CHAPTER XIV

DEVELOPMENTS IN THE CONCEPT AND PROCEDURE
OF TRYING WAR CRIMINALS

A. DEVELOPMENTS RESPECTING THE IDEA OF
INTERNATIONAL CRIMINAL ADJUDICATION, 1918-1943

(i) DEVELOPMENTS ARISING OUT OF THE FIRST WORLD WAR

The Netherlands Government replied to the Allied request for surrender of the Kaiser by saying: "If, in the future, it was in the intention of nations to establish an International Court competent in the event of war to judge acts alleged to be crimes and liable to be punished by Statutes passed previous to the commission of the acts, it would be for Holland to associate herself with the new regime."(1) At that time Holland found herself unable to surrender the Kaiser for trial before the tribunal which was to be set up under Article 227 of the Versailles Treaty. This court was to have five judges appointed respectively by the United States, Great Britain, France, Italy and Japan, and was to 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."(2)

Prior to the conclusion of the Peace Conference there had, however, been three separate proposals put forward for the establishment of some form of international tribunal for the trial of war criminals.

(1) The MacDonnell Committee

The first plan was proposed in December, 1918, by the British Committee of Inquiry into the Breaches of the Laws of War, with Sir John MacDonnell as Chairman.(3) This body, composed of leading British lawyers and representatives of the Service Departments, recommended that "an International Tribunal should be established, composed of representatives of the chief Allied States and the United States for the trial and punishment of the ex-Kaiser as well as other offenders against the laws and customs of war and the laws of humanity".(4) The Committee recommended that the British Government should appoint to such Tribunal six members, four of whom should be of judicial or legal experience, one a naval and one a military representative; that the chief Allied States and the United States should have like representation; that an opportunity should also be given to such other of the Allied States, as in the opinion

(3) First Interim Report from the Committee of Inquiry into Breaches of the Laws of War, presented to His Majesty's Attorney General 13th January, 1919, pp. 95-99.
of the chief Allied States and the United States should be represented, to appoint a member or members to the Tribunal.

It was recommended that the Tribunal should apply the laws and customs of war, as laid down in the Hague Conventions and, so far as naval warfare was concerned, in the Naval Codes and Prize Law of the chief maritime states, and the opinions of authoritative text-writers. The procedure of the tribunal should be as simple as possible, consistent with justice to the accused; the proceedings should be public and mainly oral; witnesses should be liable for cross-examination and the accused should have the assistance of counsel.

(2) The Commission on Responsibilities

In March, 1919, the Inter-Allied Commission on the Responsibility of the Authors of the War, comprising fifteen members, set up by the Peace Conference,(1) recommended the constitution of a "High Tribunal" to be composed of 22 members; three members each were to be appointed by the Great Powers (Great Britain, the United States, France, Italy and Japan) and one member each by the small Powers (Belgium, Czechoslovakia, Greece, Poland, Portugal, Roumania and Serbia). The law to be applied was "the principles of the law of nations as they result from the usages established among the civilised peoples, from the laws of humanity and from the dictates of public conscience". The Court was empowered to sentence the guilty to any punishment as might be imposed for such an offence by any court in any country. The Court was to determine its own procedure, while the duty of selecting cases for trial was to belong to the Prosecuting Commission of five members appointed by the five Great Powers.

The Court was to have jurisdiction over cases outside the competence of national courts such as:

(1) outrages performed by civilians or soldiers in camps where prisoners of war of different nationalities were congregated;

(2) high officials giving orders affecting more than one area or battlefront;

(3) civil and military authorities, irrespective of rank and including heads of State, who had ordered or had failed to take action to prevent, the violation of the laws and customs of war;

(4) instances where, having regard to the nature of the offence and the law of any belligerent country, it was considered inadvisable to proceed before any court other than the "high tribunal".

Though this scheme was a sensible, workable proposition, it had one fault from the angle of the Continental or American lawyer, namely, that it was to apply the "law of nations". This law had never been drafted and enacted and therefore it lacked precision. A British lawyer, accustomed to the administration of Common Law would have no difficulty in applying it, but it did not conform with either Continental or with American criminal doctrine. Objections to the scheme were raised by both the American and Japanese representatives and it was never adopted.

(1) Conference de la Paix 1919-20. Commission des Responsabilités des Auteurs de la Guerre. Further details of the Commission have been set out in Chapter III.
(3) The American Proposal and Article 229 of the Versailles Treaty

The American delegates, Lansing and Scott, proposed an alternative plan to that recommended by the Commission of Fifteen, and this was eventually embodied in Article 229 of the Treaty. By this plan, Germans who were accused of crimes against nationals of two or more allied nations were to be brought before an international court. The Treaty gave no precision as to the composition of this Tribunal, but according to the memorandum drawn up by the originators of the scheme, (1) the Court was to be formed by the simple process of uniting the military courts of all the countries concerned so that "the Tribunal would be formed by the mere assemblage of the members". Moreover, each member of the Court was to "bring with him the law to be applied", which the authors of the scheme described as "the laws of war". Since the phrase "laws of war" was a very vague term, and the acts which it made criminal were few, none of which had specific penalties attached, nor had any court been given competence to try them, it followed that the law which each member was to bring with him was his own national military law, different in the case of each nation. The confusion which would have resulted from such a system is obvious.

The scheme designed in Article 229 of the Versailles Treaty was imperfectly framed and the Allies were so convinced that it would not or could not be carried out that they did not even trouble to give their military courts the necessary power to judge these cases.

(ii) DEVELOPMENTS DURING THE INTER-WAR YEARS

During the years following the Treaty of Versailles, with the establishment of the Permanent Court of International Justice at the Hague, and with the development of the idea of international co-operation through the League of Nations, various official and semi-official bodies were concerned with the question of establishing an international criminal court, and various schemes were suggested with a view to setting up such a court.

(1) Baron Descamps' Suggestion in 1920

The first of these was in 1920 when Baron Descamps, the Belgian President of the Committee of Jurists appointed to draw up a scheme for the establishment of the Permanent Court of International Justice, proposed the formation of a High Court of International Justice, to deal with crimes against public order and the general law of nations. (2) The Court should be composed of one member from each State, to be chosen by the group of delegates of each State on the Court of Arbitration. It should be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or Council of the League. It should have the power to define the nature of the crime, to fix the penalty and to decide on the appropriate means of carrying out the sentence.

The recommendation was put before the Assembly of the League in

(1) op. cit., pp. 219-231.
(2) See article by Lord Phillimore in British Year Book of International Law, 1922-23, p. 79
December, 1920, but it adopted a motion[4] in which it expressed the opinion that the scheme would be "most desirable but premature", since it was considered useless to constitute a Criminal Court alongside the Court of International Justice, but left open the possibility of establishing at some future date a criminal department in the Court of International Justice.

(2) The *International Law Association*

At the Conference of the International Law Association, held in Buenos Aires in 1922, a resolution was passed advocating the creation of an International Criminal Court. In consequence, Dr. Hugh H. L. Bellot, who had been secretary to the MacDonnell Committee, presented a draft Statute for a Permanent International Criminal Court to the Conference which met in Stockholm in 1924. This draft Statute was modelled largely on that of the Permanent Court of International Justice, and incorporated certain provisions taken from the British Criminal Appeal Act of 1907.[2]

In the course of the discussion, which was led by Lord Phillimore, the draft Statute was criticised on the grounds that (a) under its provisions proceedings could be instituted at the instance of private individuals; (b) that it limited the jurisdiction of the Court to war crimes; and (c) that it lacked provision as to how sentences pronounced by the Court would be executed. It was also held that the Court lacked what constituted in municipal law the prerogative of mercy. In view of these criticisms the draft was submitted to a special committee for further consideration.

An amended draft Statute was presented to the 34th Conference which met in Vienna in 1926. After sharp discussion as to whether the Court would be competent to try charges, until a code defining offences and specific penalties for them had been accepted, it was finally resolved that the jurisdiction of the Court should extend to all charges of:

(1) violations of international obligations of a penal character committed by the subjects of one State or by a stateless person against another State or its subjects;

(2) violations of any treaty, convention or declaration binding on States, which regulates the methods and conduct of warfare;

(3) violations of the laws and customs of war generally accepted as binding by civilised nations.[9]

These three categories covered crimes committed either by a State or the subjects of a State. When the charge was against a State, the Court could sentence the accused State to pay to the injured State a pecuniary penalty and/or indemnity for the damage done. When the charge was against a citizen, the Court could order any suitable punishment, from a fine to capital punishment.

The judges to try the case were to be members of the nations concerned, and they were to apply: international treaties, conventions and declarations recognised by the States before the Court; international custom; the general principles of law recognised by civilised nations and judicial decisions, as a subsidiary means of determining the rules of law.

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(3) The Inter-Parliamentary Union

This Union, which consisted of European and American members of Parliament, raised the question of an International Court in 1923. In 1925 it adopted the principle that all international crimes should come before an International Court, and in 1927 it insisted that the principles of International Criminal Law should be agreed upon. This Union was, however, an advisory not an executive body, and its recommendations were not taken up in official quarters.

(4) The International Congress of Penal Law

In 1924 this semi-official body began to study the question of whether the institution of a Permanent International Criminal Court was a practical proposition, and at the annual Conference at Brussels in 1926 decided in the affirmative. It also possessed no executive power and was not in a position to implement its resolutions.

(5) The Pan-American Court of International Justice

The Costa-Rican delegation to the Fifth Pan-American Conference which met at Santiago in 1923(1) presented a plan for the creation of a Permanent American Court of International Justice, but the idea was shelved by being referred to a Committee of Jurists. At the Seventh Pan-American Conference, which met in Montevideo in 1933, the matter was again raised, when the Mexican delegation presented a Peace Code for consideration.(2) Chapter 5 of this Code concerned the creation of an American Court of International Justice, which was based largely on the recommendations made to the League of Nations by Baron Descamps in 1920. The Court was to be composed of one member from each of the contracting parties, the members to be of the highest judicial standing. The panel was to be divided into a Tribunal of First Instance and a Court of Appeal. Judges would not be permitted to hold any other post during their five years term of office. Each section of the Tribunal should meet in full, with a quorum of two-thirds of its members; the expenses of the tribunal should be defrayed in proper proportion by the contracting parties; it should have jurisdiction to settle disputes between the American republics and in the following cases its jurisdiction should be obligatory:—

1. the interpretation of a treaty;
2. the determination of a fact which if confirmed, would constitute a violation of an international obligation;
3. the determination of the nature and extent of the reparation to be given for a violation of an international obligation.

The Tribunal was to apply international conventions recognised by the parties to the dispute, international custom proved by general practice and the general principles of law, recognised by civilised nations.

This proposal for a Peace Code was too extensive to be adopted by the Conference. It was discussed again at the Inter-American Conference

(1) For further details of Pan-American Conferences, see Chap. IV, Section M, p. 77.
for the Maintenance of Peace which met at Buenos Aires in December, 1936, and was referred to the Seventh Pan-American Conference. When this met at Lima in December, 1938, it passed a resolution to the effect that:

"It is the firm purpose of the States of the American Continent to establish an Inter-American Court of International Justice, whenever these States may recognise the possibility of doing so with complete assurance of success, and that in the meantime the study of an adequate statute on which international justice in America may rest should be encouraged."(1)

In spite of this pious aspiration nothing further developed in the question of establishing such a court.

(6) The League of Nations Convention for the Repression of Terrorism

Following the murder of King Alexander of Yugoslavia in 1934, a Committee of Experts was set up by the Council of the League(2) to prepare a convention for the repression of terrorist outrages. In November, 1937, an international conference drew up and signed a Convention for the Repression of Terrorism, attached to which was a Convention for the Creation of an International Criminal Court.(3)

The intention was that there might be occasions when a State, having in its hands a person accused of committing terrorist offences in another country which it would normally extradite or prosecute in its own courts, might prefer to surrender that person to an international court of undoubted impartiality.

The Court, to be established under the Convention, was to consist of a permanent body of five regular and five deputy judges, appointed by the Permanent Court of International Justice from among members of the States party to the Convention. The Court, which would consist of five members, would only sit when there were cases to be tried.

The jurisdiction of the Court was to extend to wilful acts against heads of State or other senior functionaries; wilful destruction of public property of another State, or calculated to endanger the lives of the public and the manufacture of arms, explosives, etc., destined to commit offences of a terrorist nature.

The conduct of the prosecution would lie with the State committing the accused for trial, unless the State against whom the offence was committed wished to undertake it. The law to be applied was that of the State on which the crime had been committed, or of the State bringing the charge, whichever was the less severe. The State in whose territory the Court was sitting should be responsible for detention and execution of the sentence, unless the Court should direct otherwise. The decisions of the Court should be by majority vote.

Although the scope of the Court was narrow, once instituted it could have been expanded, especially in time of war, to dealing with war crimes,

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(3) Proceedings of the International Conference on the Repression of Terrorism, C. 94, M. 47, 1938V. (League of Nations.)
and this was perhaps in the minds of its originators. However, owing to the deterioration of the international situation in 1938 the Convention never came into force.

(7) Mixed Courts

Experiments of international courts had actually been made and had proved successful. The Mixed Courts of Egypt, which had jurisdiction in criminal as well as in civil cases, were an excellent example of a fruitful collaboration of jurists. Others, such as the International Court of Tangiers and the various Arbitral Mixed Courts, which functioned during the 1920's, proved that it was possible to achieve international co-operation in the judicial field.

(iii) DEVELOPMENTS BETWEEN 1939-1943

In view of the outrages perpetrated by the Germans both before and during the war, and especially in the occupied countries, the question of the establishment of some form of international tribunal had been under discussion in certain unofficial bodies, such as the London International Assembly and the Cambridge International Commission for Penal Reconstruction and Development as early as 1942, and as the war progressed the principle received recognition not only in the pronouncements of statesmen, but also in the institution of official bodies.

(1) The London International Assembly

The first of the semi-official bodies to consider the problem was the London International Assembly, which set up a Commission under the Chairmanship of Monsieur de Baer of Belgium in April, 1942. The Assembly, having adopted the principle that an International Criminal Court should be instituted, the Chairman of the Commission submitted a draft Convention for the establishment of such a court. This Convention formed the basis of discussion and was accepted by the Assembly.

Under it, the Court was to have jurisdiction over cases which were not within the competence of the national courts, namely, crimes against Jews and stateless persons in Germany; crimes which had been committed or taken effect in several countries or against the nationals of several countries and crimes committed by heads of State. The law to be applied by the Court was: international custom, international treaties, conventions and declarations; the generally accepted principles of criminal law and judicial decisions and doctrines of highly qualified publicists. A Procurator General should be the prosecuting authority accredited to the Court, and should act on behalf of the United Nations as a whole. An International Constabulary should be established to act towards the Court in the same way as the U.S. Marshals operate in the U.S. Federal Courts.

(2) The International Commission on Penal Reconstruction and Development

The Cambridge Commission, which was deliberating at the same time

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(1) For further details of the work of the London International Assembly, see Chapter V, Section B (ii), p. 99.
(3) Pamphlet The Punishment of War Criminals—Recommendations of the L.I.A. Appendix II.
(4) Confidential Report of the International Commission for Penal Reconstruction and Reform. This subject is dealt with in more detail in Chapter V, Section B (ii), p. 94.
as the London International Assembly, with several members of one body also serving as members of the other, had a majority of members in favour of the institution of an International Criminal Court to judge certain categories of war crimes. However, in his report of July, 1943, the Chairman, Sir Arnold McNair, while admitting that the time was ripe for the institution of such a Court for peacetime purposes, considered it impracticable for the purpose of trying war criminals.

(3) The Debate in the House of Lords 7th October, 1942

In the debate on war crimes in the House of Lords on 7th October, 1942, Lord Maugham raised the question of establishing an International Criminal Court. He pointed out that there would be certain crimes which could not not be tried by national courts, for instance:—crimes against persons deprived of their nationality; cases of mass murder as the consequence of an order, such as the drastic removal of foodstuffs ordered by a German officer or by some sort of German tribunal, resulting in wide-spread starvation of the population; similar acts causing death by exposure; orders for the removal of young women to unknown destinations, obviously for the purpose of prostitution; cases where two or more courts of different Allied States have jurisdiction; cases where it is uncertain which of two or more such courts have the necessary jurisdiction; and, finally, cases where, owing to political unrest in the country where the crime was committed, it might be difficult to hold a proper trial. It was recommended that the crimes to be tried by such a Court should be limited to those which were so serious as to shock the conscience of mankind; it should also only undertake to try a limited number of accused.

Replying for the Government, the Lord Chancellor, Lord Simon, expressed the view that while military tribunals were possibly more effective and prompt-working tribunals for the trial of war crimes, he did not rule out the possibility of establishing an International Criminal Court. Some of the difficulties which were likely to be raised by such a court were, that of including any but members of the United Nations as judges; that of deciding on the code of law to be applied, and above all, the question of procedure to be adopted, since legal procedure varies from one country to another.

(4) The Moscow Declaration

In the Moscow Declaration of 1st November, 1943, it was stated that the major war criminals, "whose offences have no particular geographical location" would be punished by a joint decision of the Governments of the Allies. Although the question of some international trial of the major war criminals was raised at Moscow, no machinery was suggested for the implementation of this promise.

B. RECOMMENDATIONS OF THE UNITED NATIONS WAR CRIMES COMMISSION

The United Nations War Crimes Commission, from its earliest stages


(2) See The Times of 3rd November, 1943. For further details see Chapter V, Section D.(iv).
was concerned with the question of establishing an International Criminal (or War Crimes) Court, to carry out the trial of the war criminals described in the Moscow Declaration as having committed crimes "without particular geographical location".

There was some opposition to this proposal, since the British Government did not favour the creation of such a court, and some British authorities visualised the punishment of leading Axis war criminals by "political action", as had been done in the case of Napoleon. However, the delegates in favour of the proposal, led by the American and Australian representatives, pressed so strongly for its consideration that at its meeting on 22nd February, 1944, the Commission gave authority to Committee II, the Committee on Enforcement, under the Chairmanship of Mr. Herbert C. Pell the United States representative, to begin discussions on the subject without delay.

The question of the establishment of an international court for the trial of war criminals was consequently considered in detail at weekly meetings of Committee II between February and the end of September, 1944. As an original basis for the discussions, the Draft Convention for the Creation of an International Criminal Court adopted by the London International Assembly was used, together with the report of the Netherlands representative made to the same Assembly on the question, in which the author reviewed the precedents and previous attempts to set up such a court, and reached the conclusion that its creation should be a practical proposition.

(i) CREATION OF A UNITED NATIONS WAR CRIMES COURT

The United States office presented another draft convention for the creation of the international court, which had been compiled by the State Department of the United States, taking into account the London International Assembly Draft Convention. It was on this latter document that the discussion of the Committee during the next few months was based.

When this draft was first discussed on 14th April, 1944, some members raised practical objections; for instance the British and Norwegian representatives considered that it was too late for the organisation of such a court, and it would be better to punish by political action war criminals in respect of whom no one State had exclusive jurisdiction. This was opposed by the representatives of Belgium, China, Czechoslovakia and the United States, while the French delegate agreed, in principle, but had some objections as to the law to be applied. However, it was agreed that discussion as to the constitution of the court should continue.

Rather than follow the actual development of the discussion chrono-
logically, it has been found more convenient to follow up the development of the respective points, such as the definition of war crimes; the jurisdiction of the court; the sources of law to be applied; the establishment of a prosecuting authority; the custody of the criminal and execution of sentence; the judges; the seat of the court; the language of the court and miscellaneous matters.

(1) Definition of War Crimes

In the London International Assembly draft,(1) war crimes were defined as:

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

Anyone committing, by direct action, participation or by inciting others to commit such a crime, would be regarded as a war criminal, whether as a principal or as an accessory to the crime and irrespective of rank or position, including heads of State.

The United States draft(2) listed 15 specific war crimes, based on the list drawn up in 1919. It also stated that all persons, irrespective of rank or position, who had committed or incited a crime should be considered to be guilty, whether as principals or accessories. An alternative article with a wider scope was suggested whereby war crimes were to be considered "acts committed in violation of the laws of war". Neither of these definitions, however, included crimes against humanity or crimes against peace, which were covered in the London International Assembly definition.

There was some discussion as to how far the definition of war crimes should be limited stricito sensu or whether it should include a broader meaning in respect of crimes against stateless persons, but finally the conclusion was reached that it must be limited. The definition of war crimes was given as(3) "offences against the laws and customs of war, which have been committed by members of the armed forces, the civilian authorities or other persons acting under the authority of, or in concert with, a state or other political entity, engaged in war or armed hostilities with, or in hostile occupation of territory of the United Nations". Although a suggestion was made that other offences might be brought under the provisions of this Convention by a decision of the High Contracting Parties, the final draft(4) simply defined a war crime as "an offence against the laws and customs of war".

(2) Jurisdiction of the Court

In the London International Assembly draft(5) the Court should not have jurisdiction in cases coming within the competence of

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(1) II/2 Article 2.
(2) Doc. II/11 Article 1.
(3) II/21. 22.6.44. Establishment of an International Court, articles adopted by the Committee.
(4) C. 50(1) 30.9.44. Draft Convention for the Establishment of a United Nations War Crimes Court, Article 1(1).
(5) II/2, Article 3.
any of the domestic courts of the United Nations, where those courts were willing and able to exercise such jurisdiction, but it should have competence in cases where two or more domestic courts have jurisdiction and the parties concerned agree to bring the case before the Court, and any other cases of war crimes brought by the High Contracting Parties. The United States draft also specified that the Court should have jurisdiction over persons surrendered by the ex-enemy states, or extradited from neutral states. However, this latter draft did not make it sufficiently clear as to which persons should be subject to the Court’s jurisdiction, though the indication was that it was to be offenders whom there was some reason not to bring to trial in national courts.

The Belgian representative produced a memorandum on this subject, setting out the categories of offences which would have to be tried, namely: the leaders of Nazi Germany; cases where no national court has jurisdiction; cases where the detaining authority has no jurisdiction, such as Germans, who have committed crimes against Italians, detained by the United States authorities; cases where a national court prefers not to exercise jurisdiction; and crimes against the restoration of peace, such as the Fehme murders after 1919, clandestine rearrangement in violation of peace treaties, etc.

On 29th June, 1944, the sub-committee specially appointed to redraft the appropriate article made the following recommendations:—

(1) The Court should have jurisdiction in cases where crimes have been committed in two countries and the national authorities cannot agree that one country should try the case.
(2) In cases where national courts have jurisdiction, the Government concerned would have discretion to bring the case before the International Court.
(3) States should have sole jurisdiction in trying their own nationals.
(4) The Court should try cases where no national court has jurisdiction.
(5) The Court should try persons surrendered by the neutrals.
(6) The Court should try the arch-criminals.

Article I of the final Draft Convention contained the following sub-paragraphs:—

"The jurisdiction of the Court should 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.

"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."

(1) II/11, Article 27.
(2) II/13 1.5.44. Note by M. de Baer on the categories of crimes which would come before the International Court.
(3) II/23 29.6.44. Questions as to the Jurisdiction of the proposed Court prepared by the sub-committee.
(4) C. 50(I) Article 1.
(3) Sources of Law to be Applied

Article 29 of the United States draft\(^1\) originally laid down that the sources of law to be applied were general international treaties and conventions, international custom, the general principles of criminal law recognised by civilised nations and the judicial decisions and teaching of the most highly qualified publicists of the various nations, as a subsidiary means of determining the rules of the laws of war. After discussion in the Committee, it was decided to drop the clause concerning the principles of criminal law recognised by civilised nations and to insert instead the phrase "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 public conscience", which was taken from the eighth consideration set out in the Preamble of the 1907 Convention concerning the Laws and Customs of War on Land. From the last phrase also the words "and the teachings of the most highly qualified publicists of the various nations" were deleted, leaving only judicial decisions as a subsidiary means of determining rules of war.

There was not unanimous agreement on the substitution of the phrase from the Hague Convention in place of the more general expression of the principles of criminal law recognised by civilised nations. At the meeting of the Committee held on 7th September, 1944, it was re-incorporated among the sources of law to be applied so that in the final Draft Convention\(^2\) the sources of law to be applied were shown as:—

(1) conventional and treaty law;
(2) international customs of war;
(3) 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;
(4) the principles of criminal law generally recognised by civilised nations;
(5) judicial decisions as a subsidiary means of determining the rules of the laws of war.

(4) The Prosecuting Authority

When the question of the punishment of stateless persons in Germany was raised in the first meetings of Committee I, the Committee on Facts and Evidence, in February, 1944, the French representative recommended that such cases should be prosecuted on behalf of the United Nations as a whole, and for this purpose a "United Nations Public Prosecutor" should be appointed. The matter, however, was not pursued further in view of the plans for the creation of an international court.

The recommendation of the United States draft\(^3\) was that the United Nations War Crimes Commission should continue in existence until such time as it could be merged with the United Nations Commission for the Prosecution of War Crimes. It was suggested that a conference of representatives of the United Nations should elect a Commission for the Prosecution of War Crimes, to consist of seven members, who would be chosen.

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\(^1\) II/11, Article 29.
\(^2\) C. 50(1), Article 18.
\(^3\) II/11, Articles 21 and 22.
for a term of three years, any vacancies to be filled by the Tribunal. The duties of the Commission should be: to receive evidence of crimes submitted to it by the United Nations War Crimes Commission; to select and prepare for trial cases brought before the Tribunal and its divisions; to conduct the prosecutions and to ensure that the judgments and orders of the Tribunal were carried out.

Under a separate recommendation the Chairman of Committee I(1) developing the ideas put forward earlier by the French representative, recommended that to prevent war criminals escaping at the time of the Armistice, a United Nations Criminal Justice Office or a Prosecuting Office should be established, charged with the duty of finding the war criminals, arresting and detaining them, taking down their statements and eventually making a summary investigation of the statements; the accused, with his dossier, would then be sent to the place or country where the trial was to be held. This office would act as a sort of judicial agency to which the courts of all Allied countries could apply to obtain accused persons, witnesses, evidence or information on war crimes. This suggestion aroused some criticism when it was discussed by the Commission at its meeting on 2nd May, 1944.(2)

The Committee itself could not agree on the prosecuting authority, and it was the last important question to be settled. There was much discussion as to whether the prosecution should be conducted by an organ of the Court, or of the United Nations, or individually by each United Nation. Moreover, if there was such an organ, whether it should have the power to select persons for trial before the Court.

After circulating a questionnaire, the Belgian representative reported that there was great divergence of opinion on this matter. Some held that there should be a Chief Prosecutor, whose salary and expenses should be shared by the High Contracting Parties. Others held that it was not necessary to have such an official, but that each Government bringing a case to the Court should provide the prosecuting staff.

Finally, the following four articles were agreed upon(3):

1. Responsibility for the prosecution would in general rest with the Government of the United Nation bringing the case before the Court.

2. A diplomatic conference should be summoned to appoint an officer to whom could be entrusted the prosecution in any case where a Government of one of the United Nations prefers that its own representative should not undertake the prosecution.

3. This officer should be assisted by such staff as the Court might consider necessary.

4. The expenses of the prosecution should be borne by the State transmitting the case to the Court.

These provisions were incorporated in Article 11 of the final Draft Convention.

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(1) C. 14 25.4.44. Proposal by M. de Buer, Chairman of Committee I.
(2) M.16. 2.5.44.
(3) H/35 9.9.44. Amendments to Draft Articles as a result of the Meeting of 7th September, 1944.
(5) The Detaining Authority

According to the provisions of the London International Assembly draft, an International Constabulary was to be set up, charged with the execution of orders of the Court and of the Prosecutor General. Members should be chosen by the Court from candidates of different nationalities, and it should have the power to call on the assistance of the local police when necessary. In the United States draft, however, it was laid down that the State on whose territory the tribunal or its division was sitting should supply suitable facilities for detention. The execution of the sentence should be performed by the United Nation designated, with its own approval, by the Court which imposed the sentence. In the final Draft Convention, the whole matter was simplified when it was laid down that the Court should have power to adjudge appropriate punishment, including death, and that sentences should be executed as directed by the Court.

(6) Judges of the Court

The judges were to be nationals of the High Contracting Parties and must possess the highest legal qualifications. They should be conversant with one of the official languages of the Court.

The method of electing judges should be that, within 30 days of the entry into force of the Convention, each High Contracting Party should appoint three qualified persons, notifying their names to the British Foreign Secretary. Within fifteen days of such notification, the British Foreign Secretary should call a conference of the heads of diplomatic missions to the Court of St. James's. At this conference the judges were to be elected by secret ballot from among the members of the Panel. A provision was also made whereby a State adhering later to the Convention, would be able to appoint members of the Panel.

Further provisions concerning the judges were, that in the event of a vacancy the Court should elect another judge from among its members; that each judge should make a solemn declaration in open court that he would exercise his functions impartially and conscientiously; that the judges and registrar of the Court should enjoy diplomatic privileges; that no judge should exercise any political and administrative function or engage in any activity of a professional nature during his tenure of office, and that the Court could retire a judge with the concurrence of not less than three-quarters of the judges. These provisions were incorporated with small amendments in the final Draft Convention.

(7) The Seat of the Court and Date of Meeting

The Court was to sit in Divisions, each Division to consist of not less than five judges, who should be designated by the President of the Court. The Divisions should sit at such places and for such periods as the President might determine. It was also agreed that the first meeting of the Court should be in London, and after that it should not only decide its permanent

(1) II/2, Article 25.
(2) II/11, Articles 39 and 41.
(3) C. 50(1), Articles 20 and 21.
(4) C. 50(1), Articles 2, 3, 5, 6, 8, 9 and 13.
seat, but also whether it would meet elsewhere than at its seat. In the final Draft Convention it was made for the date of the first meeting of the Court to be settled by the Diplomatic Conference.

(8) The Plea of Superior Order

According to the United States draft it was laid down that this should not constitute a defence if the order was patently illegal, but the extent to which it could be considered as a ground for mitigation of penalty would be for the Court to decide. It was, however, decided that no reference to this defence was to be included in the Draft Convention, but that reference to it should be made in the General Recommendations to the Court. When these General Recommendations were framed, the following was included among them:

"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 the 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."

(9) The Language of the Court

The United States draft had recommended that the official languages of the Court should be French and English, but that the Tribunal might direct that the proceedings were to be conducted in another language. When the final Draft Convention was adopted, the only reference to language was that members of the Court should be conversant with either English or French, but in the Recommendations to the Court it was stated that in view of the fact that divisions of the Court might sit in the Far East or Eastern Europe "the Commission . . . has considered it desirable that the Court itself should be left free to establish . . . 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."

(10) Miscellaneous Points

The Court was to establish its own rules regulating its administration, procedure, etc., and was to select its President, Vice-President, etc. All expenses involved in the execution of the Convention, including costs arising from trial proceedings and from the execution of sentences imposed, should be defrayed as the Court might decide. The Draft Convention also contained articles laying down that the Court should have power to take adequate measures for securing witnesses and evidence; that the accused should have all reasonable rights of defence, as recognised in civilised countries; that the hearings should be public unless for some special reason; that no one should be tried if he had previously been tried and acquitted for the same offence by a United Nations court; that the Court should sit in private to consider its judgment, but that the judgment was to be pro-

(1) C. 50(1), Articles 4 and 12.
(2) II/11, Article 30.
(3) C. 58 6.10.44, Explanatory Memorandum to accompany the Draft Convention for the Establishment of a United Nations War Crimes Court.
(4) II/11, Article 31.
(5) C. 50(1), Article 3.
(6) C. 58, paragraph (c)
nounced in public session, the decisions to be by a majority of the judges participating.\(^{(3)}\)

The final draft of the Convention for the Establishment of a United Nations Joint Court was circulated as a Commission document on 20th September, 1944.\(^{(2)}\) This document was considered by the Commission at its meeting on 26th September, 1944, and accepted with small amendments.\(^{(3)}\) The Chinese representative raised the question of the language of the Court, and the recommendation subsequently incorporated in the explanatory memorandum (as set out under paragraph 9 above) was agreed upon.

(ii) CREATION OF INTER-ALLIED MILITARY TRIBUNALS

While the Enforcement Committee was discussing the establishment of an international or treaty court, it had become clear that the creation of such a court would be subject to long delays and it was advisable that some other interim courts should be set up, which could operate immediately, during the period of military control.

The representatives of the United States and India proposed that the military commissions or courts of the occupying powers should also be entrusted with trials of war criminals. They should not have priority either in relation to the national courts or to the International Criminal Court. The intention was to have an efficient additional instrument of repression of mass crimes, such as those committed in the concentration camps. The perpetrators were not leading war criminals and would not, therefore, come within the jurisdiction of the international court. They had, however, committed crimes against the citizens of many nations and it would be most convenient to try them on the spot. The Committee on Enforcement considered the idea favourably and appointed a subcommittee to prepare a draft scheme.

The draft proposal presented by the Indian representative\(^{(4)}\) started with the premises that Supreme Commanders have the right to set up military tribunals and prescribe their composition, powers and procedure; that these courts have competence to try all persons, military and civilian, who are within the custody of the convening authority and charged with violations of the laws and customs of war, or similar persons transferred for trial to the Supreme Commander by one of the United Nations. The paper, therefore, recommended that United Nations Governments should request the Supreme Commander to convene such courts, as an expeditious means of trying war criminals.

The text of this paper was subject to some discussion and a new draft was produced.\(^{(5)}\) In this paper the proposal was given much more fully. It started with a preamble to the effect that, whereas in accordance with

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\(^{(1)}\) C. 50(1), Articles 7, 10 and 22.
\(^{(2)}\) C. 50 20.9.44. Convention for the Establishment of a United Nations Joint Court. Draft presented by Committee II.
\(^{(3)}\) M. 33 and the document subsequently promulgated as C. 50(1).
\(^{(4)}\) II/26 1.8.44. Proposal for a United Nations Military Tribunal (Mr. Dutt's proposal as amended by a drafting committee).
\(^{(5)}\) II/26(1) 16.8.44. New text submitted by the drafting committee.
the Moscow Declaration of 1st November, 1943, war criminals were to be tried by the national courts wherever possible, there would, however, be some crimes which would not come within the competence of those courts; that the Supreme Commander has the right to try cases arising out of military operations or involving the safety of his army; that the United Nations War Crimes Commission would be recommending the creation of a United Nations War Crimes Court, but that as an interim measure it was considered necessary that some military tribunals should be established to try war criminals. It was, therefore, recommended that: United Nations Governments should make use of such courts; that they should surrender the defendant to the convening authority; that they should supply evidence of guilt and should co-operate in providing evidence, witnesses, etc. It was further recommended that the courts should not sit within the territory of a United Nation, unless it was of the nation bringing the charge and that if the final sentence was one of imprisonment, this should be served in the manner directed by the Supreme Commander.

On 31st August, 1944, a paper(1) was circulated to the members of the Commission containing a memorandum from the Office of the United States representative. This memorandum dealt with two questions. The first was:—whether an Allied commander may on his own authority empower mixed allied tribunals to try war criminals who fall into the hands of the Allied Forces. After reviewing the practice in this connection under American law and also under Articles 228 and 229 of the Versailles Treaty, which stipulated that certain German war criminals might be brought to trial before courts “composed of members of the military tribunals of the Powers concerned”, the opinion was given that Supreme Commanders would possess such competence. The second question was whether this power extended to the trial and punishment of war criminals irrespective of where the crime had been committed. After reviewing the opinion of jurists and considering legal precedents, the view was given that the violation of the laws of war is a violation of the law of nations and is a matter of general interest and concern, so that all civilised belligerents have an interest in the punishment of such offences.

These two papers were discussed by the Commission at its meeting on 5th September, 1944.(2) After the recommendation had been moved by the Chairman and seconded by the Australian representative, the Norwegian representative put forward the view that Governments would prefer to know more of the nature and conditions of the military court and its work. He also stated that he considered that the schemes for the establishment of military courts and the United Nations War Crimes Court should go forward together. In this he was supported by the Belgian and Netherlands representatives.

At the next meeting of the Commission,(3) the United States representative expressed the view that there were in the scheme safeguards for any

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(1) C. 46 31.8.44. Trial of War Criminals by Mixed Inter-Allied Military Tribunals. Memorandum by the Office of the U.S. representative.
(2) See. M.30. 5.9.44.
(3) See. M.31. 12.9.44.
Government not wishing to avail itself of the services of such courts. The French representative pointed out that the Supreme Commander had not yet been consulted as to the setting up of such courts, and that Governments need to know the rules which will govern the appointment of the judges, the law to be applied, penalties to be imposed, etc. The Australian representative strongly supported the proposal to establish military courts as the most practical way of dealing with the cases. The Netherlands representative stated that his Government recognised the need for such courts, but that the Netherlands legislation rendered it difficult for his country to use them. He also stressed the need to know more about the composition of the court, whether the judges were to be civil or military and the rules of evidence to be applied. After further discussion the plan was generally agreed upon and it was decided that the suggested reservations should be dealt with in a covering letter.

Discussion continued at the Commission meeting on 19th September, 1944, when the Chairman stressed the importance of the two schemes going forward together. Voting was taken on the existing draft and after some amendments it was approved. A covering letter was to take into account the suggestions which had been made concerning the composition and competence of the court, the law to be applied and the systems of prosecution and execution.

On 10th October, 1944, the question was again discussed. The Commission had before it the proposal incorporating amendments previously made to the draft and the explanatory memorandum. This latter document was voted on paragraph by paragraph and its amended form was approved by 8 votes to 4. This explanatory memorandum suggested that the judges of such tribunals should be nationals of the United Nations; that the tribunals should be composed of mixed personnel; that they should have jurisdiction to try enemy nationals accused of having committed war crimes; that each tribunal should consist of not less than five members; that the rules of procedure should be consistent with practices which are usual in civilised countries and should be framed by the appointing authority; that the prosecution should be left to the United Nation concerned, but if necessary the convening authority should have power to oblige persons to give evidence and produce documents; that trial before an enemy court should not bar proceedings before an inter-Allied tribunal. With regard to the plea of superior order, reference was made to the recommendation contained in the explanatory memorandum to accompany the Draft Convention for the Establishment of a United Nations War Crimes Court, where it was stated that the Commission considered it better to leave the Court to decide the validity of this plea, while stating the general principle that it does not of itself exonerate the offender.

On 6th October, 1944, the Chairman of the Commission sent to the

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(1) See M.32, 19.9.44.
(2) See M.34, 10.10.44.
(3) C. 52(1) 26.9.44. Recommendation for the Establishment by Supreme Commanders of Mixed Military Tribunals for the Trial of War Criminals and C.51 29.9.44 Draft memorandum prepared by the Committee appointed on September 1944.
(4) Subsequently circulated as Doc. C. 59 6.10.44 Suggestions to accompany the Recommendation for the Establishment of Mixed Military Tribunals.
British Foreign Secretary a letter(1) forwarding copies of the Draft Convention for the Establishment of a United Nations War Crimes Court, together with the explanatory memorandum,(2) as well as the recommendation for the Establishment by Supreme Military Commanders of Mixed Military Tribunals for the trial of war criminals, together with the memorandum embodying suggestions to accompany the recommendation(3). The Chairman also conveyed to the British Foreign Secretary the unanimous request of the Commission that he should take such steps as he deemed fit in the near future to convene a diplomatic conference to consider, and if thought fit to conclude, a Convention for the Establishment of a United Nations Court.

While the Commission was awaiting a reply from the British Foreign Office, the Canadian Government, hitherto not represented on the Commission, approached the Chairman in December, 1944, stating that it was interested in the establishment of a United Nations War Crimes Court. The Canadian High Commissioner in a memorandum to the Chairman of the Commission(4) stated that:

"The Canadian authorities are anxious that the proposal for the mixed military tribunals should be such that the trial of war criminals may begin immediately Germany collapses. . . . It may not, in the view of the Canadian Government, be desirable that these tribunals should be too hedged round with legal restrictions and it might be useful to give them a wider discretion in order that justice may be meted out without delay."

In a letter dated 4th January, 1945, the British Foreign Secretary stated as follows:—(5)

"On the 6th October last you forwarded to His Majesty's Government and to the other Governments represented on the Commission certain proposals, to which your Commission had devoted a great deal of time and labour for

(a) the establishment by treaty of an Inter-Allied Court for the trial of war criminals
(b) the setting up of Mixed Inter-Allied Military Courts for the same purpose.

I think that both you and the other members of your Commission are well aware that His Majesty's Government have throughout doubted the desirability and the practicability, especially in view of the time factor, of the formal establishment of an Inter-Allied Court by Treaty for this purpose. On the other hand His Majesty's Government fully appreciate that some Allied countries feel that for constitutional and other reasons it would be difficult for them to ensure in a satisfactory manner the trial of at any rate all cases in which they were concerned in their national courts, as contemplated in the Moscow Declaration. In such cases the proposal made by your Commission for the establishment of mixed military courts might well afford a satisfactory solution of this difficulty. It should be plain, however, that this is not a matter in which His Majesty's Government would desire, even if it were

(1) C. 60 6.10.44. Letter from the Chairman of the Commission to the Rt. Hon. Anthony Eden, His Britannic Majesty's Principal Secretary of State for Foreign Affairs.
(2) Docs. C. 50(1) and C. 58.
(3) Docs. C. 52(1) and C. 59.
(4) Document circulated with an Aide-Memoire written by the Canadian High Commissioner on 19th December, 1944.
(5) C. 68 10.1.45. Letter dated 4th January, 1945, from Mr. Eden to Sir Cecil Hurst dealing with certain proposals submitted by the Commission to the Governments.
possible, to adopt a definite position without previous consultation with the Government of the United States, particularly as the military operations in Western Europe are on a joint basis, and the Supreme Command is now in the hands of an American general. Moreover, until the two Governments had reached, at any rate in principle, some conclusion as to the desirability of establishing an Inter-Allied Court by treaty it was obviously impossible to pursue the suggestion made in your letter for the convocation of a conference to negotiate such a treaty. The matter has accordingly been the subject of full consultation with the Government of the United States, and as soon as the views of the two Governments have been definitely formed it is the desire of His Majesty's Government that the other Allied Governments concerned should be approached with a view to consultation as to the measures to be adopted."

C. THE INTERNATIONAL MILITARY TRIBUNALS

(i) THE NUREMBERG TRIBUNAL

In the United States, however, the plan to establish some tribunal before which to try the Major War Criminals was already under consideration at the beginning of 1945. In a document circulated to the Commission by the United States representative in February, 1945,(1) the U.S. Acting Secretary of State was reported to have declared:

"Over the past months officers of the Department of State, in consultation with other departments, have worked out proposals for the realisation of the objectives stated by the President (relating to war crimes). Pending the outcome of current discussions with our allies on this subject, these proposals cannot be published. I wish, however, to state categorically, that these proposals are as forthright and far-reaching as the objectives announced by the President, which they are intended to implement. They provide for the punishment of German leaders and their associates for their responsibility for the whole broad criminal enterprise decided and executed with ruthless disregard of the very foundation of law and morality, including offences, wherever committed, against the rules of war and against minority elements, Jewish and other groups and individuals."

As time was to show these proposals concerned the establishment of the International Military Tribunal, which was constituted by the London Agreement of 8th August, 1945. The establishment of this tribunal was due to the initiative of the United States Government. The United Nations War Crimes Commission only played an indirect part in the drawing up of the Agreement, though its member Governments, through the Commission, contributed information and evidence used by the Prosecution.

On 2nd May, 1945, at a Press Conference in Washington, President Truman announced that Justice Robert H. Jackson had accepted the appointment of Chief of Counsel for the United States "in preparing and prosecuting the charges of atrocities and war crimes against such of the leaders of the European Axis Powers, and their principal agents and accessories, as the United States may agree with any of the United Nations to bring to trial before an international military tribunal".(2) The

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statement made by the President in appointing the Chief of Counsel included the words:

"Justice Jackson . . . and his staff will examine the evidence already gathered and being gathered by the United Nations War Crimes Commission in London and by the various Allied Armies and other agencies;"(1)

Mr. Dwight Whitney, assistant to Justice Jackson, attended the meeting of the Commission held on 20th May, 1945, and at the following meeting held on 6th June, 1945,(2) the Chairman read a letter from the British Foreign Office announcing the appointment of Sir David Maxwell Fyfe, K.C., Attorney General, as the British representative to join Justice Jackson, and the Soviet and French representatives when they were appointed, in bringing the Major War Criminals to trial before an Inter-Allied Tribunal.

In his report in June to the President of the United States(3) Justice Jackson stated that, among other work, he had "arranged co-operation and mutual assistance with the United Nations War Crimes Commission and with Counsel appointed to represent the United Kingdom in the joint prosecution".

Whereas the Inter-Allied Tribunal was to deal with the major criminals, all other offenders remained within the field of the War Crimes Commission, and Justice Jackson wrote to the President:

"A second class of offender, the prosecution of which will not interfere with the major case, consists of those who, under the Moscow Declaration are to be sent back to the scene of their crimes for trial by local authorities . . . The United Nations War Crimes Commission is especially concerned with cases of this kind. It represents many of the United Nations with the exception of Russia. It has been usefully engaged as a body with which the aggrieved of all the United Nations have recorded their accusations and evidence. Lord Wright, representing Australia, is the Chairman and Lt. Colonel J. V. Hodgson is the United States representative. In London I conferred with Lord Wright and Colonel Hodgson in an effort to co-ordinate our work with that of the Commission wherever there might be danger of conflict or duplication. There was no difficulty in arriving at an understanding for mutual exchange of information. We undertook to respond to requests for any evidence in our possession against those listed with the Commission as criminals and to co-operate with each of the United Nations in efforts to bring this class of offenders to justice."

On 5th July, 1945, Justice Jackson, in a letter to the Chairman of the Commission, reviewed the plans which he was formulating for the trial of the Major War Criminals, namely:—that the defendants would be charged with the crime of aggression, crimes against peace, crimes against the laws and customs of war and crimes against humanity and that not only should individuals such as Goering, Hess and Ribbentrop be charged, but also groups and organisations such as the S.S., the Gestapo, the Nazi Party leaders, the Reich Government and groups within the military establishment. The prosecution hoped to demonstrate the plan, and the defendants’ purposes and objectives in connection with it, by establishing the common

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(2) See M.63 and M.64.
pattern of the defendants' conduct at different times, in different places and against a variety of victims. This common pattern included, with regard to the countries represented on the Commission, the pre-war infiltration and subversion of the fifth column, in addition to utilising economic devices for subjecting nations to the economic domination of the German Reich, the entering into of treaties without intention to observe them for further plans of domination, the launching of a war of aggression, often treacherously and without warning, and, after invasion, the common pattern of terrorisation.

It was in regard to this latter question that the countries represented on the Commission could make a valuable contribution in compiling a document containing details of the experiences suffered as a result of German aggression and occupation. These countries could also help in the search for orders and other evidence supporting a direct tracing of responsibility to the highest authorities. Justice Jackson also stated that he was aware that these facts had been noted and discussed by the Commission.

The following day, 6th July, 1945, Justice Jackson wrote a further letter to the Chairman of the Commission giving suggestions as to the form that these reports from the respective countries should take, instancing the report of the "U.S. Congressional Delegation upon Atrocities and other conditions in Concentration Camps in Germany" and of the comparable report of the British Parliamentary Commission.

At the meeting of the Commission held on 11th July, 1945, the Chairman drew the attention of the meeting to the two letters from Justice Jackson, stating that since it had been decided to hold a trial, he had considered it advisable to obtain a statement as to the assistance required from the members of the Commission, and the result was the two letters which had been circulated to members. The Chairman appealed to members to do all they could to assist Justice Jackson and his colleagues to build up a picture of the total pattern of war crimes perpetrated throughout the length and breadth of Europe, from the first-hand experiences of member Governments.

The next meeting of the Commission, held on 18th July, 1945, was attended by Justice Jackson, Sir David Maxwell Fyfe, Colonel Bernays and Commander Donovan; the latter two accompanying Justice Jackson. The Chairman in introducing them referred to the correspondence already circulated and the discussion at the last meeting.

Justice Jackson pointed out that, whereas the Commission was principally interested in the atrocities committed against nationals of those countries represented in it, he and his colleagues were mainly concerned with finding the designers of those atrocities and the men who, by the organisation and conduct of the German State, made those things happen. One of the first things discussed between the four Allied prosecutors was the problem of utilising the great mass of experience and information accumulated by the Commission.

(1) See M.69.
(2) See M.70.
The Governments, members of the Commission, did subsequently comply with the request and submitted to the Chief Prosecutors many reports and copies of documents which were utilised in the prosecution.

The work of Justice Jackson and his colleagues, with the Prosecutors of Great Britain, France and Soviet Russia, resulted in the London Agreement of 8th August, 1945. (1)

The text of this Agreement ran as follows:

(1) "There shall be established after consultation with the Control Council for Germany an international military tribunal for the trial of war criminals whose offences have no particular geographical location, whether they be accused individually or in their capacity as members of organisations of groups, or in both capacities.

(2) "The Constitution, jurisdiction and functions of the international military tribunal shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this agreement.

(3) "Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the international military tribunal. The signatories shall also use their best endeavours to make available for investigation of the charges against them, and the trial before the international military tribunal, such of the major war criminals as are not in the territories of any of the signatories.

(4) "Nothing in this agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

(5) "Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

(6) "Nothing in this agreement shall prejudice the jurisdiction or the powers of any national or occupation court, established or to be established, in any allied territory in Germany for the trial of war criminals.

(7) "This agreement shall come into force on the day of its signature and shall remain in force for the period of one year; and shall continue thereafter, subject to the right of any signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this agreement."

According to the Charter attached to the Convention, the Tribunal was to consist of four members, each with an alternate, one member and one alternate being appointed by each of the signatories. The presence of all four members or their alternates was to constitute a quorum, and the President was to be elected by the members from among their own number. The decisions of the Tribunal were to be taken by majority vote, and in case of an even division of opinion, the President was to have the casting vote.

The Court was to have jurisdiction to try and punish persons, whether as individuals or as members of organisations who had committed either: crimes against peace, war crimes or crimes against humanity.

The Tribunal was to draw up its own rules of procedure, in accordance with the provisions of the Charter. Each signatory was to appoint a Chief Prosecutor, to be responsible for the prosecution. Provisions were made in the Charter for ensuring a fair trial for each defendant; for instance, he was to be provided with a copy of the terms of the indictment in a language which he could understand at a reasonable time before the trial and the defendant could either conduct his own defence, or have the assistance of counsel. The Tribunal should have the right to impose a sentence of death or such other punishment as it should be determined by it to be just; the judgment of the Court was final and not subject to review. The sentences were to be carried out in accordance with the orders of the Control Council for Germany and the expenses of the Tribunal and the trial were to be charged by the signatories against the funds allotted for the maintenance of the Control Council in Germany.

The Legal Committee of the United Nations War Crimes Commission—Committee III—examined the provisions of the Agreement in so far as they affected the position of the adhering as opposed to the signatory powers, as a result of which they put forward a report and recommendation to the Commission. In this report they recognised the Agreement and the Charter annexed to it as being documents which gave effect to far-reaching principles which had already been well and fully discussed in the Commission and had been embodied in recommendations made by it, and assented to by a number of its member Governments. The report continued:

"The adherence to the Agreement of all the States invited to adhere, which (as the Committee has ascertained) include all States entitled to sign the Charter of the United Nations, would greatly add to the authority not of the International Military Tribunal only, but still more of the principles of law embodied in the Charter. The Committee feels that the Four Powers in so clearly enunciating these principles, and in setting up a court to apply them, have strengthened the protection against aggression which international law should give to all States and their populations and have reinforced the provisions for the prevention of war contained in the Charter of the United Nations. It seems more desirable that they should receive all possible support from the other United Nations."

This report was considered by the Commission at its meeting on 29th August, 1945, when it was introduced by the Norwegian delegate, as Chairman of the Legal Committee. He recommended that the Commission should endorse the Agreement and the Charter; although the Commission's endorsement might not have a very practical effect, it would have a great moral and perhaps political effect. Secondly, the Commission should recommend that all the United Nations, or at least the Governments represented on it, should accept the invitation to adhere to the agreement. Thirdly, member Governments should be encouraged to give the signatory Governments any assistance in the way of reports and evidence for which they might ask. The Commission unanimously accepted the report and the recommendation.

(1) Docs. III/13 and III/13a.
(3) See M.77. 29.8.45.
The appointment of Sir Hartley Shawcross, the new Attorney-General, as British Chief Prosecutor with Sir David Maxwell Fyfe as his deputy, and the appointment of the Hon. Francis Biddle as U.S. member of the Tribunal, with the Hon. John J. Parker as his alternate, were notified to the Commission at its meetings held on 26th September and 19th October respectively. At the latter meeting the Chairman reported on a visit which he and the U.S. representative had paid to Nuremberg during the preparations for the trial.

The Chairman of the Commission attended the opening of the Nuremberg trial. He reported to the Commission, at its meeting on 28th November, 1945, that he had found it a very impressive scene. A great feature of the proceedings had been the fine and historic speech of the U.S. Chief Prosecutor, Justice Jackson, which had set the trial on the proper plane of elevation. A great mass of material assembled for the trial—the United States Counsel for their part of the case for the prosecution alone would use 1,000 tons of captured and other documents—was treated in a precise and concentrated way. It had been a great experience to see the twenty defendants in a court-room of law, facing their judges and the case being presented against them in a formal businesslike way—possibly the first time in history that anything similar had occurred.

Later in the trial the Chairman again visited Nuremberg and reported on his visit at the Commission meeting held on 31st July, 1946. He had only paid a short visit, and had heard the speech of Sir Hartley Shawcross. He had been unable to hear the speeches of the American, French and Russian prosecutors. From his seat at the British Prosecuting table, he had been able to observe the criminals at close quarters. He was much struck by the extraordinary change that had occurred in them. Formerly they were jaunty, cheerful and somewhat insolent, but none of these qualities seemed to be obvious in their expressions or their manners now. They listened intently to the catalogue of their crimes and short-comings. Whether they were merely annoyed, conscience-stricken or suffering from the effects of about ten months in the prison precincts was difficult to tell. Ribbentrop seemed to be the most overcome. Everything in the court-room went smoothly and with dignity and the presiding judge seemed to have the whole of the Court well under his hand and prepared to abide by the rulings. The whole atmosphere struck the observer as though all was proceeding in the most dignified and businesslike manner.

(ii) THE TOKYO TRIBUNAL

The Tribunal to try the Major War Criminals in the Far East was established by Special Proclamation of the Supreme Commander for the Allied Powers, signed on 19th January 1946. After a preamble setting forth the authority possessed by the Supreme Commander to punish “all war criminals including those who have visited cruelties upon our prisoners” the proclamation laid down:

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(1) See M.79 and M.81. 26.9.45 and 19.10.45.
(2) See M.87. 28.11.45.
(3) See M.110. 31.7.46.
(4) Proclamation and Charter of the International Tribunal for the Far East circulated to members of the Commission as C. 182.
Article 1

"There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organisations, or in both capacities, with offences which include crimes against peace.

Article 2.

"The constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

Article 3

"Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals."

The Charter attached to this proclamation, which was amended by General Orders No. 20 dated 26th April, 1946, 10 dealt with the constitution of the Court. Under this, the Tribunal was to consist of not less than six members and not more than eleven, appointed by the Supreme Commander from the names submitted by the signatories of the Instrument of Surrender, India and the Philippines. The Supreme Commander was to appoint a member to be President of the Tribunal. The presence of a majority of members was to constitute a quorum, and voting was to be by majority vote, with the President having the casting vote if necessary. The jurisdiction of the Court, as with that of the Nuremberg Tribunal, was to cover crimes against peace, conventional war crimes and crimes against humanity. The Tribunal was to draft its own rules of procedure, consistent with the fundamental provisions of the Charter. The Chief of Counsel, to be responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of the Tribunal, was to be designated by the Supreme Commander; any nation with whom Japan had been at war might appoint an Associate Counsel to assist the Chief of Counsel. Provisions were included in the Charter for a fair trial of the defendants and for the admissibility of evidence. The Tribunal was declared to have power to impose upon an accused, on conviction, death or such other punishment deemed by the Tribunal to be just. The judgment should be announced in open court and the records of the trial transmitted direct to the Supreme Commander for his action. Sentence should be carried out in accordance with the orders of the Supreme Commander, who might at any time reduce or otherwise alter the sentence, except to increase its severity.

The main differences between the Tokyo and Nuremberg Charters were that: at Nuremberg the members of the Court were appointed by their respective Governments and elected the President from among their own numbers, while at Tokyo they were to be appointed by the Supreme Commander from a list of names submitted, and he alone was responsible for appointing the President; at Nuremberg the Chief Prosecutors were appointed by their respective Governments and were to be responsible for their part of the prosecution, while at Tokyo, the Chief of

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1 Text of General Orders No. 20 dated 26th April, 1946, circulated to members of the Commission as document C. 198.
Counsel was to be appointed by the Supreme Commander, with Associate Counsels appointed to assist him, by any nation that had been at war with Japan. Whereas in the case of the German war criminals the sentence was to be carried out as required by the Control Council for Germany, in Tokyo, the sentence was to be carried out in accordance with the order of the Supreme Commander.

The Chairman of the Commission visited Tokyo in the late spring of 1946 and, on his return to London, reported to the Commission, at its meeting held on 31st July, 1946, on his visit to the Far Eastern Tribunal. He had been there after the indictment had been read and the defendants had pleaded not guilty. The courtroom, which he thought was slightly bigger than at Nuremberg, was modelled on the same arrangements. There were eleven judges, but as one of them had retired they had appointed another, General Kraemer; there had been some slight objection raised to his appointment, but this was overruled by a majority vote. The President of the Court, Sir William Webb, had expressed the view that the trial would not be completed before the end of the year, but a lot would depend on the extent to which the particular defendants wished to give evidence. The Supreme Commander was taking a great personal interest in everything and was most able and sympathetic.

(iii) CONCLUSIONS

Although there were many recommendations made from 1918 onwards, by both official and semi-official bodies, for the establishment of some form of international tribunal to judge cases outside the normal competence of municipal courts, it was due to the initiative taken by the United States Government that the International Military Tribunals of Nuremberg and Tokyo came to be constituted. These Courts embodied in their Charters the conceptions of both the International Criminal Court to be established by International Convention and the Mixed Military Tribunal to be established by Supreme Commanders, as recommended by the United Nations War Crimes Commission in 1944. Whereas the Nuremberg Tribunal was more of the nature of a Court established by International Convention, though having a military flavour, that of Tokyo was established by a proclamation of the Supreme Commander.

D. MILITARY AND NATIONAL TRIBUNALS ESTABLISHED FOR THE TRIAL OF WAR CRIMINALS

(i) TRIBUNALS IN GERMANY

Once the Unconditional Surrender of Germany had been accepted, a Military Government of the territory was constituted by the Supreme Commander of the Allied Forces. Under his Proclamation No. 197 the Supreme Commander declared, by virtue of the supreme legislative, judicial and executive authority vested in him, that all persons within the

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1) See M.110. 31.7.46.
occupied territory must obey immediately and without question the enactments of the Military Government. To enforce these orders, Military Government Courts would be established for the punishment of offenders. Under Ordinance No. 2(1) three types of Military Government Courts were established, namely; General Military Courts, Intermediate Military Courts and Summary Military Courts. Their jurisdiction was to cover, in addition to offences against Military Government laws and ordinances and offences against German law, all offences against the laws and usages of war. The General Military Courts had the power to impose any lawful sentence, including the death sentence, while the other two courts had respectively a lesser jurisdiction. All the members of these courts were to be officers of the Allied forces; the General Military Courts were to consist of not less than three members, while the Summary and Intermediate Courts could consist of one or more members. Advisers might be appointed to sit with the Court to give advice and assistance as might be required, but they could have no vote. The judgment in each case was subject to review by the convening authority, and in the case of the death sentence, confirmation had to be obtained from the Supreme Commander or his deputy.

The jurisdiction of these courts to try war criminals operated under the authority of this Ordinance No. 2 until 20th December, 1945, when Control Council Law No. 10 was issued.(2) According to this Law—which was to regulate the apprehension, surrender and trial of war criminals throughout Germany—each occupying authority within its own zone had the right to bring to trial before an appropriate tribunal all persons accused of committing a crime, including those charged with crimes by one of the United Nations. In the case of crimes committed by Germans against Germans or stateless persons, such a court might be a German court, if the occupying authorities so authorised. Each zone Commander was to regulate the offences to be tried and the rules and procedure to be adopted by the courts in each respective zone. Under Article II of this Law, the acts to be recognised as war crimes were crimes against peace, war crimes proper, crimes against humanity and the membership of organisations declared to be criminal. The jurisdiction of the courts to be established by the respective zone Commanders therefore extended far beyond those of the earlier Military Government Courts in the matter of war crimes.

(1) Tribunals established in the British Zone

The Royal Warrant of 14th June, 1944,(3) laid down regulations for the trial of war criminals by British Military Courts. These Courts had jurisdiction to try “viations of the laws and usages of war committed during any war in which His Majesty has been engaged at any time after 2nd September, 1939”. The scope of these Courts was therefore narrower than that conferred upon Military Government Courts by General Eisenhower’s Proclamation No. 1 and Ordinance No. 2. The Military Courts were to be convened by a competent officer and were to consist

(1) loc. cit.
(2) U.N.W.C.C. Documents Series No. 15 (bis) of January, 1946, also Misc. No. 9, 7.2.46. Note on the Control Council Law No. 10 by the Legal Officer.
of not less than two officers in addition to the President. The convening officer might, if he considered it desirable, appoint as a member of the Court, but not as President, one or more officers of the Allied forces serving under his command or at his disposal, provided that the number of non-British officers was not more than half that of the Court, excluding the President. The jurisdiction of the Court was to extend to persons within the limits of the command of the convening officer, no matter where or when the crime had been committed, whether before or after the promulgation of the Royal Warrant. The rules of procedure applicable to ordinary field courts-martial were to apply with certain modifications; for instance, rules of evidence might be relaxed and the Court might consider any oral statement or any document, provided it appeared to be of assistance in proving or disproving the charge. A Court consisting of not more than three members including the President could pass sentence of death by unanimous agreement only; a Court consisting of more than three members could pass a death sentence only with the concurrence of two-thirds of its members. There was no right of appeal from the Court, but the accused could notify his intention, within 48 hours, of submitting a petition to the confirming officer.

There were two amendments issued to the Royal Warrant. The first, on 4th August, 1945,(1) concerned the case where a group was indicted for a crime, and the second, issued on 30th January, 1946,(2) altered the customary rule in laying down that the proceedings of such courts need not be held up owing to the absence of the accused, provided the Court was satisfied that by so doing it involved no injustice to the accused. This amendment arose from difficulties which had occurred during the Belsen trial, owing to the illness of one of the defendants.

British Ordinance No. 47 concerning crimes against humanity, which came into effect on 30th August, 1946,(3) made applicable to the British zone the provisions of Control Council Law No. 10, whereby German courts could exercise jurisdiction in cases of crimes against humanity committed by Germans against other Germans and stateless persons.

When, on 14th July, 1945, the Commander-in-Chief of the British zone assumed all authority and power previously held by the Supreme Commander, Ordinance No. 4 of that date confirmed all enactments and orders already in force. Thus the Military Government Courts established under Ordinance No. 2 of the Supreme Commander, and—according to British law—by the Royal Warrant of 14th June, 1945, continued in force. However, Ordinance No. 68 which came into force on 1st January, 1947,(4) dealt with the establishment of Control Commission Courts. These were to consist of Summary Courts and a Supreme Court consisting of a High Court and Court of Appeal. Any judge of the Supreme Court, that is to say, the Chief Judge, the Judges of the Court of Appeal and the Judges of the High Court, must be qualified to practise as an advocate.

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in any court in the British Empire having unlimited jurisdiction in either civil or criminal affairs, and must have practised as an advocate or solicitor or held judicial office there. The Summary Courts were to consist of single magistrates, for whom no legal qualifications were laid down.

In addition to trying offences against the laws and customs of war, and offences against German law, these Courts had jurisdiction over all offences under any proclamation, law, etc., issued by the authority of the Allied Control Council, the Supreme Commander of the Allied forces or of the Commander-in-Chief. They, therefore, had jurisdiction to try all war crimes in the wider sense of the law, as laid down in Control Council Law No. 10, namely crimes against peace, crimes against humanity and membership of criminal organisations. Their jurisdiction over war crimes was therefore concurrent with that of the British Military Courts, though it extended beyond them, and was also concurrent with the German courts in so far as the crimes committed were by Germans against Germans or stateless persons. For instance, it was a Control Commission Court which tried members of the staff of the Esterwegen penal camp, where many of the political prisoners had been Belgians, and where the charge included crimes against humanity. The Control Commission Courts also varied from the Military Courts in that their rules of procedure allowed for an extensive review of the decisions of both the High Court and the Summary Courts.

Ordinance No. 69, which became effective on 31st December, 1946,(1) established two grades of German courts to try members of the organisations declared criminal by the International Military Tribunal at Nuremberg. These were the Courts of First Instance (Spruchkammern) and the Courts of Second Instance (Spruchsenate). The Spruchkammern were to consist of a President, who must be qualified to hold judicial office, and two law assessors. The Spruchsenate were to consist of a President, who must be a judge, and two other members qualified to hold judicial office. The Chairman of the Spruchkammern and all the members of the Spruchsenate were to be nominated by the Central Legal Office, in consultation with the highest legal administrative authority in each German Land. The law assessors of the Spruchkammern were to be nominated by the appropriate land authorities. The Courts of First Instance would be responsible for the trial and punishment of members of these organisations, with the right of appeal on questions of law to the Courts of Second Instance. The most severe sentence which could be imposed by such Courts was 10 years imprisonment

(2) United States Tribunals in the European Theatre

The first United States tribunals to be established in Europe for the trial of war criminals were in Italy, where Circular No. 114 from Headquarters Mediterranean Theatre of Operations U.S. Army, dated 23rd September, 1945,(2) set out the regulations for such trials. Military Commissions, to consist of not less than three officers, with a judge advocate and defence

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(1) Military Government Gazette—Germany—British Zone of Control No. 16 U.N.W.C.C. Doc, Misc. No. 79 of 4.3.47.
(2) Misc. No. 16 of 1.3.46.
counsel, should be appointed to try war crimes, which were defined as
violations of the laws and customs of war. According to the circular,
technical rules of evidence were not to be applied, but any evidence might
be admitted which, in the opinion of the President of the Commission,
"has any probative value to a reasonable man".

In Germany, the United States authorities, carrying into effect the
provisions of Ordinance No. 2 of the Supreme Commander, issued
instructions by means of a letter from Headquarters European Theatre
dated 16th July, 1945,(1) for the setting up of Military Government Courts
which were to deal with "cases involving offences against the laws and
usages of war or the laws of the occupied territory commonly known as
war crimes". The Courts were to be appointed by the Army or Military
District Commanders and the personnel was to be selected from the
officer personnel of the military organisation under command of the
appointing authority. The General Military Courts and Intermediate
Military Courts were to consist of not less than five members and not
less than three members respectively, and at least one officer with legal
training was to be detailed as a member of the Court. No persons could
be convicted except by concurrence of two-thirds of all the members
present at the time the vote was taken. The appointing authority should
also be the confirming authority and no sentence of death could be carried
out without confirmation from the Commander-in-Chief. On 25th
August, 1945,(2) further instructions were issued for the establishment
of Military Commissions to be composed of not less than three com-
missioned officers of the United States Army, to try cases coming within
the application of the Articles of War of the United States Army.

On 26th June, 1946,(3) additional instructions were issued by Head-
quarters United States Forces European Theatre, by which the right to
appoint Military Government Courts, which had been delegated to Army
Commanders, was abrogated and appointment was to be made in future
by Headquarters European Theatre. The formation of the General
Military Government Courts and Intermediate Military Government
Courts was to continue on the lines laid down by the former edict, and the
Courts were to deal with "cases involving American nationals as victims
and mass atrocities committed in the American zone of occupation".
The novel feature in this set of instructions was as follows: in certain
atrocity cases which had already been tried, such as those of Hadamar,
Dachau and Mauthausen, the Court, in pronouncing sentence against the
individual accused, had also found that the "mass atrocity operation
involved in each was criminal in nature". It was now ruled that, following
on the judgment of the "parent" trial, Intermediate Military Courts
would be appointed to try other persons associated with such criminal
operations. These Courts were to take judicial notice of the decision
given in the parent case, and after examining the evidence showing the
nature and participation of the accused in the mass atrocity operation,
they should pronounce appropriate sentence. Thus, as the Nuremberg
judgment pronounced certain organisations to be criminal in character

(1) Misc. No. 23 of 26.3.46.
(2) Misc. No. 23 of 26.3.46.
(3) Misc. No. 51 of 22.10.46.
and the trial of members of them was delegated to lesser courts, so in the case of the major atrocities committed in the United States zone, the judgment of the lesser participants was delegated to a lower court, which would take official cognizance of the judgment in the patent case.

It was to implement the judgment of the International Military Tribunal of Nuremberg that the United States Military Government Ordinance No. 7 of 18th October, 1946,(1) laid down regulations for the organisation of certain additional Military Tribunals. These were to have the power “to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes”. This meant that the Tribunals were to deal, other than with war crimes proper, with offences such as the design to wage aggressive war, or the design and commission of crimes against humanity. In the case of these Tribunals, the Bench was to take official cognizance of the judgment given in the parent case, namely by the International Military Tribunal. The body which organised these trials was the Subsequent Proceedings Committee and the cases tried included, for instance, that of twenty-three doctors charged with performing medical experiments on human beings, and the officials of the W.V.H.A., the body responsible for the organisation and administration of the concentration camps.(2)

Whereas, in the British zone, authority was given by means of Ordinance No. 47 for German courts to try cases of crimes against humanity committed by Germans against Germans or stateless persons, in the American zone similar authority was given by means of a letter dated 23rd August, 1947, from the Office of Military Government (U.S.) to the offices of Military Government for the respective Lands of Bavaria, Wurttemberg-Baden and Greater Hesse.(3) According to these instructions the German courts were empowered to apply the provisions of Control Council Law No. 10 in all cases “where the alleged crime against humanity was likewise an offence against German law and was committed by a German or non-United Nations national against Germans or persons of non-United Nations nationality.”

Moreover, from 9th April, 1947,(4) the Office of the Military Government for Germany (U.S.) decided to entrust to the local German courts the trials of members of criminal organisations, consistent with the findings of the International Military Tribunal.

3. French Tribunals in Germany

According to an instruction issued by the General Directorate of Justice of the War Crimes section of the French Supreme Command in Germany on 28th August, 1946,(5) for the trial of war crimes, among other offences, the permanent Military Tribunals of the French Military Districts were given jurisdiction to try war crimes committed in French territory or in territory which was under the authority of France at the time when

(2) For further details concerning the trial of members of the Criminal Organisations see Chapter X, Section D, p.332 et seq.
the crimes were committed. Other crimes, such as those committed in the French zone of occupation, fell within the jurisdiction of the Military Government Tribunals established in that zone.

(ii) UNITED STATES TRIBUNALS IN THE FAR EAST

By a regulation dated 24th September, 1945,(1) issued by the General Headquarters of the United States Army Forces in the Pacific, rules were laid down governing the trial of persons, units and organisations within the theatre accused of war crimes. These trials were to be held before Military Commissions to be convened by the Commander-in-Chief of the United States Army Forces in the Pacific, or his deputy. The number and types of tribunals to be established would depend on the number and nature of the offences involved and the offenders to be tried. Some might include international commissions consisting of representatives of several nations, appointed to try cases where the nationals of more than one nation had been the victims. Others might consist of members of any one branch or several branches of the armed forces of one or more nations, depending on whether the offences were committed against one or more service branches of one or more States. In the case of persons whose offences had a particular geographical location outside Japan, their trial might be held by competent military or civil tribunals of local jurisdiction, held on or near the scene of the offence.

The members of the Military Commissions were to be appointed by the Commander-in-Chief or under authority delegated by him. Each Commission was to consist of not less than three members, and if possible at least one member should have had legal training. A Commission might be of either service or civilian personnel, or be composed of both service and civilian personnel. The convening authority should appoint one or more persons to conduct the prosecution, and in the case of offences involving more than one nation, each nation concerned should be represented among the prosecutors. The sentence of each tribunal was subject to confirmation by the convening authority, and in the case of the death sentence, by the Commander-in-Chief. The jurisdiction of these tribunals was to extend to Japan and other areas occupied by the armed forces commanded by the Commander-in-Chief of the United States Army Forces in the Pacific, and was to cover certain specified crimes, which included not only war crimes proper but also the crime of waging aggressive war and crimes against humanity.

On 5th December, 1945, with the establishment of a Supreme Commander for the Allied Forces in Japan, a new regulation was issued from the General Headquarters of the Supreme Commander(2) which covered substantially the same provisions as those contained in the regulations issued by the Commander-in-Chief of the U.S. Army Forces in the Pacific, except that, whereas the earlier regulation limited the jurisdiction of the Commissions to “Japan and other areas occupied by the armed forces under the command of the Commander-in-Chief U.S. Army Forces in the Pacific”, the new regulation gave them jurisdiction “over all persons

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(1) Misc. No. 41 of 19.8.46.
(2) Misc. No. 51 of 22.12.46.
charged with war crimes who are in the custody of the convening authority at the time of the trial". The new regulation added the point that "the offences need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18th September, 1931".

On 21st January, 1946, the Headquarters of the United States Forces in the China Theatre issued regulations governing the trial of war criminals in that Theatre. These regulations followed much the same lines as those issued by the United States Army Forces in the Pacific; the jurisdiction of the Commissions was to cover: "all of China, co-extensive with the China Theatre of Operations and territory now or formerly belonging to China, including Formosa, Manchuria and Hainan Island, and other areas wherein the armed forces commanded by the Commanding General, U.S. Army Forces China Theatre are or have been stationed".

(iii) AUSTRALIAN TRIBUNALS

By the Commonwealth of Australia War Crimes Act, 1945, the Governor-General was declared to have authority to constitute Military Courts for the trial of war criminals. The principles on which this Act was based, were similar to those of the British Royal Warrant of 14th June, 1945. For instance, the convening authority might appoint as a member of the Court, other than as President, one or more officers of the naval, military or air forces of any Power allied or associated with His Majesty during the war, but the number of such officers must not comprise more than half the members of the Court, excluding the President. The procedure of the Courts should be as laid down in the Army Acts and Rules of Procedure relating to field general courts-martial. The provisions of the Act were to apply to war crimes committed anywhere, whether within or beyond Australia, against British subjects or allied nationals.

Instructions issued by the Headquarters of the Australian Military Forces dated 26th November, 1945, gave more detailed instructions to Army commanders concerning the establishment of the Courts. In order to facilitate administration, it divided war criminals into three categories:

Category A. Those charged with committing a war crime solely against Australian nationals.

Category B. Those charged with committing a war crime against both Australian and Allied nationals.

Category C. Those charged with committing a war crime solely against Allied nationals.

Suspects in Category A were to be brought before a Court consisting solely of officers of the Australian Defence Forces. Those in Category B were to be brought to trial before a Court consisting of two officers of the Australian Defence Forces, and, if practicable, members to represent each of the Allied Powers whose nationals had been victims of the crime.

(1) loc. cit.
(2) Assented to 11th October, 1945. C.196 of 22.5.46. Australian War Crimes Legislation.
(3) C.196 of 22.5.46.
In the case of Category C, suspects were to be detained until suitable arrangements had been made with the Allied Governments concerned.

(iv) CANADIAN TRIBUNALS

By an Order in Council of 30th August, 1945, the Governor-General issued regulations for the trial of war criminals. These regulations were confirmed by an Act of Parliament passed on 6th August, 1946, which was made retrospective and deemed to have come into force on 30th August, 1945.

The Military Tribunals established for the trial of war criminals were much on the same lines as those established by the British Royal Warrant of 14th June, 1945, and the Australian tribunals. As in the British and Australian courts, officers of the British and Allied Forces could be invited to sit as members of the Court if the crime concerned had affected their respective nationals. Whereas, in the case of the British and Australian courts, there was no limit to the number of members of the Court, the Canadian tribunals were to consist of not less than two and not more than six officers. There was also a provision by which, if the accused was an officer of the enemy forces, the convening officer should so far as was practicable, but was under no compulsion to do so, appoint as many officers as possible of equal or superior relative rank of the same branch of service as the accused. As in both the British and Australian courts, the procedure was to be that of general field courts-martial, but the rules of evidence need not be so severe, and the Court might take into consideration any oral statement, or any document appearing to be authentic, provided it was relevant to proving or disproving the case.

(v) NATIONAL TRIBUNALS CONSTITUTED BY UNITED NATIONS GOVERNMENTS

(1) Existing Courts to be used for the Trial of War Criminals

(a) French Courts. While the French Government was still in Algiers, on 28th August, 1944, it issued an ordinance concerning the prosecution of war criminals. Under this ordinance war criminals were to be prosecuted by French Military Tribunals and judged in accordance with the French laws in force where such offences, even if committed under the pretext of the existing state of war, were not justified by the laws and customs of war. These Military Tribunals were to be constituted in the manner laid down in the Military Code. This meant, in effect, that war crimes trials could commence in occupied France, provided the appropriate courts could be constitutionally appointed.

(b) Norwegian Courts. The Norwegian Law on the punishment of foreign war criminals was passed by the Storting on 12th December, 1946, and given the Royal assent on the following day. This law superseded the corresponding Provisional Decree passed by the Norwegian Govern-

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(1) Misc. No. 48 of 25.9.46, Canadian War Crimes Regulations.
(3) Documents Series No. 26 of February, 1946.
ment in London on 4th May, 1945. Its effect was to incorporate into the Norwegian National Law the already existing provisions of international law so far as war crimes were concerned, and these were made applicable to war crimes committed in Norway since the outbreak of hostilities on 9th April, 1940.

In Norway no special courts, military or otherwise, were set up to try cases of war crimes. Such proceedings are brought before the ordinary courts of the land. The procedure followed in trials of war criminals was governed by the terms of Law No. 2 of 21st February, 1947,(1) which superseded the provisional Decree of 5th February, 1945, passed by the Norwegian Government in London. This law, while intended primarily to apply to trials of traitors, contained rules of procedure which were applicable to cases dealing with crimes committed by foreign war criminals. The law aimed, inter alia, at expediting and simplifying procedure, and contained special provisions for the composition of courts when dealing with cases against war criminals. Subject to the special provisions laid down in this Law, the General Law on Criminal Procedure(2) was also applicable to cases against war criminals.

The following are the courts which were concerned with cases against war criminals:

(1) Hereds-og Byrettene (the County and Town Courts) which are composed of a judge by profession, appointed by the King, and two lay judges chosen by ballot for the individual trial. The judge by profession acts as President of the Court.

(2) Lagmannsrettene (the five Courts of Appeal—each covering their respective part of the country), which are composed of three judges by profession appointed by the King and four lay judges chosen by ballot for each individual trial, the senior judge of profession acting as President of the Court.

(3) Hoyesteretts Kjaeremalsutvalg (the Judicial Committee of the Supreme Court) which is a judicial body composed of three judges of the Supreme Court appointed by rota by the President of the Supreme Court to serve on this body for a certain period.

(4) Hoyesterett (the Supreme Court). For the time being two parallel sections of the Supreme Court are in operation. As a rule each section is composed of 5 judges, the senior being the Chairman. However, in cases of a death sentence both sections of the Supreme Court must take part in the judgment. The same applies regardless of these conditions if a majority of judges of the section in question consider that a death sentence is applicable or in cases where legal questions of a particularly doubtful character are raised.

Because of the severity of the penalties imposed for the more heinous

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(2) Law No. 5 of 1st July, 1887, and Law No. 5 of 13th August, 1915, relating to general rules of procedure common to all court proceedings.
type of war crime, all such cases would be, as a rule, tried by the Lagmannsrett in the first instance. The defendant would have the normal right of appeal to a superior court.

(c) Yugoslav Courts. The Yugoslav Law No. 619 concerning Criminal Acts against the People and the State, issued on 25th August, 1945, dealt with the trials of war criminals among those of traitors and persons guilty of "acts against the people". Criminal acts, of the nature dealt with by the Law, were to be tried in the first instance in the People's County Courts and, in the case of military persons, in the Military Courts. Important cases might be tried by the Supreme Courts of the federative units.

(d) Belgian and Danish Courts. The Belgian Law of 20th June, 1947, relating to the Competence of Military Tribunals in the Matter of War Crimes gave the Military Tribunals jurisdiction over both military personnel and civilians in the matter of war crimes. The Danish Act on the Punishment of War Crimes, assented to by the King of Denmark on 12th July, 1946, dealt with the crimes which were justifiable as war crimes; in all cases the jurisdiction of the ordinary courts was to apply, with the normal right of appeal to a superior court.

(2) Special Tribunals appointed for the trial of War Criminals

(a) Polish Tribunals. A Decree of 31st August, 1944, issued by the Polish Government in exile, laid down procedure for the trial of war crimes before Special Criminal Courts. The members of these Courts were to be, one professional judge and two lay judges. They were to be appointed by the Presidium of the National Council, on the recommendation of the Minister of Justice and their judgments were to be final.

This Decree was followed on 22nd January, 1946, by a Decree which established a Supreme National Tribunal to try war criminals and traitors. This Tribunal, and the Prosecutor attached to it, was to exercise supervisory authority over the Special Criminal Courts and the Prosecutors attached to them. Authority was given to the Supreme National Tribunal to review the judgments given in the lower courts, if necessary. The Supreme National Tribunal was to consist of a President, who was to be the First President of the Supreme Court, two other judges and four laymen. The judges and prosecutors of the Tribunal were to be appointed by the Presidium of the National Council, on the recommendation of the Minister of Justice, while the lay judges were to be appointed from among the members of the National Council. The defendant would have the right to appeal for mercy to the President of the National Council, who could, if thought desirable, commute the penalty. The Minister of Justice in a Proclamation dated 31st October, 1946, issued the necessary regulations for the establishment of the Supreme National Tribunal.

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(1) Misc. No. 60 of 9.12.46.
(3) Misc. No. 47 of 10.9.46.
The jurisdiction of the Tribunal was to cover crimes concerning responsibility for the defeat of Poland in September, 1939, for Fascist activities in public life, and for crimes committed by persons surrendered to Poland under the Moscow Declaration, excepting cases which the Prosecutor of the Supreme National Tribunal would transfer to the District Courts. This was amended by a Decree of 11th April, 1947,(1) by which the Court had jurisdiction over the same persons, though the Prosecutor might transfer some cases to the District Courts. Whereas previously any records taken during the preliminary investigation and any public and private documents could be read in court, the new decree confined this to “any records taken within or without the country, by the Polish authorities or by any allied authorities, or by any private persons . . . during the preliminary investigation” which might be read at the trial.

Owing to the stabilisation of political, economic and moral conditions in Poland and the decline of the emotional climax as regards war crimes, two years after liberation it was no longer necessary to maintain special courts for war criminals, and the cases were transferred, by a Decree of 17th November, 1946,(2) to the ordinary provincial courts and the special penal courts were abolished.

(b) Czechoslovak Tribunals. Decree No. 16 of 1945,(3) established Extraordinary People’s Courts to try war crimes in Czechoslovakia. These Courts were to consist of one professional judge and four jurors. The legal force of this decree was limited to one year.

Decree No. 17 of 1945(4) set up the Court of the Nation for the trial of the State President of the so-called Protectorate, but in actual fact Dr. Hacha died before his trial could be arranged. This Court was also to be used to try other leading personalities of the occupation period, which would, naturally, include traitors as well as war criminals.

Law No. 22 of 24th January, 1946,(5) established the Extraordinary People’s Courts on a more permanent basis. The jurisdiction of these Courts covered Nazi criminals, traitors and their accomplices, so that the bulk of their cases would concern treachery rather than war crimes. As instituted under Decree No. 16, they were to consist of five members, with a President, who must be a professional judge and four lay members. The Chairmen, their deputies and professional judges were to be appointed by the President of the Republic on the proposal of the Government, from lists drawn up for this purpose by the District National Committees. The Government should appoint the lay judges from other lists of persons drawn up by the District National Committees. The Courts were to be

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(2) Polish Official Gazette No. 59, para 324.
(3) III/14 of 3.8.45.
(4) op. cit.
(5) Misc. No. 112 of 27.11.47.
set up at the seats of the District Courts of Second Instance. As is customary in the proceedings of Czech general courts-martial, the proceedings of these Courts were to be concluded within three days, though experience in the trial of Karl Hermann Frank proved that this was not long enough, and an additional clause was added under which the proceedings might be extended beyond this period if the Public Prosecutor so proposed. There was to be no appeal against the decisions of these Courts, though an appeal for mercy might be made to the President of the Republic.

(c) Netherlands Tribunals. By Decrees of 22nd December, 1943, and of 12th June, 1945,(1) the Netherlands Government established five special Courts and a special Court of Cassation, which were to have jurisdiction over the crimes set out in the Special Penal Law Decree of 22nd December, 1943.(2) In the amendment of this latter by the Special Law Decree of 10th July, 1947,(3) provisions were laid down to cover war crimes committed both within the Kingdom and outside it. The Courts were composed of both military and civilian judges.

(d) Luxembourg Tribunals. By a Law of 3rd August, 1947,(4) a Special Court for War Crimes was established. This Court was to consist of the ordinary Military Court, composed of a Supreme Court judge and two senior officers, with the addition of two professional judges. The procedure was to be that of Military Courts, with benefit to the war criminals of all the privileges accorded to defendants in normal criminal jurisdiction. Sentences might be subjected to the Court of Cassation and appeals for clemency to the Sovereign might be allowed.

(e) Greek Tribunals. A Special Court Martial for War Criminals was established under the Greek Constitutional Act No. 90 of 1945. The Court so established was to sit in Athens, although the law provided for courts to be set up elsewhere if necessary.

The Court was to consist of five members; the President was to be a General from the legal branch of the Army; two members were to be officers of the regular army of the rank of Lieutenant Colonel or upwards, without legal qualifications, while the last two members were to be Judges of Appeal. The Prosecutor was to be from the legal branches of either the Army or the Navy. The law to be applied by the Court was the national criminal code, applicable in respect of crimes committed in Greece, or against Greek subjects abroad. The President would appoint two or three lawyers to defend the accused, who had the right to obtain a lawyer of his own nationality if he so wished, and as many additional Greek lawyers as he might choose. The Court had competence to impose all sentences from a fine to the death penalty. There was no appeal against its decisions, but the accused might appeal for clemency to a special council of the Ministry of Justice, and if that was rejected, to the King.

(2) Statute Book D.61.
(3) Statute Book H.233.
(f) Netherlands East Indies Tribunals. On 1st June, 1946, the Lieutenant-Governor-General of the Netherlands Indies signed four Decrees(1) in which the substantive and procedural law for the trial of war criminals was laid down. War criminals were to be tried by Courts-Martial and, in accordance with the discussion at Singapore in December, 1945, Allied officers can be invited to sit in these Courts-Martial and Dutch officers to sit in British Military Courts.

(g) Chinese Tribunals. The Chinese Law of 24th October, 1946, governing the trial of war criminals,(2) laid down that war crimes cases should come within the jurisdiction of the Military Tribunals for the Trial of War Criminals, attached to the various Military Organisations, which were to be constituted by order of the Ministry of Defence. These special Tribunals were to consist of five military judges and one to three military prosecutors. Three of the military judges were to be selected from the Military Organisation concerned and two were to be appointed by the Ministry of Justice from among members of the Provincial and Municipal Higher Courts. One or two of the Military prosecutors were to be selected by the Ministry of Justice from among the prosecutors of the Provincial or Municipal Higher Courts and one from the Military Organisation concerned. In case of necessity, the Military Tribunal for the Trial of War Criminals might appoint three military judges and one military prosecutor to carry out the trial of war criminals at the place where the crime was committed. The judgments of the Tribunals should be submitted for confirmation to the Ministry of Defence, through the appropriate Military Organisations. Sentences of death or life imprisonment were to be subject to confirmation by the President.

(vi) NATIONAL TRIBUNALS CONSTITUTED BY THE EX-ENEMY GOVERNMENTS FOR THE TRIAL OF WAR CRIMINALS

(1) Austrian Tribunals. Under the Constitutional Law of 26th June, 1945, passed by the Provisional Government of Austria, concerning War Crimes and other National Socialist Misdeeds,(3) the cases of war criminals were to be tried by the People's Courts.

(2) Italian Tribunals. An explanatory memorandum compiled by the Italian Ministry of Foreign Affairs was distributed to the Allied Governments on 10th March, 1947,(4) this explained the treatment of war crimes under Italian law. According to this memorandum, cases of war crimes were to be tried by Italian Military Tribunals and the rules of the Italian Penal Military Code concerning offences against the laws and usages of war were to apply to civilian as well as military personnel belonging to the armed forces of the enemy.

(3) Roumanian Tribunals. There was a preliminary Law No. 50 for the prosecution of War Criminals and Profiteers passed in January, 1945.(5)

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(1) Statute Book, 1946, Nos. 44, 45, 46 and 47(74).
(3) Documents Series No. 23 of February, 1946.
(4) Misc. No. 91 of 9.5.47.
(5) Published in Monitoral Official of 21.1.45. Misc. No. 70 of 24.1.47.
but this was superseded by the Decree-Law on the Punishment of those Responsible for the Country’s Disaster or Guilty of War Crimes\(^{(1)}\) which incorporated not only the former law on the punishment of war criminals, but also an earlier law for the prosecution of those responsible for the national disaster. The Courts thus constituted dealt, therefore, with traitors more than with war criminals. Under this law such cases were to be tried by a People’s Tribunal. These Tribunals were to consist of nine members, two of them to be judges appointed by the Minister of Justice, having judicial experience and qualifications, and the senior of them was to be President of the Court. The other seven were to be lay judges, Roumanian subjects of either sex chosen from among the members of the 7 political groups forming the Government. Within 15 days of the publication of this law, each of these political groups was to appoint five members, and if one group failed to appoint its representative, the members of the Court would be chosen from among the representatives of the other parties. The lay judges would be drawn by lots by the Minister of Justice, from names on the lists submitted by the political parties. The Minister of Justice could form groups of judges in towns with other resident Courts of Appeal, but where the offence had been committed outside the country, the case was to be tried by the Bucharest People’s Tribunal.

\(^{(4)}\) Hungarian Tribunals. Under the Orders in Council Nos. 81/M.E. and 1440/M.E. ex 1945 of the Hungarian Provisional National Government,\(^{(2)}\) the People’s Courts were given jurisdiction over persons who had committed not only war crimes proper, but had also been guilty of treachery and of crimes against the people. These People’s Courts were to consist of six members; the head judge, who was the judicially qualified member, was to be appointed by the Minister of Justice and each of the five political parties should appoint one member and two supernumerary members, one of whom would serve on the Court. If one of the political parties failed to produce candidates, the members of the Court would be chosen from those nominated by other parties. The head judge was to sum up the results of the trial to the other judges and advise them as to what forms of penalties were suitable for the acts committed. There was also to be a Supreme Council of People’s Courts, constituted in the same way, to form a Court of Appeal.

\(^{(5)}\) Bulgarian Tribunals. Decree Law No. 22 of 6th October, 1944,\(^{(3)}\) dealt with the trial by a People’s Court of those who were guilty in involving Bulgaria in the World War against the Allied Nations and of the Crimes Connected with the War. The number of war crimes cases brought before these courts were, therefore, likely to be in a minority. The Central Court for the trial of ministers and deputies was to consist of 13 members, four of whom were to be judges legally qualified and the others were to be drawn by lot from the lists of 30 names submitted by each district committee of the Fatherland Front. There were also to be District Courts, which were to consist of one appointed judge and four judges chosen from persons nominated by the respective district committees.

\(^{(1)}\) Published in Monituar Official of 23.4.45. Misc. 70.
\(^{(2)}\) Misc. 75 of 21.2.47.
\(^{(3)}\) Misc. No. 76 of 3.3.47.