION

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DRAFT CONVENTION FOR THE ESTABLISHMENT OF A  
UNITED NATIONS WAR CRIMES COURT

and

RECOMMENDATION FOR THE ESTABLISHMENT BY SUPREME  
MILITARY COMMANDERS OF MIXED MILITARY TRIBUNALS  
FOR THE TRIAL OF WAR CRIMINALS

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

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6 October 1944

Sir,

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

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

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

I have the honour to be

etc.

(Sgd.) Cecil J.B. HURST

Chairman.

SECRET

C.61  
28th October 1944

UNITED NATIONS WAR CRIMES COMMISSION

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Report by Committee I  
on the  
TREATMENT OF QUISLINGS.

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

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

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

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

In order to give full effect to the policy adopted by the United Nations for the punishment of war crimes, a distinction would seem to be necessary between what may be termed 'political quislings' and quislings who have participated in the commission of war crimes of the type with which this Commission is particularly concerned.

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

In all cases where what is charged is the commission of an act which if committed by an enemy would constitute a violation of the laws of war it would therefore seem expedient for the Commission to disregard the nationality point and treat the

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individual accused as a war criminal within its sphere of action and not as a quisling.

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

There remains the question of the political quislings.

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

Except through the operation of such machinery as the Commission may be able to secure it is difficult to see how satisfaction can be given to the Government of an Allied power not participating in the occupation of enemy territory in bringing to justice its 'political quislings'. It would therefore seem right that one of the United Nations should be entitled to invoke the aid of the Commission in securing the apprehension and surrender of any such person.

#### Conclusion

1. A distinction must be drawn between the political quislings and those who have, either as perpetrators or accomplices, taken part in the commission of war crimes.
2. The Government of one of the United Nations should be entitled to invoke the aid of the Commission in securing the apprehension and surrender of any political quisling whom it wishes to put on trial.
3. A person who has participated in the commission of a war crime should be regarded as within the competence of the Commission even if he should be found to possess the nationality of one of the United Nations.

SECRET

C.61(1)  
6th November 1944

UNITED NATIONS WAR CRIMES COMMISSION

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

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

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

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

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

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

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

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

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

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

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

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



SECRET

C.62  
6 November 1944

UNITED NATIONS WAR CRIMES COMMISSION

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

The Apprehension of War Criminals

Chief Object - to apprehend every available war criminal.

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

Suggestions for accomplishment of the specific object

(1) There is waiting to be gathered an enormous amount of information concerning war crimes and war criminals in such places as:-

- (a) Offices of the National Governments;
- (b) Offices of the various Service Departments with their offshoots (e.g. in the case of the British War Office:- the Prisoners of War Department, the Historical Section, etc.);
- (c) The British Foreign Office and its offshoots (e.g. P.I.D.);
- (d) The U.S. State Department, War Department etc. (e.g. War Department Intelligence Agencies);
- (e) Uncollected information in liberated territories;
- (f) Uncollected information in unliberated territories;
- (g) SHAEF-1;
- (h) The Extraordinary State Commission of the U.S.S.R

(2) Experience has shown that the gathering of this information should be carried out not by the National Offices, but by the Commission itself, as originally charged.

(3) The task of organising the collection of particulars concerning war crimes and war criminals should be entrusted by the Commission to an officer, who should be either a service man or civilian, but who should possess imagination, drive and initiative.

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

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

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

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

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

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

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

In charge of the travelling group should be a man of forceful character, with sufficient legal knowledge, but possessing above all initiative and great keenness. He should be imbued with a strong sense of the international duty of obtaining particulars concerning all war crimes, and see that no considerations of local prestige or favouritism should hinder the information from coming in.

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

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

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

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

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

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

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

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

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

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

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When Document C.14 came before the Commission on the 2nd May Sir C. Hurst said that "the National Offices, and possibly the Commission itself, should seek evidence against leading war criminals in orders and decrees signed by them prescribing acts and practices which were war crimes. Such evidence could be sought in newspapers, official journals, etc. Ought the Commission itself to undertake such research as well as the National Offices?" The Commission agreed to this being done.

On the 23rd May General de Baer, as Chairman of Committee I reported to the Commission that "he wished to ask that members of the Commission would urge their National Offices to transmit to the Commission cases of war crimes which did not involve violation of their national criminal law. They appeared to be avoiding doing this and it was important to find out how numerous such cases were as this had a bearing on setting up an international criminal court." General de Baer's proposal was adopted by the Commission.

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

(10) Both the Chairman of the Commission and the Chairman of Committee II have also from time to time emphasised (e.g. in C.14) that this extension of the Commission's work would involve additions to the Commission's staff.

On the 2nd May the Chairman "said he would see if he could arrange for any additional staff which might be necessary to enable the Commission, in collaboration with the National Offices, to undertake this work ...."

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

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

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

(11) From time to time articles and letters have appeared in the more responsible United Kingdom newspapers concerning public uneasiness as to the progress being made by the Commission. Similar articles are appearing in the United States Press. The public, however, obviously have no means of knowing the conditions under which the Commission labours due to the difficulties involved in its restricted terms of reference.

(12) The comparatively small number of cases on which the military authorities may take action now has not been disclosed to the public. If the number becomes known there is likely to be very strong and widespread criticism of the Commission, especially in view of such statements as that made by the Under-Secretary for Foreign Affairs in the House of Commons on 20th July, viz: the policy of the Government towards the German war criminals was well-known. The War Crimes Commission would see to it that the same excuse was not made this time as was made after the last war.

It is however no complete answer for the Commission to argue that the National Offices have been charged with the duty of putting forward particulars and that Committee I merely has to examine such cases. The Commission itself is charged with the duty of obtaining particulars of war criminals so that their custody can be demanded by the military authorities. SHAEF has made it clear that it is now ready to receive such particulars.

(13) The question of cost, which will be necessity be very considerable, ought in no wise deter the accomplishment of the duty which the Commission owes to the Governments and indeed to humanity. Nothing should be omitted which will show to the world that the immunity given to war criminals after the last war will not again be given to the war criminals of the present war. Just retribution must be exacted, but speedy and thorough-going action is now necessary if the Commission's duty is to be discharged.

(14) It is not significant in what territory or against what nationalities war crimes have been committed. They are crimes against all the United Nations and indeed against the more important interests of all countries. Their punishment is the concern of the whole of civilisation

#### Appendix I

It might be useful for the Investigation Branch to investigate the methods at present being employed by the Russians in apprehending war criminals in the eastern zone of Europe.

#### Appendix II

If in a liberated territory where the National Government is once again functioning, such National Government fails to supply the Commission with particulars, the Commission should take every possible step to secure that war criminals do not escape justice.

Steps have already been taken to prevent neutral countries from harbouring war criminals and it would be an absurdity for an Allied Government to prevent by passive methods the investigation of war crimes within its territory.

SECRET

C.62  
6 November 1944

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