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**Historical Survey of the Question of International Criminal Jurisdiction -  
Memorandum submitted by the Secretary-General**

Topic:  
**Question of international criminal jurisdiction**

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**HISTORICAL SURVEY OF THE  
QUESTION OF  
INTERNATIONAL CRIMINAL  
JURISDICTION**

*(Memorandum submitted by the Secretary-General)*

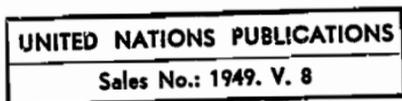


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## NOTE

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## **PREFATORY NOTE**

This study was undertaken pursuant to General Assembly resolution 175 (II) instructing the Secretary-General to

“do the necessary preparatory work for the beginning of the activity of the International Law Commission, particularly with regard to the questions referred to it by the second session of the General Assembly . . .”

and to General Assembly resolution 260 (III) B requesting the International Law Commission to

“study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions”

and in carrying out this task to

“pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice”.

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## INTRODUCTION

Throughout most of the history of international law it has been customary to speak of certain offences as *communis juris* and to describe these as *delicta juris gentium* or "crimes against the law of nations". The best-known example of such an offence is of course piracy. Indeed, subject to what is said in the paragraph next following, piracy is perhaps the only example of such an offence recognized by customary law. International conventions have, however, added to the number of such offences certain others of like concern to more than one State. Amongst these may be mentioned the slave trade, traffic in narcotics, traffic in women and children, the dissemination of obscene publications, the counterfeiting of currency and the injury of submarine cables.

During the greater part of modern history customary law has also recognized so-called war crimes of various description. Perfidy, particularly that type of perfidy which is described as espionage, is the oldest example of such a war crime. But the great enlargement of the scope of the laws and customs of war and their codification has extended the categories of offences against them very much beyond the comparatively simple cases of espionage and war treason recognized by the classical writers of the eighteenth century. Thus war crimes today consist principally in violations of the very detailed, though often imprecise, provisions of the Hague and Geneva Conventions and other general treaties.

The various offences described as crimes against the law of nations have not, historically, been given this appellation as a result of any doctrine that such offences are triable only by an international court. The implication of the description has rather been that in relation to their trial and punishment there is permissible some departure from the normal principles upon which national criminal jurisdiction is exercised—and particularly from the alleged principle of the territoriality of crimes. Thus, in the case of piracy, any State may take jurisdiction over the offenders. Similarly, in the case of war crimes, jurisdiction is conceded to the belligerent against whose forces, or population, or territory, the alleged offence is committed.

The possibility and desirability of according jurisdiction over certain offences to international courts or organs have thus been questions distinct from those of qualifying particular acts as international crimes and of adding, by means of treaties, to the numbers of the latter. It would appear that the former questions were first studied seriously in relation to war crimes charged as having been committed during the War of 1914-1918. The national jurisdiction of the complainant belligerents, and thus the quality of the acts charged as international crimes in the sense described,

was fully conceded in this connexion. It was, however, felt that the moral effect of the repressive measures to be taken would be greater if they were instituted under international auspices rather than merely under those of the several victor States. This purely procedural question was also influenced by the obscurity of the rules governing the responsibility for war crimes of Heads of State and of civilian war leaders. Thus it was urged that Heads of State were not triable at all, or at least not responsible for the acts of their subordinates, and that civilian officials, whose activities were confined to the territory of their own State, were, in accordance with the alleged principle of the territoriality of crimes, responsible only to the extent, if any, that the law of such State might provide.

It was considerations such as these which led to proposals at the Paris Peace Conference of 1919 for the trial by international courts of accused persons of the nationalities of the defeated Powers.<sup>1</sup> But a difference of opinion amongst the victors<sup>2</sup> led to provision in the Treaty of Versailles merely for the international trial of the ex-Head of the German State, which was never in fact carried out, and for the surrender by Germany of other accused persons for trial either by military tribunals of individual Allied Powers or by the military tribunals of more than one such Power sitting together.<sup>3</sup>

With the ending of the war of 1939-1945 exactly the same problem arose and very similar discussions, both official and semi-official, took place between the victors. The outcome was, however, very different, there being set up for the trial of major war criminals the International Military Tribunal (Nürnberg) and the International Military Tribunal for the Far East, which were truly international courts, albeit restricted in membership to judges of the nationality of the victor States, and not mere national tribunals sitting in combined session.<sup>4</sup>

Doubtless the advance which was thus achieved in relation to the trial of war crimes was to some extent influenced by the development which had taken place between 1919 and 1945 in relation to the question of the trial of other international crimes.

The stipulation in Article 14 of the Covenant of the League of Nations that the League Council should formulate and submit for adoption to the Members of the League plans for the establishment of a Permanent Court of International Justice gave a great impetus to the movement for the trial on an international basis of so-called international crimes which had already developed in connexion with war crimes in particular. Baron Descamps, the President of the Advisory Committee of Jurists appointed by the League Council to draw up the plan of the international system of judicature envisaged, proposed the establishment not only of a Permanent Court of International Justice but of a parallel High Court of International

<sup>1</sup> See p. 7 and appendix 1 *infra*.

<sup>2</sup> See in especial appendix 2 *infra*.

<sup>3</sup> See appendix 3 *infra*.

<sup>4</sup> See pp. 21-23 *infra*.

Justice for the trial of "crimes against international public order, and against the universal law of nations".<sup>1</sup> Though entertained with some sympathy by the Advisory Committee, this proposal was subjected to criticism on the ground that it would be workable only if agreement on the law to be applied could first be achieved. It was, however, transmitted to the League Council in the form of a *voeu* of the Committee.

The League Council in turn referred the proposal to the Assembly. The terms of the resolution whereby it did so are of great interest from the point of view of the history of the whole matter in that they not only endorsed the suggestion of the Advisory Committee that various private scientific organizations should be consulted inviting them to study the question, together with the question of the law to be applied by the proposed tribunal, but also contemplated the alternative of the creation of a criminal chamber of the Permanent Court of International Justice.<sup>2</sup> The Third Committee of the League Assembly, to which the matter then went, supported this alternative as the more practical but took the view that there was not then in existence any generally recognized international criminal law, so that neither proposal called for immediate action by the Assembly. But the same Committee advocated that the League Council should invite appropriate scientific institutions to consider how an international code could best be drawn up. Its report was not, however, adopted.<sup>3</sup>

Despite the failure of the League of Nations to furnish further encouragement, the different scientific bodies expended a great deal of labour in the matter. It is sufficient, in this connexion, to refer to the work done by the International Law Association, on the inspiration of the late Hugh Hale Bellot, resulting in the preparation of a draft statute for a criminal chamber of the Permanent Court of International Justice;<sup>4</sup> to the activities of the Inter-Parliamentary Union, conducted in a permanent sub-committee of the Union and directed to the preparation of a draft international criminal code;<sup>5</sup> and to the proceedings of the congresses of the International Association for Penal Law resulting in the endorsement of a draft statute for a criminal chamber of the Permanent Court of International Justice prepared by M. Pella.<sup>6</sup>

Governmental interest in a rather different aspect of the question was aroused again in 1937 by the French proposal to the League of Nations, inspired by the murder of King Alexander of Yugoslavia, of measures for the repression of terrorism and for its punishment by an international tribunal. The result was the signature of a convention of 16 November 1937 obliging the parties thereto to qualify as criminal, under their respective laws, various terroristic acts, and of a parallel convention of the same date making provision for their trial by a special international tribunal of a

<sup>1</sup> See p. 8 *infra*.

<sup>2</sup> See p. 11 *infra*.

<sup>3</sup> See p. 12 *infra*.

<sup>4</sup> See pp. 12-14 and appendix 4 *infra*.

<sup>5</sup> See p. 14 and appendix 5 *infra*.

<sup>6</sup> See p. 15 and appendices 6 and 7 *infra*.

permanent character, applying the appropriate national criminal law, in default of trial by national courts. These conventions were never, however, brought into force.<sup>1</sup>

No further developments took place up to the time of the termination of the War of 1939-1945 except that, as has been already said, during the latter part of that war, official and semi-official discussions and negotiations took place resulting in the establishment of the two international tribunals for the trial of major German and Japanese war criminals. Amongst the activities referred to there may be mentioned in especial those of the semi-official London International Assembly, a body of delegates designated by Governments, meeting under the auspices of the League of Nations Union, which recommended the international trial of certain exceptional categories of war crimes;<sup>2</sup> those of the International Commission for Penal Reconstruction and Development, another semi-official body, which also advocated a departure in certain cases from the process of repression of war crimes by national tribunals;<sup>3</sup> and finally, those of the United Nations War Crimes Commission, whose terms of reference included the examination of the question of the establishment of an international war crimes tribunal and which drew up a draft convention providing for an organ of this sort.<sup>4</sup> The influence of the work of each of the bodies mentioned on the shape the two International Tribunals eventually took was, of course, different in degree, but in each case significant.

Upon the establishment of the United Nations the question of the setting up of an international criminal court was raised within it in two connexions. First, a French proposal, made to the Committee of the General Assembly on the Progressive Development of International Law and its Codification referred to the criticism made of the International Military Tribunal that that body was not truly international in character because it represented only the Powers victorious in the War of 1939-1945.<sup>5</sup> The proposal advocated both the giving of criminal jurisdiction of a semi-appellate character and over States and Heads of States to the International Court of Justice and the establishment of a special international criminal tribunal, comparable to that provided for in the Convention of 1937, having jurisdiction in other categories of international crimes. The same Committee was already bound by its terms of reference to consider the connected question of plans for the formulation of the principles recognized in the Charter and Judgment of the Nürnberg Tribunal "in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code". And the outcome of the discussion of the French proposal was a majority decision to draw the attention of the General Assembly to the fact that the implementation of the principles referred to and the punishment of other international crimes

<sup>1</sup> See pp. 16-18 and appendix 8 *infra*.

<sup>2</sup> See pp. 18-19 and appendix 9 *infra*.

<sup>3</sup> See pp. 19-20 *infra*.

<sup>4</sup> See pp. 20-21 and appendix 10 *infra*.

<sup>5</sup> See p. 25 and appendix 11 *infra*.

might render desirable the establishment of an international judicial authority with criminal jurisdiction.<sup>1</sup> This, however, provoked no further reference to the matter.

But, in the second place, there were included in the draft convention on genocide, prepared in 1947 by the Secretary-General, with expert assistance, upon the instructions of the Economic and Social Council in connexion with resolution 96 (I) of 11 December 1946 of the General Assembly, certain alternative proposals for an international tribunal with residual jurisdiction over offences envisaged in the convention.<sup>2</sup> The alternatives presented were those of, first, a tribunal, being either a distinct body or a criminal chamber of the International Court of Justice, with general jurisdiction over international crimes, and, secondly, of a tribunal with jurisdiction limited to cases of genocide. The second draft of a convention on genocide, prepared the following year by an *ad hoc* committee of the Economic and Social Council, which took into consideration the Secretary-General's draft, contemplated the exercise by an appropriate international organ of jurisdiction over cases of genocide as an alternative to, rather than in default of, trial by national courts.<sup>3</sup> But no suggestions as to the organization of the tribunal were made. The proposal was subjected to some criticism both in the Economic and Social Council and in the Sixth Committee of the General Assembly, to which it was next referred, principally on the grounds of its indefiniteness as to the nature of the tribunal envisaged and of the lack of agreement as to the principles upon which such a tribunal would proceed. Amendments which would have restricted the area of international jurisdiction conferred and referred questions of State responsibility to the International Court of Justice did not, however, find favour with the Sixth Committee. Whereas, therefore, the draft convention as adopted contained provision for alternative trial "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" and for the reference to the International Court of Justice of disputes as to the responsibility of any State, no greater precision was introduced.<sup>4</sup>

The Sixth Committee did, however, recommend to the General Assembly that the International Law Commission should study the desirability and possibility of establishing an international judicial organ for the trial of individuals, charged either with genocide or with other international crimes over which jurisdiction might by treaty be given. And, having adopted the draft convention on genocide, the General Assembly proceeded immediately to adopt a further resolution in the terms proposed by the Sixth Committee. The resolution (260 (III) B, dated 9 December 1948) reads as follows:

<sup>1</sup> See p. 29 *infra*.

<sup>2</sup> See pp. 32-33 and appendix 12 *infra*.

<sup>3</sup> See pp. 33-34 and appendix 14 *infra*.

<sup>4</sup> See pp. 33-46 *infra*.

"The General Assembly,

"Considering that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal,

"Considering that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,

"Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions;

"Requests the International Law Commission, in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."

The purpose of this paper is to set out the history of the question of the establishment of an international jurisdiction hitherto, such as has been described in brief outline in this introduction, in some detail and to present in convenient form the various texts relevant in this connexion.

## CONSIDERATION OF INTERNATIONAL CRIMINAL JURISDICTION PRIOR TO THE UNITED NATIONS

### 1. THE PARIS PEACE CONFERENCE (1919)

The Preliminary Peace Conference, at its plenary session on 25 January 1919, decided to create, for the purpose of assessing responsibility for the War of 1914-1918, a Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties. This body, made up of two members named by each of the five great Powers and of five members elected from amongst the Powers with special interests, was charged to report on, *inter alia*, the constitution and procedure of a tribunal appropriate for the trial of breaches of the laws and customs of war committed by the forces of the enemy.

The Commission's report, which was unanimously adopted subject to certain reservations by the United States of America and to certain others on the part of Japan, stated the conclusion that every belligerent had by international law the power and authority to try individuals for war crimes but that an international tribunal was essential for the trial of certain charges. These were charges of crimes against persons of varying nationalities, e.g., atrocities in prison camps containing prisoners of war of more than one nationality, charges against persons of authority whose orders affected more than one nationality or operations against the armies of more than one of the Allies, and charges against the major enemy authorities and against any other persons whom it might not be desirable to try in any national court.

For the trial of charges of this kind it was proposed that there should be set up a "high tribunal", consisting of twenty-two judges, three appointed by each of the five great Powers and one each by six smaller Powers, to sit in divisions of not less than five members and to apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience". The scheme envisaged a prosecuting commission made up of representatives of the great Powers and of other Allied Powers interested. It also provided for the application of the principle *non bis in idem* in connexion with trials before the "high tribunal".<sup>1</sup>

It is noteworthy that the Commission also contemplated the trial by an international organ of persons accused not of war crimes *stricto sensu* but of certain "acts which brought about the war and . . . accompanied its inception, particularly the violation of the neutrality of Belgium and Luxembourg". The representatives of the United States questioned whether

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<sup>1</sup> The proposals of the Commission are printed as appendix 1 to this paper.

such acts should be passed upon by a judicial tribunal, if at all, in view of the Commission's conclusion that they were not criminal in the sense of being punishable under law. The Commission, however, failed to adopt an American proposal for the establishment of commissions of enquiry to deal with acts of this character. In general the United States representatives were not in favour of the establishment of an international war crimes tribunal and suggested that "if an act violating the laws and customs of war committed by the enemy affected more than one country, a tribunal could be formed of the countries affected by uniting the national commissions or courts thereof", citing a precedent of the American Civil War. Other American objections to the proposed "high tribunal" were the uncertainty of liability for violation of the "laws of humanity" and the extension of its jurisdiction to charges against Heads of States.<sup>1</sup>

The recommendations of the Commission were not adopted by the Peace Conference and the relevant portions of the Treaty of Versailles,<sup>2</sup> which contemplated the trial of the former Head of the German State before an international tribunal "for a supreme offence against international morality and the sanctity of treaties", and of persons accused of war crimes *stricto sensu* before national military tribunals or, in the case of crimes against the nationals of more than one Power, before tribunals composed of members of the appropriate national tribunals, reflect rather the views of the United States representatives.

## 2. THE ADVISORY COMMITTEE OF JURISTS (1920)

The Council of the League of Nations, in February 1920, decided to appoint a committee for the purpose of preparing plans for the establishment of the Permanent Court of International Justice provided for in Article 14 of the Covenant.<sup>3</sup>

In addition to the plan for the Permanent Court of International Justice, this Advisory Committee of Jurists adopted, as the expression of their *vœu*, three resolutions which were transmitted, late in 1921, to the Council and Assembly of the League of Nations. The second of these resolutions suggested the establishment of a high court of justice, separate and distinct from the International Court of Justice in organization and jurisdiction. This court was to be composed of one member for each State, to be chosen by the group of delegates from each State represented in the Permanent Court of Arbitration. The preliminary draft of this suggestion was contained in a proposal concerning "the organization of international justice", submitted by the President of the Advisory Committee, Baron

<sup>1</sup> The opinions of the United States representatives are set out *in extenso* in appendix 2.

<sup>2</sup> Articles 227-230, printed in appendix 3.

<sup>3</sup> The membership of the Advisory Committee was as follows: Mr. Mineichiro Adatci, Mr. Rafael Altamira, Mr. Clovis Bevilacqua (represented and subsequently succeeded by Mr. Raoul Fernandes), Baron Descamps, Mr. Francis Hagerup, Mr. Albert de Lapradelle, Dr. Loder, Lord Phillimore, Mr. Arturo Ricci-Busatti and Mr. Elihu Root.

Descamps. Two of its articles, dealing with the establishment of a high court of international justice "for the purpose of trying crimes against international public order, and against the universal law of nations", read as follows:

"The High Court of International Justice is composed of one member for each State, chosen respectively by the group of delegates from each State to the Court of Arbitration.

"The High Court of International Justice shall be competent to hear and determine cases which shall be submitted to it by the Assembly of the League of Nations or by the Council of the League, and which concern international public order, for instance: crimes against the universal law of nations."<sup>1</sup>

The proposal was, generally speaking, favourably received by the majority of the members of the Committee. Mr. de Lapradelle, supported by Mr. Altamira, expressed the view that since the object of the League of Nations was to prevent a repetition of the calamities which gave rise to its creation, "a stable judicial organization was required which could take action against those guilty of crimes against international justice . . . There were also other crimes against international law besides crimes against the rules of war. It was possible therefore to make provision for the future without stirring up memories of the past".<sup>2</sup> Another member of the Committee, Mr. Adatci, was also in favour of creating a high court of justice before the crimes which it would have to try had been committed.<sup>3</sup> Mr. Root sympathized with the President's proposal, but recognized that some serious difficulties existed, for unless there is a law to be broken there can be no penalty for breaches of it. As only States are subjects of international law "an individual can only be punished if the act which he has committed is punishable according to the national law which applies to the case".<sup>4</sup>

Since the proposal made no specific statement on the nature of the crimes to be punished, Lord Phillimore wondered if the offenders tried were to be States or individuals. He noted that the proposal did not state whether it referred to a condition of peace or war. If it only referred to crimes committed in time of war, he was prepared to accept the adoption of a resolution on the matter.<sup>5</sup>

The second part of the proposal was called "unsound" by Mr. Ricci-Busatti, as it was not clear what was to be understood by "a crime against the universal law of nations" and because "it was [not] possible in international affairs to make a distinction between civil and penal law, as was

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<sup>1</sup> *Procès-verbaux* of the proceedings of the Advisory Committee of Jurists, 1920, p. 142.

<sup>2</sup> *Ibid.*, pp. 500, 501.

<sup>3</sup> *Ibid.*, p. 502.

<sup>4</sup> *Ibid.*, p. 505.

<sup>5</sup> *Ibid.*, pp. 507, 508.

done in national law".<sup>1</sup> Similarly, Mr. Loder pointed out that the President's plan suggested the establishment of a court before defining the law to be applied, and crimes were mentioned which were not yet defined. "Under such circumstances", he said, "the court could only be of a political nature".<sup>2</sup>

With a view to reconciling the divergent opinions, Mr. Fernandes suggested that a resolution might be drawn up to the effect that steps should be taken to define crimes and assess penalties in order to make the operation of a high court possible.<sup>3</sup>

Finally, the Advisory Committee adopted three resolutions (*vœux*). The first suggested that a new inter-State conference to carry on the work of the Hague Conferences should be called as soon as possible, and that certain organizations specializing in international law should be invited to prepare draft plans to be submitted first to the various Governments and then to the conference.

The third resolution recorded the hope that the Academy of International Law, the work of which had been suspended owing to circumstances, might resume its activities in as near a future as possible side by side with the Permanent Court of International Justice and the Permanent Court of Arbitration, at the Peace Palace at the Hague.

The second resolution recommended to the consideration of the Council and of the Assembly of the League of Nations the following proposal for the establishment of a High Court of International Justice:

"Article 1. A High Court of International Justice is hereby established.

"Article 2. This Court shall be composed of one member for each State, to be chosen by the group of delegates of each State at the Court of Arbitration.

"Article 3. The High Court of Justice shall 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 by the Council of the League of Nations.

"Article 4. The Court shall have the power to define the nature of the crime, to fix the penalty and to decide the appropriate means of carrying out the sentence. It shall formulate its own rules of procedure."<sup>4</sup>

The Council of the League of Nations, in submitting the resolution of the Committee of Jurists to the Assembly, advocated the adoption in part of the first resolution. Its report,<sup>5</sup> adopted on 27 October 1920, reads as follows in so far as concerns the second resolution:

<sup>1</sup> *Procès-verbaux* of the proceedings of the Advisory Committee of Jurists, 1920, p. 503.

<sup>2</sup> *Ibid.*, p. 504.

<sup>3</sup> *Idem.*

<sup>4</sup> *Ibid.*, p. 748.

<sup>5</sup> *Procès-verbal* of the tenth session of the Council, 1920, pp. 181-183.

"The second recommendation of the Committee of Jurists concerns the eventual establishment of a High Court of Justice which shall try, in the future, crimes against the universal law of nations.

"The question thus raised might advantageously be examined in the same way as that involved in the first recommendation.

"After being submitted by the Council to the Assembly, it would then be forwarded for the consideration of the associations mentioned in the first recommendation. These associations would then have to give preliminary replies to the two questions as to whether a High Court of Justice should be established with the objects, the jurisdiction and the organization laid down in the draft contained in the second recommendation, and, if so, whether this should be a special court, or if jurisdiction in criminal matters should be entrusted to the Permanent Court of International Justice provided for by Article 14 of the Covenant. The preliminary replies of the international associations should then be submitted by the Council to the Governments of the States Members of the League of Nations."

This report, together with that of the Committee of Jurists, was referred to the Third Committee of the Assembly which agreed with the opinion expressed by the Council. In the course of the discussion, Mr. Lafontaine (Belgium) expressed the view that it was impossible to create an international criminal court, "since there was no defined notion of international crimes and no international penal law".<sup>1</sup>

In its report to the Assembly, the Third Committee expressed the following opinion:

"The second recommendation communicated by the Jurists' Committee at The Hague advocates the establishment of a Court of International Criminal Justice, the object of which would be to prosecute crimes committed against international public order. The Third Committee holds that there is not yet any international penal law recognized by all nations, and that, if it were possible to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the Court of International Justice. The Committee therefore considers that there is no occasion for the Assembly of the League of Nations to adopt any resolution on this subject."<sup>2</sup>

In addition, the report of the Third Committee recommended that:

"The Assembly of the League of Nations invite the Council to address to the most authoritative institutions which are devoted to the study of international law a request to consider what would be the best methods of co-operative work to adopt for the more precise definition and more complete co-ordination of the rules of international law which are to be applied in the mutual relations of States."<sup>3</sup>

<sup>1</sup>Records of the First Assembly of the League of Nations, 1920, tenth meeting of the Third Committee, p. 329.

<sup>2</sup>*Ibid.*, p. 764.

<sup>3</sup>*Idem.*

At the thirty-first plenary meeting of the Assembly, on 18 December 1920, the Rapporteur of the Third Committee, in presenting its report, declared that:

"The Committee is of the opinion that it would be useless to establish side by side with the Court of International Justice another Criminal Court, and that it is best to entrust criminal cases to the ordinary tribunals as is at present the custom in international procedure. If crimes of this kind should in future be brought within the scope of an international penal law, a criminal department might be set up in the Court of International Justice. In any case, consideration of this problem is, at the moment, premature."<sup>1</sup>

The Assembly failed to adopt the recommendation of the Third Committee.

### 3. PROPOSALS OF SCIENTIFIC INSTITUTIONS

#### A. THE INTERNATIONAL LAW ASSOCIATION

In a paper read at the Thirty-First Conference of the International Law Association,<sup>2</sup> held at Buenos Aires in 1922, Dr. Hugh H. L. Bellot emphasized the vital necessity of establishing a permanent international criminal court without further loss of time.<sup>3</sup> Following a brief discussion of the paper the Conference resolved that:

"In the opinion of this Conference the creation of an International Criminal Court is essential in the interests of justice, and that the Conference is of the opinion that the matter is one of urgency."<sup>4</sup>

Dr. Bellot was instructed by the Conference to draft the statute of this court and to submit it to a committee of the Association.<sup>5</sup>

Dr. Bellot thereafter submitted to the Thirty-Third Conference of the Association, held at Stockholm in 1924, a draft statute for a permanent international criminal court. Following a general discussion, a resolution was adopted according to which:

"The Conference, without expressing any further opinion upon the practicability or expediency of the creation of an International Criminal Court, refers it to a Committee to consider Dr. Bellot's report and see if a scheme for such a Court can be composed."<sup>6</sup>

This Committee, called the "Permanent International Criminal Court Committee", submitted its report to the next conference, held at Vienna, in 1926. In its report, the Committee declared that, after a careful study of the question, it had come to the conclusion that the creation of a permanent international criminal court was not only highly expedient, but

<sup>1</sup> Records of the First Assembly of the League of Nations, 1920, plenary meetings, pp. 744, 745.

<sup>2</sup> Report of the Thirty-First Conference, vol. I, p. 63, *et seq.*

<sup>3</sup> *Ibid.*, p. 79.

<sup>4</sup> *Ibid.*, p. 86. The text of the resolution is reproduced in the Report of the Thirty-Third Conference, p. 74.

<sup>5</sup> Report of the Thirty-First Conference, vol. I, p. 85.

<sup>6</sup> Report of the Thirty-Third Conference, pp. 110-111.

also practicable. The reason which had weighed foremost with the Committee was that the trial of the nationals of one State by the courts of another, however fair and impartial it might be in fact, was invariably regarded with suspicion. Especially, experience had shown that trial of war crimes by national courts, whether of the victor or vanquished, had almost invariably proved unsatisfactory. Such trials "are naturally open to suspicion of national bias; secondly, they would result in conflicting decisions and varying penalties; thirdly, it is international, not national, law which is broken, and violations of international law are more fittingly tried by an international court than by a national court; finally, if the rule of law is to be established in the family of nations, it can only be satisfactorily established by the co-operation of all nations expressed through an international court".<sup>1</sup>

The report was accompanied by a draft statute which was discussed and amended by the Conference. As it finally emerged from the deliberations of the Conference, the statute<sup>2</sup> provided that the international penal court to be established should be a division of the Permanent Court of International Justice, but was to exercise a separate jurisdiction in the cases of States and individuals charged with international offences as defined in the statute. The court would consist of ten judges and five deputy judges elected in the same way as the members of the Permanent Court of International Justice. The jurisdiction of the court would extend to all charges of:

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

(b) Violations of any treaty, convention or declaration binding on the States adhering to the Court, and regulating the methods and conduct of warfare;

(c) Violations of the laws and customs of war generally accepted as binding by civilized nations.

The court would, furthermore, have power to deal with cases of a penal character referred to it by the Council or Assembly of the League of Nations for trial, or for inquiry and report.

It was also provided, that no act could be tried as an offence unless it was specified as a criminal offence either in the statute of the court or in the municipal penal law of the defendant or, in the case of a stateless person, in the law of his residence at the time of the commission of the act or, failing such residence, the law of the State where the act was committed.

In the event of a dispute as to whether the court had jurisdiction or not, the matter would be settled by a decision of the court.

<sup>1</sup> Report of the Thirty-Fourth Conference, p. 110.

<sup>2</sup> Printed as appendix 4 to this paper.

The court was to have the power to impose penalties both on States and individuals, but it might also pronounce a declarator judgment without imposing any penalty.

Sentences upon individuals were to be carried out by the State of which the defendant convicted was a subject or citizen or, in the case of a stateless person, by the State in which he resided. In case of a judgment given against a State, each contracting State should, upon request, execute the judgment.

#### B. THE INTER-PARLIAMENTARY UNION

At the 23rd Conference of the Inter-Parliamentary Union, held in Washington, D.C., and in Ottawa in 1925, a report was submitted by Mr. V. V. Pella on behalf of the Permanent Committee for the Study of Juridical Questions of the Union, on *La criminalité de la guerre d'agression et l'organisation d'une répression internationale*.<sup>1</sup>

Having heard the report, the Conference adopted a resolution<sup>2</sup> by which it decided to set up a permanent sub-committee to study the causes of wars of aggression and to draw up a preliminary draft of an international legal code for the repression of international crimes. For this purpose the Conference called the attention of the sub-committee to the principles laid down by Mr. V. V. Pella in his report and summarized in an annex to the resolution. Some of these principles referred to the question of an international criminal jurisdiction. The criminal responsibility of individuals, as well as of States, was recognized for offences against public international order and the law of nations. Such offences were, however, to be defined in advance by enactments drawn up in precise terms, and international repression was to be founded on the principle *nulla poena sine lege*. It was recommended that the Permanent Court of International Justice should be given power to adjudicate upon all international crimes and offences, and that provision should be made within the Permanent Court for an international public prosecutor's department and a chamber before which offenders could be arraigned. Accusations of offences alleged to be committed by States were to be heard and determined by the Chambers of the Permanent Court in combined session. And cases in which individuals were the responsible parties were to be dealt with in a special criminal chamber set up in accordance with Article 26 of the Statute of the Court. This chamber would have jurisdiction over all international offences committed by individuals and all offences which by their nature fall outside the jurisdiction of national courts.<sup>3</sup>

<sup>1</sup> For the full text of the report see *Union interparlementaire, compte rendu de la XXIII Conférence*, pp. 205-242.

<sup>2</sup> Printed as appendix 5 to this paper.

<sup>3</sup> It should be mentioned that the 37th Conference of the Inter-Parliamentary Union, held in Rome in 1948, declared "that the collectivity of States must adopt as soon as possible an international penal code and create an international penal court for the punishment of crimes against peace, war crimes and crimes against humanity, including in particular the crime of genocide". United Nations document A/C.3/221.

## C. THE INTERNATIONAL CONGRESS OF PENAL LAW

When the first International Congress of Penal Law, held by the International Association for Penal Law, met at Brussels in 1926, twelve reports and other documents were submitted on the subject of an international criminal jurisdiction.<sup>1</sup> The Congress took as the basis for its discussions a number of conclusions prepared by Mr. V. V. Pella and Mr. H. Donnedieu de Vabres, who had been appointed co-rapporteurs.<sup>2</sup>

As a result of its deliberations,<sup>3</sup> the Congress adopted a *vœu* recommending that the Permanent Court of International Justice should be empowered to deal with criminal matters. This contemplated that the Court should have competence to try both States and individuals. The crimes and offences coming within the jurisdiction of the Court were, however, to be defined by international conventions, which were also to prescribe the penal sanctions and measures of restraint to be imposed by the Court. The number of judges on the Court was to be increased and the new judges were to be experts in criminal law. Furthermore, a prosecutor's department was to be established at the Court. Sentences upon States were to be enforced by the Council of the League of Nations, and sentences upon individuals by a State chosen and supervised by the Council.<sup>4</sup>

The *vœu* referred to recommended the setting up of a committee of the International Association for Penal Law to prepare a draft statute of an international criminal court. The Committee, which met first in Paris in January 1927, charged Mr. V. V. Pella with the drafting of this document and in January 1928, adopted his draft, which was then communicated to all the Governments represented at the Congress and to the League of Nations. The draft, in the same manner as that adopted by the International Law Association and in conformity with the views of the Brussels Congress, contemplated rather the attribution of criminal jurisdiction to the Permanent Court of International Justice than the creation of an independent international criminal court. Mr. V. V. Pella has recently republished this draft, with modifications taking account of the supersession of the Permanent Court of International Justice and the League of Nations by the International Court of Justice and the United Nations.<sup>5 6 7</sup>

<sup>1</sup> Cf. *Premier congrès international de droit pénal, Actes du congrès*. These papers were submitted by: H. Bellot (pp. 366-370); J. E. Coll and J. P. Ramos (pp. 370, 371); P. Cárdenas (p. 69); F. Segura (p. 75); E. Regiieiferos (pp. 371-377); A. Saldana (pp. 377-392); H. Donnedieu de Vabres (pp. 392-409); N. Politis (pp. 409-423); R. Garofalo (pp. 423-429); V. V. Pella (pp. 430-459); J. Kallab (pp. 459-471); J. Peritch (pp. 472-480).

<sup>2</sup> The text of these conclusions is reproduced in *op. cit.*, pp. 572, 573.

<sup>3</sup> For the discussion, see *ibid.*, pp. 554-579 and 584-608.

<sup>4</sup> *Premier congrès international de droit pénal, Actes du congrès*, p. 634. The full text of the *vœu* is reproduced in appendix 6.

<sup>5</sup> An English translation of the draft is printed as appendix 7 to this paper.

<sup>6</sup> In 1947, the fifth International Congress of Penal Law recommended again, in general terms, the establishment of a permanent international criminal jurisdiction. See *Revue internationale de droit pénal (1948)*, pp. 410 and 424.

[Footnote 7 on page 16]

#### 4. THE CONVENTION FOR THE CREATION OF AN INTERNATIONAL CRIMINAL COURT (1937)

Following the assassination of King Alexander of Yugoslavia and Mr. Barthou, at Marseilles on 9 October 1934, the French Government addressed a letter to the Secretary-General of the League of Nations emphasizing the need for ensuring the effective suppression of political crimes of an international character and containing a statement of principles upon which an international convention for the suppression of terrorism might be based. The proposal included a suggestion for the establishment of an international criminal court to try individuals accused of acts of terrorism within the scope of the Convention.<sup>1</sup>

The Council of the League took up the matter and on 10 December 1934 adopted a resolution expressing the opinion that:

... the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation in this matter", and setting up:

"... a Committee of Experts to study this question with a view to drawing up a preliminary draft of an international convention to assure the repression of conspiracies or crimes committed with a political and terrorist purpose".<sup>2</sup>

This Committee was composed of experts appointed by the Governments of Belgium, the United Kingdom, Chile, France, Hungary, Italy, Poland, Romania, Spain, Switzerland and the Union of Soviet Socialist Republics. At its first meeting, held in April and May 1935, it examined the proposals submitted by the French Government and observations thereon and on the general question of international anti-terrorist action received from thirteen other Governments. A draft convention and a memorandum from the Executive Bureau of the International Criminal Police Commission were also communicated to the Committee.<sup>3</sup>

The Committee drew up a first draft of a convention for the repression of terrorism. This draft, and a preliminary draft of articles instituting an international criminal court, which certain members of the Committee had

<sup>1</sup> In connexion with the proposals of scientific organizations, there may be mentioned the plan of Professor H. Kelsen for a general international organization to replace the League of Nations, having as one of its principal organs an international court with, in addition to jurisdiction over disputes between States, a certain criminal jurisdiction. Such criminal jurisdiction was to be instance jurisdiction over individuals charged with responsibility for illegal use of force by States and war crimes, and appellate jurisdiction, on appeal from national courts, in cases "in which an individual ha[d] been tried for having violated international law, or national law the purpose of which is to enforce international law". An interesting feature of the scheme is the according of the right to invoke the appellate jurisdiction to any convicted person, any State injured by the offence charged, any State "in relation to which the State having exercised jurisdiction is obliged to prosecute the delinquent", the State of which the accused is a national, and to the executive organ of the proposed organization. See Kelsen, *Peace through Law* (1944), annexes I and II.

<sup>2</sup> League of Nations, *Official Journal*, 15th year, No. II (Part I), pp. 1839-1840.

<sup>3</sup> For the text of the resolution see *ibid.*, p. 1760.

<sup>4</sup> Cf. League of Nations document C. 184. M. 102. 1935. V., pp. 11-22.

presented but which the Committee as a whole was not able to discuss, was reproduced in a report to the Council of the League of Nations circulated to all the Members of the League of Nations.<sup>1</sup> The second session of the Committee was held in January 1936. It then adopted a report presenting to the Council two draft conventions concerning, respectively, terrorism and the creation of an international criminal court, prepared in the light of observations from three Governments.<sup>2</sup>

The Council of the League submitted the drafts of the Committee of Experts to Member Governments requesting them to submit their observations, the question being placed on the agenda of the 1936 session of the Assembly. Nineteen Governments presented, in writing, criticisms or proposals for amendments.<sup>3</sup> The First Committee of the Assembly devoted the greater part of four meetings to an exhaustive consideration of the proposals and observations. And, the Assembly having recommended that the Committee of Experts should revise its conclusions in the light of the observations to be found in the Governments' replies, the Committee in pursuance of this task met for the third and last time in April 1937, and the results of its deliberations were communicated to all Governments.<sup>4</sup>

The Council, on 27 May 1937, directed the Secretary-General to invite the Members of the League and certain non-member States to be represented at a diplomatic conference for the purpose of "considering the two draft Conventions drawn up by the Committee of Experts".<sup>5</sup> The International Conference on the Repression of Terrorism finally took place at Geneva from 1 to 16 November 1937.

The first draft convention, considered and adopted by the Conference, for the prevention and punishment of terrorism,<sup>6</sup> contemplated the qualification as criminal, by the national law of the contracting parties, of various terroristic acts. The second, the convention for the creation of an international criminal court, contemplated the trial, by an international tribunal, of persons accused of any offence dealt with in the Convention for the Prevention and Punishment of Terrorism. Under article 2 each contracting party was to be entitled, instead of proceeding in its own courts, to commit for trial to the International Criminal Court persons charged with any of the acts referred to in articles 2, 3, 9 and 10 of the Convention on Terrorism. The international criminal court was to be a permanent body, but to sit only when it was seized of an offence within its jurisdiction

<sup>1</sup> League of Nations document C. 184. M. 102. 1935. V., pp. 2-11.

<sup>2</sup> League of Nations document A. 7. 1936. V. (Ser. L. of N. P. 1936. V. 2), p. 2.

<sup>3</sup> League of Nations documents A. 24. 1936. V. (Ser. L. of N. P. 1936. V. 6); A. 24 (a). 1936. V. (Ser. L. of N. P. 1936. V. 7); C. 552. M. 356. 1936. V.; C. 194. M. 139. 1937. V.

<sup>4</sup> League of Nations document C. 222. M. 162. 1937. V. (Ser. L. of N. P. 1937. V. I).

<sup>5</sup> The text of the Council's resolution is reproduced in the Proceedings of the International Conference on the Repression of Terrorism, pp. 183-184.

<sup>6</sup> For this Convention, see the Proceedings of the International Conference on the Repression of Terrorism, p. 5 *et seq.*, and Hudson, *International Legislation*, vol. VII, p. 862 *et seq.* The text of the relevant articles is reproduced in a footnote to appendix 8 of this paper.

(article 3). The substantive criminal law to be applied by the court was to be the national law applicable which was the least severe. In determining what that law was, the court was to take into consideration the law of the territory on which the offence was committed and the law of the country which had committed the accused for trial (article 21). In addition, the Convention provided for the selection of judges, for the internal organization of the court, for the procedure to be followed when a case was brought before it, and the like.<sup>1</sup>

## 5. PROPOSALS MADE DURING THE SECOND WORLD WAR

The outrages perpetrated in connexion with the Second World War, especially in the occupied countries, made the punishment of war criminals an issue of first importance. Allied Governments and statesmen solemnly and repeatedly declared their intention to bring those guilty of war crimes and atrocities to justice. Representatives of occupied and other Allied countries began to meet, at first in informal or semi-official conferences, to investigate the intricate problems involved. Among the questions thus brought into discussion was also the establishment of some form of international tribunal for the trial of war criminals. It may be useful to summarize briefly some of the proposals and opinions which emerged from these discussions.

### A. THE LONDON INTERNATIONAL ASSEMBLY

The London International Assembly, created in 1941 under the auspices of the League of Nations Union, was not an official body but its members were designated by the Allied Governments established in London and it made recommendations, through its members, to these Governments.

After a thorough study of the whole question of war crimes this body came to the conclusion with respect to jurisdiction over such crimes, that, as far as possible, national courts should deal with all war crimes which came within their respective jurisdictions, but that certain categories of war crimes (this term being interpreted in the widest possible manner so as to cover also aggression and crimes subsequently referred to as crimes against humanity) should be remitted to an international criminal court. These categories were: (1) crimes in respect of which no national court had jurisdiction (e.g., crimes committed against Jews and stateless persons in Germany); (2) crimes in respect of which a national court of any of the United Nations had jurisdiction, but which the State concerned did not wish, for political or other reasons, to try in its own courts; (3) crimes which had been committed or taken effect in several countries, or against the nationals of different countries; and (4) crimes committed by Heads of State.

The members of the court, which was to sit in divisions, were to be judges of the highest standing and repute. A chief prosecutor was to act

<sup>1</sup> Cf. Proceedings, p. 19 *et seq.*, and Hudson, *op. cit.*, p. 879 *et seq.* The full text of the Convention is reproduced in appendix 8.

on behalf of the United Nations as a whole, assisted by deputies appointed by the several nations concerned. If possible, a codified international criminal law, approved by the United Nations, was to be applied by the court. Failing such a codification, the court was to apply international custom and treaties, the generally accepted principles of criminal law, judicial precedents and opinions of highly qualified publicists. The court was to have discretion as to the penalty to be imposed.

The opinions of the London International Assembly which have been outlined above are contained in a statement of "conclusions", and in a draft convention for the creation of an international criminal court.<sup>1</sup>

#### B. THE INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

This semi-official body, composed of jurists from the United Kingdom and certain Allied countries, never arrived at any definite proposals. The Commission, however, collected much useful information (especially on national jurisdiction over war criminals) and some of its members gave expression to interesting, although somewhat divergent, opinions on the problem of an international criminal court.<sup>2</sup> In July 1942 a committee, including all the members of the Commission and set up to advise on the rules and procedure relating to the punishment of crimes committed in the course of and incidental to the Second World War, adopted an interim resolution stating that "while most of us believe that the time is ripe for the establishment of a Permanent International Criminal Court, we all hold the provisional view that a very large percentage of the crimes which have been and will be committed incidental to and in the course of the present war (which for the present we shall merely refer to as 'war crimes') can be punished by means of the jurisdiction of the municipal courts of the Allied Powers both civil and military". After further researches had been undertaken by a sub-committee, the chairman of the above-mentioned committee on rules and procedure, Sir Arnold McNair, co-ordinated the material and added a covering note. He stated therein, as his opinion, that the vast majority of criminal acts perpetrated by enemy nationals could be punished by resorting to existing national laws and tribunals. As he saw it, there were several powerful arguments against the creation of an international criminal court and an international criminal code to be administered by it. In view of the importance of having the war criminals tried and punished with the utmost speed after the signing of the armistice, it would be impractical to wait for the establishment of an international criminal court. Such a court would furthermore in substance be an inter-United Nations court, not a truly international court. In order to fill serious gaps in existing international law, a new code of law to be applied by the

<sup>1</sup>London International Assembly—Reports on Punishment of War Crimes, pp. 225-346. The "conclusions" and draft convention are reproduced in appendix 9 to this paper.

<sup>2</sup>Confidential report of the International Commission for Penal Reconstruction and Development.

court would have to be created and, as a consequence, the court would be exposed to the objection that it operated under an *ex post facto* law, at least in regard to some of the offences brought before it. Lastly, there would be considerable practical difficulties as to the execution of the punishments. These considerations were expressed to relate not to the general question of the establishment of an international criminal court as a permanent international institution, but only to the advisability of creating an international tribunal for the punishment of war criminals.

Other members of the Commission, while agreeing that, as a rule, war criminals should be tried by municipal courts, felt that there were instances where an international court would be needed. One member, the late Dr. J. M. de Moor (Netherlands), listed as such instances the same categories of crimes as those mentioned by the London International Assembly, namely, crimes over which national courts lacked jurisdiction or which the State concerned preferred not to try in its own courts, crimes affecting several countries and crimes committed by Heads of States. A similar view was, in this respect, taken by other members favouring an international jurisdiction. No elaborate proposals concerning the organization of the tribunal envisaged were submitted, but it may be noted that some members of the Commission suggested that the court should include neutral and even enemy judges.

### C. THE UNITED NATIONS WAR CRIMES COMMISSION

On 20 October 1943 a diplomatic conference in London, attended by representatives of Allied Governments, decided to set up a United Nations Commission for the investigation of war crimes.<sup>1</sup> Besides other problems this Commission also examined the question of establishing an international court for the trial of war criminals. A final draft of a Convention for the Establishment of a United Nations War Crimes Court was approved by the Commission on 26 September 1944.<sup>2</sup>

The members of this court were to be nationals of the High Contracting Parties and to possess the highest legal qualifications. Each High Contracting Party was to designate three qualified persons as members notifying their names to the British Foreign Secretary who should call a conference in London of representatives of the parties to the convention. At this conference the judges were to be elected by secret ballot from among the members of the court. The court was to sit in divisions, each division to consist of not less than five judges. It was to elect its president and establish its own rules of procedure.

As to the jurisdiction of the court, the draft Convention provided:

"The jurisdiction of the Court shall extend to the trial and punishment of any person—irrespective of rank or position—who has committed, or

<sup>1</sup> History of the United Nations War Crimes Commission, London 1948, p. 112.

<sup>2</sup> *Ibid.*, p. 450. The draft convention, with an explanatory note is reproduced in appendix 10.

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." The law to be applied by the Court was defined as follows:

"(1) Conventional and treaty law;

"(2) International customs of war;

"(3) The principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience;

"(4) The principles of criminal law generally recognized by civilized nations;

"(5) Judicial decisions as a subsidiary means of determining the rules of the laws of war."

Responsibility for prosecution was in general to rest with the Government bringing the case before the court, but the diplomatic conference mentioned above was to appoint an officer to whom could be entrusted the prosecution in any case where a Government preferred that its own representative should not undertake it.

## 6. INTERNATIONAL MILITARY TRIBUNALS AFTER THE SECOND WORLD WAR

### A. THE NÜRNBERG INTERNATIONAL MILITARY TRIBUNAL

In the Moscow Declaration<sup>1</sup> of 30 October 1943 the principal Allied Powers laid down their policy with respect to the German war criminals. The officers and men of the German Army and members of the Nazi Party who were responsible for or had taken a consenting part in atrocities, massacres and executions were to be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein". So far as the great mass of common war criminals were concerned, the principal Allied Powers thus favoured punishment through national courts in the countries where their crimes had been committed. But it was added, in the Declaration, that this policy was "without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allied Powers". For some

<sup>1</sup> Department of State Bulletin (USA) vol. IX, No. 228, p. 310.

time it was left undecided whether the major war criminals were to be punished without judicial proceedings or whether they would be tried in a court of justice. Eventually it was decided to establish an international military tribunal for this purpose.

On 8 August 1945 the Governments of the United States, France, the United Kingdom and the Soviet Union concluded, in London, an agreement<sup>1</sup> providing for the establishment, after consultation with the Control Council for Germany, of an International Military Tribunal for the trial of war criminals of the European Axis<sup>2</sup> whose offences had no particular geographical location. Subsequently, nineteen other Governments of the United Nations adhered to the agreement. The constitution, jurisdiction and functions of the International Military Tribunal were laid down in a charter annexed to and forming an integral part of the agreement.

The Tribunal was to consist of four members, each with one alternate, one member and one alternate to be appointed by each of the signatory Powers. Neither the Tribunal, its members nor their alternates could be challenged by the defendants or their counsel. The members of the Tribunal were to agree among themselves upon the selection from their number of a President. The Tribunal was, as a rule, to take decisions by a majority vote, the president having the decisive vote in case of evenly divided votes. Convictions and sentences, however, could only be imposed by affirmative votes of at least three members of the Tribunal.

Four chief prosecutors were to be appointed, one by each of the signatories. Besides their ordinary duties as individual prosecutors they were, as a committee, acting by a majority vote, entrusted with the following tasks: to agree upon a plan of the individual work of each of the chief prosecutors and his staff; to settle the final designation of major war criminals to be tried by the Tribunal,<sup>3</sup> to approve the indictment and lodge it with the Tribunal, to draw up and recommend to the Tribunal for its approval draft rules of procedure.

The charter contained various provisions for the fair trial of the defendants and for the expeditious conduct of proceedings. The Tribunal was not to be bound by technical rules of evidence and was to be at liberty to admit any evidence which it deemed to have probative value. The Tribunal was authorized to impose upon a defendant, on conviction, death or such other punishment as it might consider to be just. In addition, the Tribunal might deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany. The judgment of the Tribunal as to the guilt or the innocence of any defendant could not be

<sup>1</sup> See Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945. Department of State Publication 3080. Washington, D.C., 1949.

<sup>2</sup> Eventually only German war criminals were tried by the Tribunal.

<sup>3</sup> In case of an equal division of votes concerning such designation of the persons to be charged or as to the nature of the charges, the view of the party making the proposal was to prevail.

subject to review. The sentences were to be carried out in accordance with the orders of the Control Council for Germany, which was authorized to reduce or otherwise alter the sentences but not to increase the severity thereof.

The charter also laid down the substantive law to be applied by the Tribunal. Its article 6 defined three categories of crimes coming within the jurisdiction of the Tribunal and entailing individual responsibility: crimes against peace, war crimes in the strict sense and crimes against humanity.<sup>1</sup> Other articles excluded superior orders as a defence and provided that the official position of defendants should not be considered as freeing them from responsibility or mitigating punishment.

In addition to its power to try and punish individuals, the Tribunal was authorized to declare groups or organizations of which a defendant was a member to be criminal, with the effect that individuals could thereafter be brought to trial for membership therein before national, military or occupation courts by the competent national authority of any signatory.

#### B. THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

In the Declaration of Potsdam of 26 July 1945, made by the United States, China and the United Kingdom, and later adhered to by the Soviet Union, it was provided, with respect to Japanese war criminals, that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners".<sup>2</sup> On 2 September 1945 an Instrument of Surrender<sup>3</sup> was signed on behalf of the Emperor and Government of Japan and of nine Allied Powers: the United States, China, the United Kingdom, the Soviet Union, Australia, Canada, France, the Netherlands and New Zealand. The Instrument included a declaration of unconditional surrender of the Japanese armed forces and an undertaking by Japan to carry out the provisions of the Potsdam Declaration in good faith. It was further provided therein that "the authority of the Emperor and the Japanese Government to rule the State shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender". At the Moscow Conference, 16-26 December 1945, it was agreed between the Governments of the United States, the United Kingdom and the Soviet Union, with the concurrence of China, that "the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan and directives supplementary thereto".<sup>4</sup>

Acting on this authority, General MacArthur, the Supreme Commander for the Allied Powers, by a special proclamation of 19 January 1946, established the International Military Tribunal for the Far East for "the trial

<sup>1</sup> For particulars see The Charter and Judgment of the Nürnberg Tribunal: memorandum submitted by the Secretary-General to the International Law Commission, Lake Success, 1949 (A/CN.4/5).

<sup>2</sup> Department of State Bulletin (USA), vol. XLII, No. 318, p. 138.

<sup>3</sup> *Ibid.*, No. 324, p. 364.

<sup>4</sup> *Ibid.*, No. 340, pp. 1029-1030.

of those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace", in other words, for the trial of the major war criminals in the Far East. The constitution, jurisdiction and functions of the Tribunal were, by the proclamation, declared to be those set forth in the charter of the Tribunal approved by the Supreme Commander on the same day. The charter was subsequently amended in some respects.<sup>1</sup>

The charter, as amended, provided that the Tribunal should consist of not less than six nor more than eleven members, appointed by the Supreme Commander from names submitted by the Governments to the Instrument of Surrender, India and the Philippines.<sup>2</sup> The Supreme Commander was also to appoint the President of the Tribunal (from among its members), a Secretary-General as chief of the secretariat of the Tribunal, and the Chief of Counsel responsible for the investigation and prosecution of charges against the defendants. Each of the United Nations with which Japan had been at war was authorized to appoint an associate counsel to assist the Chief of Counsel.

All decisions and judgments of the Tribunal, including convictions and sentences, were to be taken by a majority vote of those members of the Tribunal present. In case the votes were evenly divided, the vote of the President decided.

The Charter, furthermore, laid down provisions for fair and expeditious trial and entrusted to the Tribunal the drafting and amending of rules of procedure. The Tribunal was not to be bound by technical rules of evidence but to be at liberty to admit any evidence which it considered to have probative value.

The Tribunal was empowered to impose upon an accused, on conviction, death or such other punishment as it would determine to be just. The record of the trial was to be transmitted to the Supreme Commander for his action thereon. Sentences were to be carried out in accordance with the order of the Supreme Commander who was authorized to reduce or otherwise alter the sentence but not to increase its severity.

The substantive law to be applied by the Tribunal was laid down in the charter. The provisions of the charter in this respect were largely the same as those of the Charter of the Nürnberg Tribunal. There were, however, some differences, *inter alia*, in the definition of the crimes falling within the jurisdiction of the Tribunal.<sup>3</sup>

Unlike the Nürnberg Tribunal, the Tribunal for the Far East was not empowered to declare groups or organizations to be criminal.

<sup>1</sup> The special proclamation and the charter may be found in Department of State Bulletin (USA), vol. XIV, No. 349, p. 361; the amendments in the same volume, No. 360, p. 890.

<sup>2</sup> Eventually eleven judges were appointed.

<sup>3</sup> For particulars, see The Charter and Judgment of the Nürnberg Tribunal, memorandum submitted by the Secretary-General to the International Law Commission, Lake Success, 1949 (A/CN.4/5) addendum.

### III

## CONSIDERATION OF INTERNATIONAL CRIMINAL JURISDICTION IN THE UNITED NATIONS

The question of an international criminal jurisdiction has been considered in the United Nations in connexion with the consideration of the formulation of the principles of international law recognized in the charter and judgment of the Nürnberg Tribunal as well as in connexion with the Organization's initiatives concerning the prevention and punishment of genocide.

### 1. CONSIDERATION OF THE QUESTION IN CONNEXION WITH THE FORMULATION OF THE NURNBERG PRINCIPLES

By resolution 94 (I) of 11 December 1946 the General Assembly created a Committee on the Progressive Development of International Law and its Codification consisting of representatives of seventeen Member States. By resolution 95 (I) of the same date it directed that Committee "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the charter of the Nürnberg Tribunal and in the judgment of the Tribunal".<sup>1</sup>

During the deliberations of the Committee the question of an international criminal court was raised by the representative of France, Mr. Donnedieu de Vabres, at the second meeting on 13 May 1947. He said that as a judge of the Nürnberg Tribunal he was very much alive to the criticism passed upon that Tribunal that it was composed only of representatives of victor countries and did not represent the international community.<sup>2</sup> He therefore urged that the establishment of an international criminal court should be considered by the Committee and on 15 May he submitted a memorandum on the subject.<sup>3 4</sup>

In this memorandum he recalled that earlier proposals concerning an international criminal jurisdiction might be divided in two categories: those who were in favour of giving to the Permanent Court of International Justice (now the International Court of Justice) jurisdiction in criminal matters and those who advocated the creation of a special international criminal court. He recommended a combination of the two systems.

<sup>1</sup> Cf. the Charter and Judgment of the Nürnberg Tribunal. Memorandum submitted by the Secretary-General, Lake Success, 1949 (A/CN.4/5), pp. 14-15.

<sup>2</sup> A/AC.10/SR.2, p. 2.

<sup>3</sup> A/AC.10/21. For the full text of the memorandum, see appendix 11.

<sup>4</sup> There may also be mentioned, in connexion with the French proposal referred to, the parallel work of the *Commission du droit commun international*, a private scientific body set up in Paris by the *Mouvement National Judiciaire*. This organization produced in 1948 two interesting draft conventions. The first, entitled *La première* [Continued on page 26]

A criminal chamber might be established as part of the International Court of Justice to be composed of fifteen judges elected under the same conditions as the other members of that court. The chamber would deal, on the one hand, with such matters as conflicts relating to judicial and legislative competence and *res judicata* arising between courts of different States and, on the other, with indictments brought against a State or its rulers for crimes against peace or crimes against humanity.

Furthermore, a special international court of justice might be created on lines similar to those of the Conventions of 16 November 1937 for the repression of terrorism. This court would deal with all international offences capable of being committed in time of peace, war crimes (violations of *communis juris* being also violations of the laws of war) and all offences *communis juris* connected with crimes against humanity committed by the rulers of a State. Its jurisdiction might be optional in the sense that the State holding the offender might try him in its own tribunals, extradite him or hand him over to the international tribunal.

When the discussion on the question of an international criminal court was resumed in the Committee at its 19th meeting on 5 June 1947, paragraph 5 of a memorandum submitted by the representative of the United States, Mr. Jessup, was taken as the basis of discussion.<sup>1</sup> This paragraph read as follows:

"5. With respect to implementing the Nürnberg principles by the establishment of an international criminal court or of a criminal chamber

*convention internationale sur les droits de l'homme*, is designed to elaborate the Charter of Human Rights and contemplates systems of national and international protection of such rights. For purposes of the latter, it is declared that any violation of human rights may be made the subject of international proceedings. Where the violation is of the human right to life and constitutes a crime against humanity or an offence under the Convention on Genocide, proceedings are to be taken by an international public prosecutor's department before the criminal chamber of a special international penal court to be set up at The Hague. A draft statute of this tribunal is annexed to the draft convention. In so far as concerns violations of other human rights the procedure envisaged is similar except that charges made by individuals (as distinct not only from States but also from certain *groupements de droit international*) are to be scrutinized by the Secretariat of the United Nations from the point of view of their receivability and transmitted, in the case of those emanating from a trust territory, to the Trusteeship Council, in the case of those involving human rights guaranteed by the draft, to the international public prosecutor's department, and, in the case of those involving other human rights, to an advisory commission of the Economic and Social Council. In respect of charges of violation of such human rights guaranteed by the draft other than the right to life, where the public prosecutor's department does not *scilicet* institute proceedings *ex proprio vigore* a procedure of enquiry and conciliation is provided. Failing conciliation in such cases, and in cases where the department itself institutes proceedings for violations of human rights other than the right to life, trial is to be in the human rights chamber of the proposed penal court. That chamber is to make unofficial or official recommendations to the State concerned, and only to give judgment failing compliance with its recommendations. The second draft of the commission provides a definition of the "crimes against humanity" referred to in the judgment of the Nürnberg Tribunal and proposes the conferment of jurisdiction in relation to them upon the international penal court. The two drafts are to be found in the *Revue internationale de droit pénal* (1948), pp. 369-386.

<sup>1</sup> A/AC.10/36.

in the International Court of Justice, it may be pointed out that, if our Committee is not to undertake discussion of substantive provisions regarding the Nürnberg principles, *a fortiori* it should not undertake discussion as to what means should be adopted with a view to enforcing substantive provisions not yet agreed upon. The question of jurisdiction and appropriate means of enforcement can obviously be considered more appropriately after the substantive provisions are settled. For these reasons, it is believed that the question of enforcement of the Nürnberg principles by the establishment of an international criminal court or otherwise should be deferred for consideration and study by the Commission of Experts.<sup>1</sup> However, in view of the importance of the proposals of the French delegation, the report of our Committee should contain special mention of this subject and should recommend that the attention of the Commission of Experts be called thereto."

The representative of Poland, Mr. Bramson, observed that he could not agree to the United States proposal, as crimes against peace could be treated only after a war. In times of peace it was for the Security Council to take action when peace was threatened. Therefore, there was no need to create in times of peace an international tribunal which could only function after a future war.<sup>2</sup>

The representative of Yugoslavia, Mr. Bartos, objected to the suggestion for an international criminal court on the ground that it was contrary to the Charter of the United Nations. The creation of a criminal chamber in the International Court of Justice would violate Article 34 of the Statute of the Court, which provided that only States could be parties in cases before the Court. Consequently a recommendation to the International Law Commission that it study the possibility of creating a criminal chamber would amount to suggesting to that Commission that it alter the Statute. Similarly, the setting up of an international criminal court as an organ of the United Nations would be impossible under the provisions of Article 7 of the Charter. As to the creation of an independent international criminal court, this was a matter for the Governments to take action on and not for the United Nations. It was urged, moreover, that the question was beyond the terms of reference of the Committee.<sup>3</sup>

As against these arguments of the Yugoslav representative, the French representative urged that the International Law Commission was perfectly entitled to make a recommendation to the General Assembly with regard to the giving of criminal jurisdiction to the International Court of Justice, although this would require an alteration of the Statute of the Court. As to whether an independent international criminal court should be set up, he had never intended that the Committee make a choice between the two possibilities. He further argued that there was a close connexion between

<sup>1</sup> The present International Law Commission.

<sup>2</sup> A/AC.10/SR.19, p. 9.

<sup>3</sup> *Ibid.*, p. 10.

the Nürnberg principles and an international criminal jurisdiction. The General Assembly resolution referred to both the charter and the judgment of the Nürnberg Tribunal.<sup>1</sup>

The representative of the Netherlands, Mr. de Beus, observed that he agreed that the Committee was not competent to decide on the creation of an international criminal court or its organization, but he considered that it was entitled to discuss the desirability of the creation of such a court.<sup>2</sup>

At the 21st meeting of the Committee, the representative of the Netherlands submitted a proposal as follows:

"That the Committee requests the rapporteur to draw the attention of the General Assembly to the fact that the implementation of the principles of the charter of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international legislation, may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes."

The Netherlands proposal met with objections on the part of the representatives of the Union of Soviet Socialist Republics (Mr. Koretsky), the United Kingdom (Mr. Brierly), Yugoslavia and Poland. It was pointed out by these representatives that the question was beyond the terms of reference of the Committee. Furthermore, it was argued that, as the London agreement and Nürnberg charter annexed thereto clearly showed, it was for the national jurisdictions of the various States to judge war criminals. Only those criminals were to be tried by the Nürnberg Tribunal whose crimes had no particular geographical location. The Committee had decided not to take up the substance of the Nürnberg principles. The Netherlands proposal, if adopted, would be contrary to this decision. The Netherlands proposal mentioned that implementation of the Nürnberg principles might render desirable the existence of an international criminal court. However, there were many other points which such implementation might make desirable as, for instance, a regulation concerning the enforcement of such judgments on international criminals.

The representative of the United States agreed that, as the Committee had already decided to refrain from certain discussions connected with the Nürnberg principles, it would be inconsistent to mention criminal procedure in this matter. He therefore proposed that, in the report of the Committee, the French proposal should merely be mentioned in the context of the Committee's decision that it could not discuss the substance of the Nürnberg principles and therefore refrained from a discussion of the French representative's document.<sup>4</sup>

<sup>1</sup> A/AC.10/SR.19, p. 11.

<sup>2</sup> *Ibid.*, p. 12.

<sup>3</sup> A/AC.10/SR.21, p. 1.

<sup>4</sup> *Ibid.*, p. 5.

The Netherlands proposal, on the other hand, was supported by the majority of the Committee. It was argued that the Committee was concerned with the development of international law and that the creation of an international criminal jurisdiction was part of such development. The fact that the Committee was only to study plans for the formulation of the Nürnberg principles did not preclude it from expressing an opinion on the desirability of an international criminal court. The Nürnberg Tribunal was the first international criminal court, at least in intention. The question of an international criminal court was so closely connected with the Nürnberg principles that its mention was inevitable. The Netherlands representative emphasized that his proposal was intended merely to draw the attention of the General Assembly to the suggestion made and did not embody any recommendation to the International Law Commission. It was certainly permissible, he contended, to draw the attention of the General Assembly to such a question. As regards the argument that under the London agreement the jurisdiction of national criminal courts was maintained over war criminals, it was pointed out that an international criminal court was needed to deal with those crimes for which in 1945 an international court had been considered necessary.

As to the observation that the Nürnberg principles applied only to crimes committed during the war, it was argued that the terms of reference did not limit the Committee to consideration of these crimes only, since the Committee had before it the question of genocide which could also be committed in times of peace. Independently of the Nürnberg principles, the Committee had considered the matter of an international criminal code for international crimes. If this code were to be applied only by national courts, the result would be a widely diversified interpretation of its provisions and there would be no *cour de cassation* which could ensure the uniformity of judicial decisions. An international criminal court was therefore necessary, and the very fact of having an international criminal code would render it indispensable to settle conflicts of jurisdiction, to ensure observance of the rule of *res judicata*, and finally to ensure uniformity in the interpretation and application of the international criminal code.

The question was finally resolved by the inclusion in the report of the Committee of paragraph 3 which read as follows:<sup>1</sup>

"3. The Committee also decided by a majority to draw the attention of the General Assembly to the fact that the implementation of the principles of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes.

"The representatives of Egypt, Poland, the United Kingdom, the Union of Soviet Socialist Republics, and Yugoslavia desired to have their dissent from this decision recorded in this report. In their opinion the question of

<sup>1</sup> A/332.

establishing an international court falls outside the terms of reference from the General Assembly to the Committee."

The report of the Committee on the Progressive Development of International Law and its Codification on the plans for the formulation of the principles recognized in the charter and judgment of the Nürnberg Tribunal was submitted to the second session of the General Assembly and was referred to the Sixth Committee. Although the report was discussed in the Sixth Committee and in its Sub-Committee 2, no reference was there made to the establishment of an international criminal jurisdiction.

## 2. CONSIDERATION OF THE QUESTION IN CONNEXION WITH THE DRAFTING OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

### A. HISTORY OF THE CONVENTION ON GENOCIDE

The General Assembly, at the second part of its first session, considered a draft resolution on the crime of genocide presented jointly by the delegations of Cuba, India and Panama.<sup>1</sup> This draft resolution was discussed by the Sixth Committee, and upon the recommendation of that Committee, the General Assembly, by resolution 96 (I) of 11 December 1946, requested the Economic and Social Council "to undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly".

The Economic and Social Council, at its fourth session, considered the General Assembly's request, and on 28 March 1947, adopted resolution 47 (IV) instructing the Secretary-General: "(a) to undertake, with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly; and (b) after consultation with the General Assembly Committee on the Development and Codification of International Law and, if feasible, the Commission on Human Rights and, after reference to all Member Governments for comments, to submit to the next session of the Economic and Social Council a draft convention on the crime of genocide".

In conformity with this resolution the Secretary-General, with the aid of experts, prepared a draft convention for the prevention and punishment of genocide,<sup>2</sup> which was referred to the Committee on the Progressive Development of International Law and its Codification. The Committee, having considered the draft convention on 13, 16 and 17 June 1947,<sup>3</sup> in a letter dated 17 June 1947 from its Chairman to the Secretary-General stated that:

<sup>1</sup> A/BUR/50.

<sup>2</sup> A/AC.10/41, A/AC.10/42 and A/AC.10/42/Rev.1.

<sup>3</sup> A/AC.10/SR.28, p. 11, A/AC.10/SR.29, p. 3 and A/AC.10/SR.30, p. 1.

"The Committee fully realizes the urgency, which was expressed in the recommendation contained in the resolution of the General Assembly of 11 December 1946, of organizing co-operation between States with a view to facilitating the speedy prevention and punishment of the crime of genocide. It notes, however, that the text prepared by the Secretariat, owing to lack of time, has not yet been referred to the Member Governments of the United Nations for their comments, as is contemplated in the resolution of the Economic and Social Council, and it regrets that, in the absence of information as to the views of the Governments, it feels unable at present to express any opinion in the matter."<sup>1</sup>

At the fifth session of the Economic and Social Council, the Secretary-General submitted the draft convention.<sup>2</sup>

On 6 August 1947 the Economic and Social Council, by resolution 77 (V), decided to inform the General Assembly that it proposed to proceed as rapidly as possible with the consideration of the question, subject to any further instructions of the General Assembly; it also requested the Secretary-General in the meantime to transmit to the General Assembly the draft convention prepared by the Secretariat, together with any comments from Governments received in time for transmittal to the General Assembly. In compliance with this request, the Secretary-General transmitted, to the second session of the General Assembly, the draft convention for consideration.

During the second session of the General Assembly the matter was again considered by the Sixth Committee at its 36th, 39th, 40th, 41st, 42nd and 59th meetings.<sup>3</sup> Upon the recommendation of this Committee the General Assembly adopted resolution 180 (II) of 21 November 1947, which partly reads as follows:

"The General Assembly . . .

"Requests the Economic and Social Council to continue the work it has begun concerning the suppression of the crime of genocide, including the study of the draft convention prepared by the Secretariat, and to proceed with the completion of a convention, taking into account that the International Law Commission, which will be set up in due course in accordance with General Assembly resolution 174 (II) of 21 November 1947, has been charged with the formulation of the principles recognized in the charter of the Nürnberg Tribunal, as well as the preparation of a draft code of offences against peace and security; informs the Economic and Social Council that it need not await the receipt of the observations of all Members before commencing its work, and requests the Economic and Social Council to submit a report and the convention on this question to the third regular session of the General Assembly."

<sup>1</sup> A/AC.10/55.

<sup>2</sup> E/476 and E/447.

<sup>3</sup> A/AC.6/SR.36, 39, 40, 41, 42, 59.

In pursuance of the foregoing resolution the Economic and Social Council, at its sixth session, by resolution 117 (VI) of 3 March 1948, established an *Ad Hoc* Committee to prepare a draft convention on the crime of genocide, taking into consideration the draft convention prepared by the Secretary-General, comments of Member Governments on this draft and other drafts on the matter submitted by any Member Government. The Council instructed the *Ad Hoc* Committee to submit the draft convention which it should prepare, together with the recommendations of the Commission on Human Rights thereon, to the seventh session of the Council.

The *Ad Hoc* Committee on Genocide accordingly met at Lake Success from 5 April to 10 May 1948 and prepared a "Draft Convention on the Prevention and Punishment of the Crime of Genocide", which it duly submitted to the seventh session of the Council.<sup>1</sup>

Because of pressure of business, the Economic and Social Council decided that the report of the *Ad Hoc* Committee on Genocide which had been referred to the Human Rights Committee of the Council, should be dealt with in plenary session, and that there should be an opportunity for each delegation to make one general statement of its position, without debate or decisions other than the decision to transmit the documents to the General Assembly together with the statements of position. On 26 August 1948 statements were made by members of the Council, most of which were in favour of the transmission of the draft convention to the General Assembly. By resolution 153 (VII) the Council decided accordingly.

On the basis of a report from its Sixth Committee, the General Assembly, during the first part of its third session, by resolution 260 (III) of 9 December 1948, approved the Convention on the Prevention and Punishment of the Crime of Genocide and proposed it for signature and ratification or accession in accordance with the provisions laid down in article XI of the Convention.

#### B. THE SECRETARIAT DRAFT AND COMMENTS THEREON

The draft convention on the crime of genocide prepared by the Secretariat with the assistance of experts provided for both national and international jurisdiction over the crimes contemplated therein.

According to article VII of the draft, the contracting parties were to undertake to punish persons guilty of genocide found in their territory, irrespective of the nationality of the offender or of the place where the crime was committed. The article thus provided for the punishment of such crimes by national authorities on the basis of the principle of universality of jurisdiction. By article VIII of the draft the contracting parties were, furthermore, to pledge themselves not to consider genocide as a political crime and therefore not to refuse extradition in such cases.

<sup>1</sup> E/794.

The international jurisdiction over crimes of genocide was, according to article IX of the draft, to be optional in some cases, obligatory in others. A contracting State would be released from its obligation to try offenders under article VII or to grant their extradition under article VIII, if it brought them before an international court. In cases where acts of genocide had been committed by individuals acting as organs of the State or with the support or toleration of the State, the jurisdiction of the international court would, however, be obligatory.

As to the organization of the international court, the draft presented alternative suggestions.

The first alternative was to create an international court having jurisdiction in all matters connected with international crimes. Two of the experts consulted suggested, in that connexion, that a criminal chamber should be set up within the International Court of Justice, and the third estimated that the establishment of a permanent international criminal court having general jurisdiction would, in the absence of a sufficiently developed international criminal law, be premature.

The second alternative was to create a special international court with jurisdiction limited to cases of genocide. This court might be set up either as a permanent court or as an *ad hoc* court. Draft statutes of these two types of a special court to try exclusively crimes of genocide were annexed to the draft.<sup>1</sup>

The Secretariat draft was submitted to the Members of the United Nations for comment.<sup>2</sup>

### C. THE DRAFT OF THE *Ad Hoc* COMMITTEE ON GENOCIDE

The draft convention prepared by the *Ad Hoc* Committee on Genocide, established by the Economic and Social Council, also provided for both national and international jurisdiction over crimes of genocide.

With respect to national jurisdiction over such crimes, the draft, however, did not follow the principle of universal repression, accepted by the Secretariat draft. The majority of the Committee held that universal repression was against the traditional principles of international law and that it would lead national courts to judge the acts of foreign Governments, as genocide generally involved the responsibility of the State on the territory of which the crime was committed. Universal repression might therefore create dangerous international tensions. On the other hand, the supporters of the principle of universal jurisdiction argued, *inter alia*, that since genocide was a crime under international law it was natural to apply this principle.

The establishment of an international jurisdiction gave rise to lengthy discussion in the *Ad Hoc* Committee. It was accepted by a majority vote,

<sup>1</sup> Articles VII-X of the draft with accompanying commentaries and the annexed draft statutes of a special international court for the trial of crimes of genocide are reproduced in appendix 12.

<sup>2</sup> The relevant parts of the replies received from Member Governments are set forth in appendix 13.

the three dissenting members making express reservations on this point. Those favouring the granting of jurisdiction to an international court felt that such a provision was essential, as in almost every serious case of genocide it would be impossible to rely on the courts of the State, where the crime had been committed, to exercise effective jurisdiction. The opponents contended that the intervention of an international court would be an infringement of State sovereignty. Furthermore, they claimed that, as the convention would simply provide for an international jurisdiction without actually setting up an international court, such a provision would have no practical value.

As finally drafted by the Committee the relevant article (article VII) laid down that persons charged with genocide should be tried "by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal".<sup>1</sup>

#### D. DISCUSSIONS IN THE ECONOMIC AND SOCIAL COUNCIL

When the *Ad Hoc* Committee's draft was considered in plenary at the seventh session of the Economic and Social Council some delegations made general statements concerning the international tribunal suggested in article VII of the draft.

The representative of Venezuela, Mr. Pérez Perozo, did not approve of the establishment of international criminal jurisdiction as contemplated by the draft convention. He remarked that if the international tribunal were established as planned, States would be relinquishing their domestic penal jurisdiction and would be undertaking to hand over their own nationals to external jurisdiction. That would be inconsistent with the classic principles of sovereignty and many States might quite possibly refuse to sign a convention containing such provisions. He stated that his Government also had objections to the establishment of the proposed tribunal because it might give rise to disputes and difficulties and thus endanger peace; that there was a danger that the United Nations might jeopardize peace in order to punish a crime which might be prevented and punished by other means. In addition, he thought that the practical objections were not less considerable, for it was easy to picture the difficulties that would be entailed by bringing to judgment the corporate bodies which as a general rule were the perpetrators of the crime of genocide.<sup>2</sup>

The representative of Poland, Mr. Katz-Suchy, was also opposed to the mention of an international criminal tribunal in the draft convention. He called attention to the fact that the provision of the draft was intended to involve acceptance in principle of an international criminal tribunal without such a tribunal being set up by the convention itself. It had been intended as a compromise, but committed States ratifying the convention to accept

<sup>1</sup> The relevant parts of the draft and report of the *Ad Hoc* Committee are reproduced in appendix 14.

<sup>2</sup> E/SR.218, pp. 20-21.

the creation, at a future date, of an international tribunal, the length of life and responsibilities of which were left entirely vague. Nothing had been laid down about its competence, in particular as to whether it should supersede or only supplement national tribunals. In his opinion, States were therefore asked to sign a blank cheque. He further observed that an international criminal tribunal was only practicable when an international executive power already existed, having at its disposal substantial means of enforcement. He finally made the observation that the creation of an international criminal court, submission to the jurisdiction of which would be compulsory and not optional, was contrary to the principles of the Statute of the International Court of Justice and might result in violation of the national sovereignty of States, an important element of which was the right to try all crimes committed on their territory.<sup>1</sup>

Mr. Pavlov, the representative of the USSR, criticized the provision in article VII for an international jurisdiction on the ground that, in his opinion, the trial of those accused of the crime of genocide by an international tribunal would constitute a violation of national sovereignty.<sup>2</sup>

Representatives of other countries were of a different opinion. The representative of New Zealand, Mr. Thorn, thought that there was a possible weakness in that section of the convention dealing with the trial of persons charged with genocide. Since large-scale acts of genocide could hardly take place under modern conditions without at least the complicity of the government of the territory concerned, it might not be sufficient to rely on the jurisdiction of national courts, and some form of international tribunal working in conjunction with the United Nations would appear to be necessary.<sup>3</sup> The representative of Brazil, Mr. Guerreiro, while desiring to retain the principle of national competence, thought that the possibility of referring violations of the convention to an international court should be provided for.<sup>4</sup>

The representative of France, Mr. Ordonneau, insisted that genocide was to be regarded as a crime committed, encouraged or tolerated by the government of a State and that, as such, it should be dealt with by an international court. He thought it unwise to have recourse to national courts in these matters and advocated the omission of all references to them in the draft convention. Only an international court could try a crime of genocide committed by a government. He therefore considered that the creation of an international court was absolutely essential.<sup>5</sup>

The representative of the United States, Mr. Thorp, drew attention to the last part of article VII and said that the provision of a competent

<sup>1</sup> E/SR.218, pp. 37-38.

<sup>2</sup> E/SR.219, p. 6.

<sup>3</sup> E/SR.218, p. 43.

<sup>4</sup> *Ibid.*, p. 48.

<sup>5</sup> E/SR.219, p. 9.

international tribunal would constitute a new and significant step in international law. The conscience of the world would no longer allow massacres to be committed without calling the perpetrators, whether they were high officials or private individuals, before the bar of international justice. He thought that such a tribunal might take the form of a criminal chamber of the International Court of Justice, or alternatively that a permanent international tribunal might be established, with general jurisdiction over genocide and other international crimes.<sup>1</sup>

The representative of the Netherlands, Mr. van der Mandele, stated that on a previous occasion his delegation had supported the United Kingdom view that the definition of genocide should be referred to the International Law Commission in connexion with its studies on the Nürnberg principles. His Government still hoped that, at a later stage, there would be an opportunity to consult the International Law Commission on the subject. He finally stressed that his Government was in complete agreement with what had been said by the French and United States representatives on international jurisdiction.<sup>2</sup>

#### E. THE FIRST PART OF THE THIRD SESSION OF THE GENERAL ASSEMBLY

The draft convention prepared by the *Ad Hoc* Committee on Genocide was referred to the Sixth Committee by the General Assembly at its 142nd plenary meeting on 24 September 1948.<sup>3</sup> Article VII of this draft convention read as follows:

"Persons charged with genocide or any of the other acts enumerated in article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal."

Discussion in the Sixth Committee on the question of the establishment of an international criminal jurisdiction arose out of the last phrase of the article, "or by a competent international tribunal". The Committee first decided to delete this phrase<sup>4</sup> but, upon reconsideration, reversed that decision and restored the provision in an amended form.<sup>5</sup>

##### (a) *Objections to the provision for an international penal tribunal*

Several representatives expressed their opposition to the inclusion of a provision for an international criminal jurisdiction. The representative of the Dominican Republic, Mr. Messina, said that he would vote for the deletion of the final words of article VII, because the Dominican Constitution recognized only the jurisdiction of national tribunals with respect to crimes committed in the territory of the Republic and was consequently opposed to the very principle of sharing that jurisdiction with international

<sup>1</sup> E/SR.219, p. 13.

<sup>2</sup> *Ibid.*, pp. 15-16; and E/SR.219/Corr.2.

<sup>3</sup> A/C.6/206.

<sup>4</sup> A/C.6/SR.98, p. 11.

<sup>5</sup> A/C.6/SR.129, p. 9, and A/C.6/SR.130, p. 15.

tribunals. Moreover, he feared that sentences pronounced by an international tribunal dealing with all acts of genocide might provoke or increase international tension.<sup>1</sup>

The representative of Brazil, Mr. Amado, recalled that the organization of the international repression of crimes was being developed side by side with the organization of international co-operation, but that the time had not yet come to establish an international criminal court because there did not exist any international criminal law, properly speaking.<sup>2</sup>

The representative of India, Mr. Sundaram, warned against the danger that article VII might lead to international intervention in the domestic jurisdiction of States and thus to action contrary to the Charter of the United Nations.<sup>3</sup> He further stated that his Government could not subscribe to the establishment of an international criminal court without being in possession of details, in particular as to the composition of the court, the procedure to be followed before it and the law to be applied.<sup>4</sup>

Mr. Zourek, representative of Czechoslovakia, doubted whether States would agree to submit to the jurisdiction of an international criminal court or be willing to alter their existing legal systems in order to make provision for extraditing their own nationals. Even if it were possible to establish an international criminal court, it was doubtful whether such a court would really be able to function, for it was unlikely that rulers, if guilty of genocide, would allow themselves to be extradited so as to appear before an international tribunal over which they would have no influence. In such cases, if extradition were refused, it would be necessary to establish an international police force in order to arrest and bring criminals to justice.<sup>5</sup>

The representative of Venezuela, Mr. Pérez Perozo, contended that those advocating an international criminal court showed a completely unrealistic approach to the problem. Even the optional clause of the Statute of the International Court of Justice had not yet been adhered to by all the Member States, and it was therefore unlikely that States would be prepared to accept the jurisdiction of an international criminal court, which would be more extensive. To illustrate his point, he recalled that the convention drafted in Geneva in 1937 to establish an international tribunal for the suppression of terrorism had been signed by three States only.<sup>6</sup>

The representative of the Soviet Union, Mr. Morozov, warned that the introduction of an international jurisdiction was a violation of the sovereign right of every State to judge crimes committed in its territory. The sovereignty of States was the very basis of the United Nations. Co-operation by the sovereign States was essential in order to combat genocide.

<sup>1</sup> A/C.6/SR.97, p. 12.

<sup>2</sup> *Ibid.*, p. 16.

<sup>3</sup> A/C.6/SR.64, p. 5.

<sup>4</sup> A/C.6/SR.97, p. 18.

<sup>5</sup> A/C.6/SR.98, p. 4.

<sup>6</sup> *Ibid.*, p. 6.

He expressed the view that there were four elements in that co-operation: (1) the condemnation of genocide as a crime against humanity; (2) uniform agreement as to the nature of the crime; (3) the obligation imposed on the parties to the convention not only to punish the crime but to arrest it in its first stages; and (4) the consideration of every violation of the convention by the Security Council.<sup>1</sup>

(b) *Arguments in favour of providing for recourse to international jurisdiction*

The advocates of an international criminal jurisdiction upheld the view that such jurisdiction was necessary to achieve effective repression of the crime of genocide, because national courts might be unable to punish such a crime, especially when committed or tolerated by State authorities.

The representatives of France, Mr. Chaumont and Mr. Spanien, declared that genocide was a crime committed, encouraged, or tolerated by the rulers of a State. The distinguishing factor of this crime was the intervention of public authorities, otherwise it could be comprehended within the juridical definition of murder. The purpose of the convention was not to repress murder, but to ensure the prevention and repression of crimes committed by States. It was therefore necessary to provide for recourse to an international criminal court.<sup>2</sup> To this end, the French delegation submitted a draft convention on genocide which made provision for the establishment of such a court.<sup>3</sup>

Mr. Ingles, representative of the Philippines, agreed with the French thesis that genocide was a collective crime of such proportions that it could rarely be committed except with the participation or toleration of the State. It would therefore be paradoxical to leave to that same State the punishment of the guilty. His delegation supported the principle stated in article VII that international as well as national tribunals should be competent to deal with genocide.<sup>4</sup>

Sardar Bahadur Khan, representative of Pakistan, preferred that international tribunals alone should have jurisdiction over all cases of genocide. However, he expressed willingness to accept the double jurisdiction laid down in article VII of the draft convention. He suggested, furthermore, that Heads of States should be subject to international jurisdiction only, and that States who were parties to the convention should always be able to appeal to that jurisdiction from judgments pronounced by national tribunals against official and private individuals.<sup>5</sup>

As against the objection to international jurisdiction over genocide on the ground that it would impair the sovereignty of States, the representa-

<sup>1</sup> A/C.6/SR.98, pp. 8-9.

<sup>2</sup> A/C.6/SR.63, p. 7, A/C.6/63/Corr. 1, and A/C.6/SR.97, p. 19.

<sup>3</sup> A/C.6/211. For full text see appendix 15.

<sup>4</sup> A/C.6/SR.97, pp. 9, 10.

<sup>5</sup> *Ibid.*, pp. 11, 12.

tives of Haiti, Mr. Demesmin,<sup>1</sup> and Chile, Mr. Arancibia Lazo,<sup>2</sup> contended that national sovereignty was now out of date, and that the idea of interdependence of States had taken its place.

(c) *Proposals to limit the international criminal jurisdiction to cases where the State has failed to punish crimes of genocide*

While retaining the principle that the convention should provide for an international criminal jurisdiction over individuals guilty of genocide, some delegations considered that such jurisdiction should be limited to cases where the municipal courts had failed to take appropriate measures.

Mr. Maktos, representative of the United States, opposed the deletion of the phrase "or by a competent international tribunal" from article VII, because he felt that domestic tribunals might not be sufficiently effective in the punishment of genocide.<sup>3</sup> But, on the other hand, he proposed the addition of the following limiting clause:

"Jurisdiction of the international tribunal in any case shall be subject to a finding by the tribunal that the State in which the crime was committed had failed to take appropriate measures to bring to trial persons who, in the judgment of the court, should have been brought to trial or had failed to impose suitable punishment upon those convicted of the crime."<sup>4</sup>

The representative of Uruguay, Mr. Manini y Rios, followed a similar line of thought. He stated that, in the opinion of his delegation, the convention could not be effective, unless it provided international jurisdiction "to remedy any lapses on the part of national tribunals".<sup>5</sup> Like Mr. Maktos, he advocated that, in case of such lapses, recourse to an international tribunal should be open, but he differed from the representative of the United States, in that he expressly proposed that the competent international tribunals should be the International Court of Justice and a criminal chamber to be established within that Court. He presented an amendment to the effect that article VII of the *Ad Hoc* Committee's draft be replaced by an article worded as follows:<sup>6</sup>

"Persons charged with genocide or any of the other acts enumerated in article IV shall be tried by the competent tribunals of the State in the territory of which the act was committed.

"Should the competent organs of the State which is under a duty to punish the crime fail to proceed to such punishment effectively, any of the parties to the present Convention may submit the case to the International Court of Justice which shall decide whether the complaint is justified.

<sup>1</sup> A/C.6/SR.98, p. 7.

<sup>2</sup> A/C.6/SR.97, p. 18.

<sup>3</sup> A/C.6/SR.98, p. 7.

<sup>4</sup> A/C.6/235.

<sup>5</sup> A/C.6/SR.97, p. 10.

<sup>6</sup> A/C.6/209.

"Should it be proved that there has been such failure as aforesaid the Court shall deal with and pronounce judgment on the crime of genocide. For this purpose the Court shall organize a criminal chamber."

(d) *Proposals to provide for international jurisdiction over cases where the responsibility of States is involved*

Some representatives, who for practical reasons opposed the reference contained in article VII to "a competent international tribunal" having criminal jurisdiction over individuals accused of genocide, suggested that a provision should be included in the convention giving to the International Court of Justice obligatory jurisdiction over cases of genocide involving State responsibility. In their opinion, the only realistic approach to the problem of international jurisdiction with respect to genocide was to have recourse to the only existing international court in a position to take measures capable of putting an end to the criminal acts and of awarding compensation for the damage caused to the victims. Although not competent to judge individuals, the International Court of Justice would thus be able to contribute effectively to the prevention of genocide.<sup>1</sup>

The United Kingdom delegation submitted an amendment to the effect that article VII of the draft should be replaced by the following text:<sup>2</sup>

"Where the act of genocide as specified by articles II and IV is, or is alleged to be, the act of the State or Government itself or of any organ or authority of the State or Government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed."

Similarly, the delegation of Belgium suggested the following:<sup>3</sup>

"Any dispute relating to the fulfilment of the present undertaking or to the direct responsibility of a State for the acts enumerated in article IV may be referred to the International Court of Justice by any of the parties to the present Convention.

"The Court shall be competent to order appropriate measures to bring about the cessation of the imputed acts or to repair the damage caused to the injured persons or communities."

In view of the fact that few delegations were in favour of the suggestion put forward by Belgium and the United Kingdom, they withdrew their amendments, reserving their right, however, to submit a joint proposal to amend article X of the draft convention<sup>4</sup> which dealt with the competence of the International Court of Justice with respect to disputes between the

<sup>1</sup> A/C.6/SR.97, p. 16 and A/C.6/SR.98, p. 3.

<sup>2</sup> A/C.6/236/Corr.1.

<sup>3</sup> A/C.6/252.

<sup>4</sup> A/C.6/SR.99, p. 11.

contracting parties relating to the interpretation or application of the convention.

Article X, as drafted by the *Ad Hoc* Committee, stipulated that such disputes should be submitted to the International Court of Justice, provided that no dispute should be so submitted if it involved "an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal".<sup>1</sup>

According to the joint Belgian and United Kingdom amendment, article X would read as follows:<sup>2</sup>

"Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice, at the request of any of the High Contracting Parties."

The representative of the United Kingdom, Mr. Fitzmaurice, explained that the joint amendment represented an attempt to combine the provisions of article X of the *Ad Hoc* Committee draft with "the essential features of the Belgian and United Kingdom amendments to article VII, namely, the responsibility of States and an international court to try them".<sup>3</sup> Replying to Mr. Lapointe, the Canadian representative, Mr. Fitzmaurice further stated that "the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention", and that the amendment "referred to civil responsibility and not to criminal responsibility".<sup>4</sup>

(e) *Decisions of the Sixth Committee with respect to articles VII and X of the Ad Hoc Committee draft convention on genocide*

(1) *First decision concerning article VII.* At its 98th meeting, on 10 November 1948, the Sixth Committee decided, by twenty-three votes to nineteen, with three abstentions, to delete the phrase "or by a competent international tribunal" in article VII of the draft convention.<sup>5</sup> Several representatives who voted in favour of the deletion made it clear that they were not opposed to the principle of international criminal jurisdiction, but that they were unable to vote for a provision which did not express a reality but only a hope.<sup>6</sup>

Mr. Chaumont, representative of France, however, requested that the following declaration should be included in the records: "Just as it has taken twenty-five years for collective security to triumph, penal jurisdiction

<sup>1</sup> E/794, p. 38 (printed edition, p. 13).

<sup>2</sup> A/C.6/258.

<sup>3</sup> A/C.6/103, p. 4.

<sup>4</sup> *Ibid.*, p. 17.

<sup>5</sup> A/C.6/SR.98, p. 11.

<sup>6</sup> Explanations of votes to this effect were made by the representatives of Luxembourg, Poland, Peru, Belgium, Iran, United Kingdom, Panama and Cuba. *Ibid.*, pp. 11-14.

will inevitably come into existence. The French delegation regards the vote just taken as an extremely serious matter. By rejecting all international measures for punishing the crime, the Committee has rendered the draft convention on genocide purposeless. In these circumstances, France will probably not be in a position to sign such a convention."<sup>1</sup>

The United States and Uruguay amendments to article VII were not put to the vote.

(2) *Reconsideration of the question.* When the Sixth Committee came to the consideration of the whole text of the draft convention as revised by its Drafting Committee, which renumbered the original article VII as article VI, Mr. Gross, representative of the United States, proposed to add to the end of the article a provision for an international penal tribunal so as to make it read as follows:<sup>2</sup>

*"Article VI. Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international penal tribunal subject to the acceptance at a later date by the contracting party concerned of its jurisdiction."*

In support of his amendment, he pointed out that two new factors had intervened. The first factor was that, while a number of representatives had voted against any mention of an international penal tribunal because of the wide scope which the inclusion of offences against political groups had given to the draft convention, it had been decided, at the preceding meeting, to omit any reference to such groups. Secondly, the United States amendment took into account the wish of certain delegations not to bind themselves as regards an international criminal jurisdiction before the statute and powers of the international penal tribunal were known.<sup>3</sup>

It may be pointed out that many of the former opponents of the clause "or by competent international tribunal" were now in favour of the United States amendment. The representative of Belgium, M. Kaeckenbeek, declared that in spite of its earlier attitude, the Belgian delegation would now accept the United States amendment "not only in a spirit of conciliation but because it considered that if no such allusion were made, it would be necessary to revise the convention if an international criminal court were instituted".<sup>4</sup> Similarly, the representative of Brazil, Mr. Amado, who had originally voted against the reference to an international criminal tribunal because he had considered it too vague and obscure, since no such tribunal was actually in existence, declared that since the Committee had subsequently decided to recommend to the International Law Commission that

<sup>1</sup> A/C.6/SR.98, p. 11. The representatives of Canada, Egypt, Haiti, United States and Uruguay also made statements in support of their votes against deletion.

<sup>2</sup> A/C.6/295.

<sup>3</sup> A/C.6/SR.129, p. 7.

<sup>4</sup> *Ibid.*, p. 11.

it study the desirability and possibility of establishing a criminal tribunal, he was now prepared to accept such a reference.<sup>1</sup>

At its 129th meeting, the Committee decided, by a vote of thirty-three to nine, with six abstentions, to reconsider article VI.<sup>2</sup> New amendments to the article were introduced by the French,<sup>3</sup> Indian<sup>4</sup> and Belgian<sup>5</sup> representatives. A drafting committee was appointed consisting of the representatives of Belgium, France, India and the United States to prepare the final text of article VI.<sup>6</sup> A joint amendment was thereafter proposed by the representatives of Belgium, France and the United States to add to the end of article VI the following words:

"or by such international penal tribunal as may have jurisdiction with respect to such Contracting Parties as shall have accepted the jurisdiction of such tribunal".<sup>7</sup>

After considerable discussion, this amendment was adopted, in substance, at the 130th meeting of the Committee, by twenty-nine votes to nine, with five abstentions. The article, as amended, was then put to the vote and was adopted by twenty-seven votes to five with eight abstentions.<sup>8</sup> As finally adopted by the Committee, it read as follows:

"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."<sup>9</sup>

(3) *Decision on article X.* At its 104th meeting, the Sixth Committee adopted,<sup>10</sup> by 23 votes to 13, with 18 abstentions, the joint United Kingdom-Belgian amendment to article X, as amended by a proposal presented by the representative of India. As finally adopted by the Committee the article, which became article IX in the draft of the Committee, read as follows:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."<sup>11</sup>

<sup>1</sup> A/C.6/SR.130, p. 8.

<sup>2</sup> A/C.6/SR.129, p. 9.

<sup>3</sup> *Ibid.*, p. 10.

<sup>4</sup> A/C.6/299.

<sup>5</sup> A/C.6/19, p. 11.

<sup>6</sup> *Ibid.*, p. 12.

<sup>7</sup> A/C.6/130, p. 4.

<sup>8</sup> A/C.6/SR.130, pp. 15-16.

<sup>9</sup> A/760, p. 10. It may be pointed out that, at an earlier stage, a proposal submitted by Iran (A/C.6/218) to include in the article the principle of universal repression of the crime of genocide was rejected by the Sixth Committee. See A/C.6/SR.100, p. 17.

<sup>10</sup> A/C.6/SR.104, p. 10.

<sup>11</sup> A/760, p. 10.

(f) *Draft resolution requesting the International Law Commission to study certain aspects of the establishment of an international criminal tribunal*

Immediately after its first decision, subsequently reversed, to omit the reference to "a competent international tribunal", contained in the last phrase of article VII of the *Ad Hoc* Committee draft, the Sixth Committee took up two proposals, previously submitted by the delegations of Iran and the Netherlands respectively, both having in view an invitation to the International Law Commission to study the question of an international criminal jurisdiction.

The proposal of Iran provided that the International Law Commission, "after inviting the opinions of all Governments of Members on this question", should undertake "the necessary studies with a view to preparing a draft convention on the establishment of an international tribunal competent to deal with the crime of genocide".<sup>1</sup>

The Netherlands proposal was to request the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of individuals "charged with crimes over which jurisdiction will be conferred upon that organ by international conventions". In so doing, the Commission was to "pay particular attention to the possibility of establishing a criminal chamber of the International Court of Justice".<sup>2</sup>

<sup>1</sup> The Iranian draft resolution, in full, read as follows:

"Whereas genocide is a grave crime against mankind which the civilized world condemns;

"Whereas punishment must be meted out for the crime of genocide wherever and by whomsoever committed; and

"Whereas if a competent international tribunal were established, it could deal with crimes of genocide and mete out punishment to the guilty;

"The General Assembly

"Recommends

"The International Law Commission, after inviting the opinions of all Governments of Members on this question, to undertake the necessary studies with a view to preparing a draft convention on the establishment of an international tribunal competent to deal with the crime of genocide."

See A/C.6/218.

<sup>2</sup> The Netherlands draft resolution read as follows:

"The General Assembly

"Considering that the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal,

"Considering that in the course of development of the international community the need for trial of crimes by an international judicial organ will be more and more felt,

"Requests the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of individuals, whether private persons or officials, charged with crimes over which jurisdiction will be conferred upon that organ by international conventions;

"Requests the International Law Commission in the accomplishment of that task to pay particular attention to the possibility of establishing a criminal chamber of the International Court of Justice."

See A/C.6/248 and A/C.6/248/Rev.1.

In order to reconcile the proposal of Iran which referred only to genocide and that of the Netherlands which made no specific reference to genocide, the representative of Venezuela, Mr. Pérez Perozo, proposed the following amendment to the wording of the third paragraph of the Netherlands proposal:

"Requests the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of individuals, whether private persons or officials, charged with the crime of genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."<sup>1</sup>

The Venezuelan formula was accepted by Mr. de Beus and Mr. Abdoh, representatives of the Netherlands and Iran respectively.<sup>2</sup> The rapporteur, Mr. Spiropoulos (Greece), suggested that the introductory sentence of the first paragraph of the Netherlands draft should read "Considering that the discussion of the Convention . . ."<sup>3</sup> The Belgian representative, Mr. Kaeckenbeeck, proposed that the word "particular" in the penultimate line of the same draft should be deleted, as it might mean that the International Law Commission would be bound to give priority to the study of the question of the establishment of a criminal chamber of the International Court of Justice.<sup>4</sup> The representatives of the Netherlands and Iran accepted this deletion.

The Netherlands draft resolution as amended was thereafter adopted by thirty-two votes to four, with nine abstentions.<sup>5</sup>

#### (g) *Decisions of the General Assembly*

The report of the Sixth Committee containing the text of the draft Convention on the Prevention and Punishment of the Crime of Genocide together with the draft resolution providing for the study by the International Law Commission of the question of an international criminal jurisdiction,<sup>6</sup> was submitted to the General Assembly and discussed at its 178th and 179th plenary meetings. The Soviet delegation submitted, *inter alia*, an amendment calling for the deletion of the clause in article VI<sup>7</sup> referring to an international penal tribunal.<sup>8</sup> The delegations of Czechoslovakia, Byelorussia, India and Poland were in favour of this Soviet amendment. On the other hand, the delegations of Australia, Brazil, France, the Netherlands, Pakistan and the United States expressed the contrary view.<sup>9</sup>

<sup>1</sup> A/C.6/SR.99, p. 2.

<sup>2</sup> *Idem*.

<sup>3</sup> *Ibid.*, p. 5.

<sup>4</sup> *Ibid.*, p. 7.

<sup>5</sup> *Ibid.*, p. 8. This draft resolution became resolution 260 (III) B, see above pp. 5-6.

<sup>6</sup> A/760 and A/760/Corr.2.

<sup>7</sup> Corresponding to article VII of the *Ad Hoc* Committee draft.

<sup>8</sup> A/766.

<sup>9</sup> A/PV.178 and A/PV.179.

The General Assembly, by thirty-nine votes to eight, with eight abstentions, rejected the amendment submitted by the Soviet Union. It then unanimously approved the Convention on the Prevention and Punishment of the Crime of Genocide. By a vote of forty-three to six, with three abstentions, the General Assembly next adopted the resolution relating to the study by the International Law Commission of the question of an international criminal jurisdiction.<sup>1</sup>

<sup>1</sup> A/PV.179, pp. 56, 57-60, 68-70, 71.

## IV

### APPENDICES

#### 1. Extract from the report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to the Preliminary Peace Conference, 1919<sup>1</sup>

##### *Chapter IV*

#### CONSTITUTION AND PROCEDURE OF AN APPROPRIATE TRIBUNAL

The fourth point submitted to the Commission is stated as follows:

"The constitution and procedure of a tribunal appropriate for the trial of these offences (crimes relating to the war)".

On this question the Commission is of opinion that, having regard to the multiplicity of crimes committed by those Powers which a short time before had on two occasions at The Hague protested their reverence for right and their respect for the principles of humanity,<sup>2</sup> the public conscience insists upon a sanction which will put clearly in the light that it is not permitted cynically to profess a disdain for the most sacred laws and the most formal undertakings.

Two classes of culpable acts present themselves:

- (a) Acts which provoked the world war and accompanied its inception.
- (b) Violations of the laws and customs of war and the laws of humanity.

#### (a) ACTS WHICH PROVOKED THE WORLD WAR AND ACCOMPANIED ITS INCEPTION

In this class the Commission has considered acts not strictly war crimes, but acts which provoked the war or accompanied its inception, such as, to take outstanding examples, the invasion of Luxembourg and Belgium.

The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reprovcs and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a

<sup>1</sup> *American Journal of International Law*, vol. 14 (1920), pp. 95-154.

<sup>2</sup> See the declaration of Baron Marschall von Bieberstein, who, speaking at the Hague Conference of 1907 with regard to submarine mines, used the following expressions: "Military operations are not governed solely by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German Navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization".

tribunal such as the Commission is authorized to consider under its terms of reference.

Further, any inquiry into the authorship of the war must, to be exhaustive, extend over events that have happened during many years in different European countries, and must raise many difficult and complex problems which might be more fitly investigated by historians and statesmen than by a tribunal appropriate to the trial of offenders against the laws and customs of war. The need of prompt action is from this point of view important. Any tribunal appropriate to deal with the other offences to which reference is made might hardly be a good court to discuss and deal decisively with such a subject as the authorship of the war. The proceedings and discussions, charges and counter-charges, if adequately and dispassionately examined, might consume much time, and the result might conceivably confuse the simpler issues into which the tribunal will be charged to inquire. While this prolonged investigation was proceeding some witnesses might disappear, the recollection of others would become fainter and less trustworthy, offenders might escape, and the moral effect of tardily imposed punishment would be much less salutary than if punishment were inflicted while the memory of the wrongs done was still fresh and the demand for punishment was insistent.

We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.

There can be no doubt that the invasion of Luxembourg by the Germans was a violation of the Treaty of London of 1867, and also that the invasion of Belgium was a violation of the Treaties of 1839. These treaties secured neutrality for Luxembourg and Belgium and in that term were included freedom, independence and security for the population living in those countries. They were contracts made between the high contracting parties to them, and involve an obligation which is recognized in international law.

The Treaty of 1839 with regard to Belgium and that of 1867 with regard to Luxembourg were deliberately violated, not by some outside Power, but by one of the very Powers which had undertaken not merely to respect their neutrality, but to compel its observance by any Power which might attack it. The neglect of its duty by the guarantor adds to the gravity of the failure to fulfil the undertaking given. It was the transformation of a security into a peril, of a defence into an attack, of a protection into an assault. It constitutes, moreover, the absolute denial of the independence of states too weak to interpose a serious resistance, an assault upon the life of a nation which resists, an assault against its very existence while, before the resistance was made, the aggressor, in the guise of tempter, offered material compensations in return for the sacrifice of honor. The violation of international law was thus an aggravation of the attack upon the independence of states which is the fundamental principle of international right.

And thus a high-handed outrage was committed upon international engagements, deliberately, and for a purpose which cannot justify the conduct of those who were responsible.

The Commission is nevertheless of opinion that no criminal charge can be made against the responsible authorities or individuals (and notably the ex-Kaiser) on the special head of these breaches of neutrality, but the gravity of these gross outrages upon the law of nations and international good faith is such that the Commission thinks they should be the subject of a formal condemnation by the Conference.

### *Conclusions*

1. The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

2. On the special head of the breaches of the neutrality of Luxembourg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxembourg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.

4. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.

### (b) VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR AND OF THE LAWS OF HUMANITY

Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases. These courts would be able to try the incriminated persons according to their own procedure, and much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal.

There remain, however, a number of charges:

(a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labour in mines where prisoners of more than one nationality were forced to work;

(b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct of operations against several of the Allied armies;

(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction

of rank, including the Heads of States, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators);

(d) Against such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the high tribunal hereafter referred to.

For the trial of outrages falling under these four categories the Commission is of opinion that a high tribunal is essential and should be established according to the following plan:

(1) It shall be composed of three persons appointed by each of the following Governments: The United States of America, the British Empire, France, Italy and Japan, and one person appointed by each of the following Governments: Belgium, Greece, Poland, Portugal, Romania, Serbia and Czecho-Slovakia. The members shall be selected by each country from among the members of their national courts or tribunals, civil or military, and now in existence or erected as indicated above;

(2) The tribunal shall have power to appoint experts to assist it in the trial of any particular case or class of cases;

(3) The law to be applied by the tribunal shall be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience";

(4) When the accused is found by the tribunal to be guilty, the tribunal shall have the power to sentence him to such punishment or punishments as may be imposed for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person;

(5) The tribunal shall determine its own procedure. It shall have power to sit in divisions of not less than five members and to request any national court to assume jurisdiction for the purpose of inquiry or for trial and judgment;

(6) The duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it shall be imposed upon a prosecuting commission of five members, of whom one shall be appointed by the Governments of the United States of America, the British Empire, France, Italy and Japan, and for the assistance of which any other Government may delegate a representative;

(7) Applications by any Allied or Associated Government for the trial before the tribunal of any offender who has not been delivered up or who is at the disposition of some other Allied or Associated Government shall be addressed to the prosecuting commission, and a national court shall not proceed with the trial of any person who is selected for trial before the tribunal, but shall permit such person to be dealt with as directed by the prosecuting commission;

(8) No person shall be liable to be tried by a national court for an offence in respect of which charges have been preferred before the tribunal, but no trial or sentence by a court of an enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States.

### *Conclusions*

The Commission has consequently the honour to recommend:

1. That a high tribunal be constituted as above set out;
2. That it shall be provided by the treaty of peace:

(a) That the enemy Governments shall, notwithstanding that peace may have been declared, recognize the jurisdiction of the national tribunals and the high tribunal, that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree, and that the Governments of such persons shall undertake to surrender them to be tried;

(b) That the enemy Governments shall undertake to deliver up and give in such manner as may be determined thereby:

(i) The names of all persons in command or charge of or in any way exercising authority in or over all civilian internment camps, prisoner-of-war camps, branch camps, working camps and "commandoes" and other places where prisoners were confined in any of their dominions or in territory at any time occupied by them, with respect to which such information is required, and all orders and instructions or copies of orders or instructions and reports in their possession or under their control relating to the administration and discipline of all such places in respect of which the supply of such documents as aforesaid shall be demanded,

(ii) All orders, instructions, copies of orders and instructions, General Staff plans of campaign, proceedings in naval or military courts and courts of inquiry, reports and other documents in their possession or under their control which relate to acts or operations, whether in their dominions or in territory at any time occupied by them, which shall be alleged to have been done or carried out in breach of the laws and customs of war and the laws of humanity,

(iii) Such information as will indicate the persons who committed or were responsible for such acts or operations,

(iv) All logs, charts, reports and other documents relating to operations by submarines,

(v) All orders issued to submarines, with details or scope of operations by these vessels,

(vi) Such reports and other documents as may be demanded relating to operations alleged to have been conducted by enemy ships and their crews during the war contrary to the laws and customs of war and the laws of humanity;

3. That each Allied and Associated Government adopt such legislation as may be necessary to support the jurisdiction of the international court, and to assure the carrying out of its sentences;

4. That the five States represented on the prosecuting commission shall jointly approach neutral Governments with a view to obtaining the surrender for trial of persons within their territories who are charged by such States with violations of the laws and customs of war and the laws of humanity.

**2. Extract from the memorandum of reservations presented by the representatives of the United States to the report of the Commission on Responsibility<sup>1</sup>**

The fourth question [submitted to the Commission] calls for an investigation of and a report upon "the constitution and procedure of a tribunal appropriate for the trial of these offences". Apparently the Conference had in mind the violations of the laws and customs of war, inasmuch as the Commission is required by the third submission to report upon "the degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed". The fourth point relates to the constitution and procedure of a tribunal appropriate for the investigation of these crimes, and to the trial and punishment of the persons accused of their commission, should they be found guilty. The Commission seems to have been of the opinion that the tribunal referred to in the fourth point was to deal with the crimes specified in the second and third submissions, not with the responsibility of the authors of the war, as appears from the following statement taken from the report:

"On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Luxembourg and of Belgium, the Commission is of the opinion that it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts."

This section of the report, however, deals not only with the laws and customs of war—improperly adding "and of the laws of humanity"—but also with the "acts which provoked the war and accompanied its inception", which either in whole or in part would appear to fall more appropriately under the first submission relating to the "responsibility of the authors of the war".

Of the acts which provoked the war and accompanied its inception, the Commission, with special reference to the violation of the neutrality of Luxembourg and of Belgium, says: "We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal". And a little later in the same section the report continues: "The Commission is nevertheless of opinion that no criminal charge can be made against the responsible authorities or individuals, and notably the ex-Kaiser, on the special head of these breaches of neutrality, but the gravity of these gross outrages upon the law of nations and international good faith is such that the Commission thinks they should be the subject of a *formal condemnation by the Conference*". The American representatives are in thorough accord with these

<sup>1</sup> *American Journal of International Law*, vol. 14 (1920), pp. 95-154.

views, which are thus formally stated in the first two of the four conclusions under this heading:

"The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

"On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference."

If the report had stopped here, the American representatives would be able to concur in the conclusions under this heading and the reasoning by which they were justified, for hitherto the authors of war, however unjust it may be in the forum of morals, have not been brought before a court of justice upon a criminal charge for trial and punishment. The report specifically states: (1) that "a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference"; the Commission refused to advise (2) "that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal"; it further holds (3) that "no criminal charge can be made against the responsible authorities or individuals, and notably the ex-Kaiser, on the special head of these breaches of neutrality". The American representatives, accepting each of these statements as sound and unanswerable, are nevertheless unable to agree with the third of the conclusions based upon them:

"On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts".

The American representatives believe that this conclusion is inconsistent both with the reasoning of the section and with the first and second conclusions, and that "in a matter so unprecedented", to quote the exact language of the third conclusion, they are relieved from comment and criticism. However, they observe that, if the acts in question are criminal in the sense that they are punishable under law, they do not understand why the report should not advise that these acts be punished in accordance with the terms of the law. If, on the other hand, there is no law making them crimes or affixing a penalty for their commission, they are moral, not legal, crimes, and the American representatives fail to see the advisability or indeed the appropriateness of creating a special organ to deal with the authors of such acts. In any event, the organ in question should not be a judicial tribunal.

In order to meet the evident desire of the Commission that a special organ be created, without however doing violence to their own scruples in the premises, the American representatives proposed:

"The Commission on Responsibilities recommends that:

"1. A Commission of Inquiry be established to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course.

"2. The Commission of Inquiry to consist of two members of the five following Powers: United States of America, British Empire, France, Italy, and Japan; and one member from each of the five following Powers: Belgium, Greece, Portugal, Romania, and Serbia.

"3. The enemy be required to place their archives at the disposal of the Commission, which shall forthwith enter upon its duties and report jointly and separately to their respective Governments on the 11th November, 1919, or as soon thereafter as practicable".

The Commission, however, failed to adopt this proposal.

The fourth and final conclusion under this heading declares it to be "desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law". With this conclusion the American representatives find themselves to be in substantial accord. They believe that any nation going to war assumes a grave responsibility, and that a nation engaging in a war of aggression commits a crime. They hold that the neutrality of nations should be observed, especially when it is guaranteed by a treaty to which the nations violating it are parties, and that the plighted word and the good faith of nations should be faithfully observed in this as in all other respects. At the same time, given the difficulty of determining whether an act is in reality one of aggression or of defence, and given also the difficulty of framing penal sanctions, where the consequences are so great or may be so great as to be incalculable, they hesitate as to the feasibility of this conclusion, from which, however, they are unwilling formally to dissent.

With the portion of the report devoted to the "constitution and procedure of a tribunal appropriate for the trial of these offences", the American representatives are unable to agree, and their views differ so fundamentally and so radically from those of the Commission that they found themselves obliged to oppose the views of their colleagues in the Commission and to dissent from the statement of those views as recorded in the report. The American representatives, however, agree with the introductory paragraph of this section, in which it is stated that "every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes" constituting violations of the laws and customs of war, "if such persons have been taken prisoners or have otherwise fallen into its power". The American representatives are likewise in thorough accord with the further provisions that "each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases". The American representatives concur in the view that "these courts would be able to try the incriminated persons according to their own procedure", and also in the conclusion that "much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal", supposing that the single tribunal could and should be created. In fact, these statements are not only in accord with but are based

upon the memorandum submitted by the American representatives, advocating the utilization of the military commissions or tribunals either existing or which could be created in each of the belligerent countries, with jurisdiction to pass upon offences against the laws and customs of war committed by the respective enemies.

This memorandum already referred to in an earlier paragraph is as follows:

"1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;

"2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;

"3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;

"4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and

"5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences."

In a matter of such importance affecting not one but many countries and calculated to influence their future conduct, the American representatives believed that the nations should use the machinery at hand, which had been tried and found competent, with a law and a procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice, or procedure. They further believed that, if an act violating the laws and customs of war committed by the enemy affected more than one country, a tribunal could be formed of the countries affected by uniting the national commissions or courts thereof, in which event the tribunal would be formed by the mere assemblage of the members, bringing with them the law to be applied, namely, the laws and customs of war, and the procedure, namely, the procedure of the national commissions or courts. The American representatives had especially in mind the case of Henry Wirz, commandant of the Confederate prison at Andersonville, Georgia, during the war between the States, who, after that war, was tried by a military commission, sitting in the City of Washington, for crimes contrary to the laws and customs of war, convicted thereof, sentenced to be executed, and actually executed on the 11th November, 1865.

While the American representatives would have preferred a national military commission or court in each country, for which the Wirz case furnished ample precedent, they were willing to concede that it might be

advisable to have a commission of representatives of the competent national tribunals to pass upon the charges, as stated in the report :

“(a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labor in mines where prisoners of more than one nationality were forced to work ;

“(b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct towards several of the Allied armies.”

The American representatives are, however, unable to agree that a mixed commission thus composed should, in the language of the report, entertain charges :

“(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the Heads of States, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war, it being understood that no such abstention shall constitute a defence for the actual perpetrators.”

In an earlier stage of the general report, indeed, until its final revision, such persons were declared liable because they “abstained from preventing, putting an end to, or repressing, violations of the laws or customs of war”. To this criterion of liability the American representatives were unalterably opposed. It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime ; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offence. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission. To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected. The difficulty in the matter of abstention was felt by the Commission, as to make abstention punishable might tend to exonerate the person actually committing the act. Therefore the standards of liability to which the American representatives objected are modified in the last sessions of the Commission, and the much less objectionable text, as stated above, was adopted and substituted for the earlier and wholly inadmissible one.

There remain, however, two reasons, which, if others were lacking, would prevent the American representatives from consenting to the tribunal recommended by the Commission. The first of these is the uncertainty of the law to be administered, in that liability is made to depend not

only upon violations of the laws and customs of war, but also upon violations "of the laws of humanity". The second of these reasons is Heads of States are included within the civil and military authorities of the enemy countries to be tried and punished for violations of the laws and customs of war and of the laws of humanity. The American representatives believe that the Commission has exceeded its mandate in extending liability to **violations of the laws of humanity**, inasmuch as the facts to be examined are solely violations of the laws and customs of war. They also believe that the Commission erred in seeking to subject Heads of States to trial and punishment by a tribunal to whose jurisdiction they were not subject when the alleged offences were committed.

As pointed out by the American representatives on more than one occasion, war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity. The law of humanity, or the principle of humanity, is much like equity, whereof John Selden, as wise and cautious as he was learned, aptly said:

"Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience."

While recognizing that offences against the laws and customs of war might be tried before and the perpetrators punished by national tribunals, the Commission was of the opinion that the graver charges and those involving more than one country should be tried before an international body, to be called the High Tribunal, which "shall be composed of three persons appointed by each of the following Governments: the United States of America, the British Empire, France, Italy, and Japan, and one person appointed by each of the following Governments: Belgium, Greece, Poland, Portugal, Romania, Serbia, and Czecho-Slovakia;" the members of this tribunal to be selected by each country "from among the members of their national courts or tribunals, civil or military, and now in existence or erected as indicated above". The law to be applied is declared by the Commission to be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience". The punishment to be inflicted is that which may be imposed "for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person". The cases selected for trial are to be determined and the

prosecutions directed by "a prosecuting commission" composed of a representative of the United States of America, the British Empire, France, Italy, and Japan, to be assisted by a representative of one of the other Governments, presumably a party to the creation of the court or represented in it.

The American representatives felt very strongly that too great attention should not be devoted to the creation of an international criminal court for the trial of individuals, for which a precedent is lacking, and which appears to be unknown in the practice of nations. They were of the opinion that an act could not be a crime in the legal sense of the word, unless it were made so by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted. They were perhaps more conscious than their colleagues of the difficulties involved, inasmuch as this question was one that had arisen in the American Union composed of states, and where it had been held in the leading case of *United States v. Hudson* (7 Cranch, 32), decided by the Supreme Court of the United States in 1812, that "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence". What is true of the American states must be true of this looser union which we call the Society of Nations. The American representatives know of no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime affixing a punishment to it, and declaring the court which has jurisdiction over the offence. They felt, however, that the difficulty, however great, was not insurmountable, inasmuch as the various States have declared certain acts violating the laws and customs of war to be crimes, affixing punishments to their commission, and providing military courts or commissions within the respective States possessing jurisdiction over such offence. They were advised that each of the Allied and Associated States could create such a tribunal, if it had not already done so. Here then was at hand a series of existing tribunal or tribunals that could lawfully be called into existence in each of the Allied or Associated countries by the exercise of their sovereign powers, appropriate for the trial and punishment within their respective jurisdictions of persons of enemy nationality, who during the war committed acts contrary to the laws and customs of war, in so far as such acts affected the persons or property of their subjects or citizens, whether such acts were committed within portions of their territory occupied by the enemy or by the enemy within its own jurisdiction.

The American representatives therefore proposed that acts affecting the persons or property of one of the Allied or Associated Governments should be tried by a military tribunal of that country; that acts involving more than one country, such as treatment by Germany of prisoners contrary to the usages and customs of war, could be tried by a tribunal either made up of the competent tribunals of the countries affected or of a commission thereof possessing their authority. In this way existing national tribunals or national commissions which could legally be called into being would be utilized, and not only the law and the penalty would be already declared, but the procedure would be settled.

It seemed elementary to the American representatives that a country could not take part in the trial and punishment of a violation of the laws and customs of war committed by Germany and her Allies before the particular country in question had become a party to the war against Germany and her allies; that consequently the United States could not institute a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war, unless such violations were committed upon American persons or American property, and that the United States could not properly take part in the trial and punishment of persons accused of violations of the laws and customs of war committed by the military or civil authorities of Bulgaria or Turkey.

Under these conditions and with these limitations the American representatives considered that the United States might be a party to a high tribunal, which they would have preferred to call, because of its composition, the Mixed or United Tribunal or Commission. They were averse to the creation of a new tribunal, of a new law, of a new penalty, which would be *ex post facto* in nature, and thus contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities. They believed, however, that the United States could co-operate to this extent by the utilization of existing tribunals, existing laws, and existing penalties. However, the possibility of co-operating was frustrated by the insistence on the part of the majority that criminal liability should, in excess of the mandate of the Conference, attach to the laws and principles of humanity, in addition to the laws and customs of war, and that the jurisdiction of the high court should be specifically extended to "the Heads of States".

In regard to the latter point, it will be observed that the American representatives did not deny the responsibility of the Heads of States for acts which they may have committed in violation of law, including, in so far as their country is concerned, the laws and customs of war, but they held that Heads of States are, as agents of the people, in whom the sovereignty of any State resides, responsible to the people for the illegal acts which they may have committed, and that they are not and that they should not be made responsible to any other sovereignty.

The American representatives assumed, in debating this question, that from a legal point of view the people of every independent country are possessed of sovereignty, and that that sovereignty is not held in that sense by rulers; that the sovereignty which is thus possessed can summon before it any person, no matter how high his estate, and call upon him to render an account of his official stewardship; that the essence of sovereignty consists in the fact that it is not responsible to any foreign sovereignty; that in the exercise of sovereign powers which have been conferred upon him by the people, a monarch or Head of State acts as their agent; that he is only responsible to them; and that he is responsible to no other people or group of people in the world.

The American representatives admitted that from the moral point of view of the Head of a State, be he termed emperor, king, or chief executive, is responsible to mankind, but that from the legal point of view they expressed themselves as unable to see how any member of the Commission

could claim that the Head of a State exercising sovereign rights is responsible to any but those who have confided those rights to him by consent expressed or implied.

The majority of the Commission, however, was not influenced by the legal argument. They appeared to be fixed in their determination to try and punish by judicial process the "ex-Kaiser" of Germany. That there might be no doubt about their meaning, they insisted that the jurisdiction of the high tribunal whose constitution they recommended should include the Heads of States, and they therefore inserted a provision to this effect in express words in the clause dealing with the jurisdiction of the tribunal.

In view of their objections to the uncertain law to be applied, varying according to the conception of the members of the high court as to the laws and principles of humanity, and in view also of their objections to the extent of the proposed jurisdiction of that tribunal, the American representatives were constrained to decline to be a party to its creation. Necessarily they declined the proffer on behalf of the Commission that the United States should take part in the proceedings before that tribunal, or to have the United States represented in the prosecuting commission charged with the "duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it". They therefore refrained from taking further part either in the discussion of the constitution or of the procedure of the tribunal . . .

### 3. Extract from the Treaty of Versailles

#### *Part VII*

#### PENALTIES

#### ARTICLE 227

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

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

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

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

#### ARTICLE 228

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of

having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

#### ARTICLE 229

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

#### ARTICLE 230

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.

#### 4. **Draft statute of the International Penal Court<sup>1</sup> as amended by the Permanent International Criminal Court Committee of the International Law Association**

##### PRELIMINARY CONVENTION

A permanent Constitution of the International Penal Court is hereby established in accordance with the provisions of the Convention of (place) dated . . . day of . . . 192 . . . This Court shall be a Division of the Permanent Court of International Justice at The Hague, and shall exercise a separate jurisdiction in the cases of States and individuals charged with international offences as hereinafter defined.

##### CHAPTER I

##### ORGANISATION OF THE COURT

##### Article 1

##### *Composition of the Court*

The Court shall be composed of a body of Judges elected regardless of their nationality from among persons who possess the qualifications

<sup>1</sup>Text from *International Law Association, 34th Report (Vienna) (1927)*, pp. 113-125.

in their respective countries for appointment to high judicial office, being or having been either Judges of Courts administering penal law, or being lawyers specially qualified by experience in the practice of such Courts.

#### Article 2

##### *Number of Judges*

The Court shall consist of fifteen members—ten Judges and five Deputy Judges. The number of Judges and Deputy Judges may be varied by the parties who ratify or subsequently adhere to the Convention of (place) dated . . . day of . . . 192 . . . whenever they may so determine.

#### Article 3

##### *Election of Members*

The Members of the Court shall be elected by the Assembly and by the Council of the League of Nations from a list of persons nominated by the national groups in the Permanent Court of Arbitration at The Hague, in manner provided in Articles 4 to 12 inclusive of the Statute of the Permanent Court of International Justice.

#### Article 4

##### *Declaration on Assuming Office*

Every Member of the Court shall on assuming his appointment make a solemn declaration in open court that he will exercise his functions impartially and conscientiously.

#### Article 5

##### *Duration of Appointment*

The Members of the Court shall be elected for nine years, and may be re-elected.

They shall continue to discharge their duties until their places have been filled. Although replaced, they shall finish any cases of which they may have commenced the hearing.

#### Article 6

##### *Diplomatic Immunities*

Members of the Court, when travelling to or from The Hague on the business of the Court, shall be entitled to diplomatic passports, and while actually at The Hague engaged on the business of the Court shall enjoy diplomatic privileges and immunities.

#### Article 7

##### *Disabilities of Members*

No Judge of the Court shall act as agent, advocate, or counsel in any case. Deputy Judges shall be precluded from so acting in those cases only in which they are called upon to exercise their functions in court.

No Member shall function in any case in which he has previously taken part as agent, advocate or counsel for one of the parties, or as a member

of a National or International Court, or of a Commission of Inquiry, or in any other capacity in connection with the case.

### Article 8

#### *Vacancies, How Filled*

Vacancies which may occur shall be filled by the same method as that laid down for the first election. A person elected to fill any vacancy in the Court shall likewise hold office subject to the provisions of this Statute for a period of nine years from the date of his election.

### Article 9

#### *Loss of Office*

A Member of the Court may be dismissed if in the unanimous opinion of all the other Members of the Court, he has ceased to fulfil the conditions prescribed by this Statute.

Formal notice thereof shall be given to the Secretary-General of the League of Nations by the Registrar.

Such notifications shall render the office vacant.

### Article 10

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

The Court shall elect a President and a Vice-President from their Members for a term of three years, who may be elected for subsequent periods of three years.

### Article 11

#### *Election of Registrar*

The Court shall appoint the Registrar, who shall reside at The Hague. The duties of the Registrar shall not be deemed incompatible with those of the Secretary-General of the Permanent Court of Arbitration.

### Article 12

The Seat of the Court shall be established at The Hague.

### Article 13

#### *Sessions of Court*

The Court shall sit within three months after any case has been set down for trial, and shall continue to sit so long as may be necessary, in order to dispose of all cases on the list.

The President may summon a session of the Court whenever he may deem it necessary.

### Article 14

#### *Composition of Court*

Subject to the provisions of this Statute, the President, or failing him the Vice-President, shall determine who shall act as Judges at any session of the Court.

If for some special reason a Member of the Court considers that he should not take part in the hearing of a particular case, he shall so inform the President.

The Court may sit in one or more sections. A Sectional Court shall consist of five Judges, one of whom may be a Deputy Judge.

#### Article 15

##### *Right of Appeal*

Where sentence of death or imprisonment for life, or for a term of not less than five years, has been passed by a Sectional Court, there shall be a right of appeal to a Full Court consisting of not less than seven Judges, of whom not more than two may be Deputy Judges. A defendant State charged with an offence shall be entitled in any case to appeal to the Full Court from the decision of a Sectional Court.

#### Article 16

##### *Courts of Summary Jurisdiction*

Courts of Summary Jurisdiction may be constituted by the President or Vice-President, whenever he may deem it necessary, each such Court consisting of three members, of whom one shall be a Judge, to try, by way of summary procedure, cases in which the charge is directed not against a State, but only against a national of a State, and where the representative of the defendant's Government consents to the hearing before such a Court. In this case the defendant has a right of appeal under Article 15. Such Courts shall have power to inflict punishment for not more than two years without hard labour, or not more than one year with hard labour, and/or to impose a fine not exceeding £100.

All applications in interlocutory proceedings shall be made to a Court of Summary Jurisdiction.

#### Article 17

##### *Nationality of Judges*

Judges of the nationality of each contesting party shall be appointed to sit on the case before the Court. If the Court includes upon the Bench a Judge of the nationality of one of the parties only, the other party may select from among the Deputy Judges a Judge of his nationality if there be one. If there should not be one, the party may choose a Judge from the list of candidates last presented by the Permanent Court of Arbitration. If the Court includes upon the Bench no Judge or Deputy Judge of the nationality of the contesting parties, each of these may choose from the said list. Judges so appointed under this Article shall be subject to the provisions of Articles 1 and 8 of this Statute.

#### Article 18

##### *Rules of Procedure*

The Court shall frame rules for regulating procedure, including summary procedure.

## Article 19

*Emoluments*

All emoluments (including allowances and pensions) of the Judges, and Deputy Judges, and of the Registrar, shall be such as shall be determined by the Assembly of the League of Nations upon the proposal of the Council, and shall be subject to any regulations which may be framed in like manner.

## Article 20

*Expenses of Court*

The expenses of the Court shall be borne by the members of the League of Nations in such proportions as may be decided by the Assembly upon the proposal of the Council.

## CHAPTER II

## JURISDICTION AND COMPETENCE OF COURT

## Article 21

*Jurisdiction*

The jurisdiction of the Court shall extend to all charges of :

(a) Violations of international obligations of a penal character committed by the subjects or citizens of one State or by a *heimatlos* against another State or its subjects or citizens.

(b) Violations of any treaty, convention or declaration binding on the States parties to the Convention of (place) dated . . . day of, 192 , which regulate the methods and conduct of warfare.

(c) Violations of the laws and customs of war generally accepted as binding by civilised nations.

Without prejudice to the original jurisdiction of the Court as hereinbefore defined, the Court shall have power to deal with cases of a penal character referred to it by the Council or Assembly of the League of Nations for trial, or for inquiry and report.

In the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court.

## Article 22

*Judgment, Conviction, Sentence*

The Court shall have power to pronounce a declaratory judgment on any matter in dispute which is before the Court without imposing any penalty.

If the Court finds that a charge against a State is proved, the Court may order such State to pay to the complaining State (a) a pecuniary penalty; (b) indemnity for any damage done; (c) a sum by way of indemnity to any subject or citizen of the complaining State who proves any loss or injury caused by the act or default of the defendant State or of any subject or citizen of such State.

If the Court finds that a charge against a subject or citizen or heimatlos is proved, the Court may order such punishment as it may think fit, provided always that (a) the penalty of death shall not be pronounced on any individual, unless by the law of his State the death penalty may be inflicted for an offence of a similar character; (b) in no case shall the punishment of flogging be decreed; (c) in other cases the penalty of imprisonment or penal detention may be pronounced by the Court, which may give directions as to the character of the imprisonment or penal detention to be inflicted; (d) pecuniary penalties and indemnities may also be imposed in addition to, or substitution for, any punishment.

### Article 23

#### *Law to be Applied*

The Court shall apply:

- (1) International treaties, conventions and declarations, whether general or particular, recognised by the States which are before the Court;
- (2) International custom, as evidence of a general practice accepted as law;
- (3) The general principles of Public or International Law recognised by civilised nations;
- (4) Judicial decisions, as subsidiary means for the determination of rules of law;

Doctrines of highly qualified publicists may also be referred to.

Provided that no act may be tried as an offence unless it is specified as a criminal offence either in the Statute of the Court or in the municipal penal law of the defendant or, in the case of a heimatlos, in the law of his residence at the time of the commission of the crime or, failing such residence, the law of the State where the crime was committed.

## CHAPTER III

### PROCEDURE

### Article 24

#### *Parties*

The States which are parties to the Convention of (place) dated the . . . day of . . . 192 . . . and all other States which accept the jurisdiction of the Court by treaty, or adherence, or otherwise, shall have a right of recourse thereto. A lodgment of a charge by a non-party State shall be deemed to be equivalent to adherence to the Convention.

(1) Every such State shall be entitled to lodge a charge on its own behalf and/or on that of any of its subjects or citizens against any other such States and/or its subjects or citizens, provided that where a charge is directed only against a subject or citizen the State of such subject or citizen shall be a party to the proceedings.

(2) No subject or citizen or heimatlos shall have a *locus standi* as prosecutor.

A charge may be lodged against a State and/or a subject or citizen of a State, although such State is not a party to the Convention or has not accepted the jurisdiction of the Court. A non-party State against which a charge is made may accept the jurisdiction of the Court by giving notice to that effect to the Registrar.

If such charge is proved the Court shall pronounce judgment only, and shall not pass sentence. Subject to the provisions of Rules of Court, the provisions of this Statute as to the framing and service and hearing of charges shall, so far as they are applicable, be observed in such proceedings.

## Article 25

### *Content and Service of Charge*

The charge shall be in writing, shall contain a concise statement of the particulars of the alleged offence, and shall be accompanied by the documents, if any, relied upon in support thereof. Such charge and documents shall be lodged with the Registrar.

No charge shall be served on a State or subject or citizen except after application to and with the leave of the Court as herein provided.

The application for leave to serve the charge shall be made *ex parte* by the complainant State to a Court constituted by the President or Vice-President to hear the application.

The Court shall have power to dismiss at any stage of the proceedings any complaint which in its opinion is of an unsubstantial character, or is frivolous, or vexatious, or an abuse of the process of the Court.

It shall be the duty of the Registrar to serve a copy of the charge on the defendant State, and it shall be the duty of such State to appear before the Court and to ensure the attendance of any subject or citizen named in the charge.

If a defendant State or subject or citizen or heimatlos relies on any special defence, notice thereof shall be filed with the Registrar in due course, and a copy thereof shall be forwarded by the Registrar to the complainant State.

## Article 26

### *Representation of Parties*

The complainant and defendant States shall be represented in the proceedings by agents, and may conduct their respective cases in Court by agents or by counsel or advocates.

At the hearing the defendant subject or citizen or heimatlos shall appear before the Court, and may conduct his case in person or may be represented for that purpose by an agent or by counsel or advocates.

## Article 27

### *Appointment of Procurator or Agent*

All complainants upon lodging a charge, and all defendant States upon being served with a charge, shall forthwith appoint a procurator or

agent resident within the State in which the Court is situate, and shall give notice of such appointment to the Registrar of the Court.

Such appointment shall *ipso facto* empower and oblige the appointed procurator or agent to accept on behalf of his principal service of all notices, orders, summonses, and other steps in the proceedings (*démarches*), and service upon him shall be deemed good service on his principal, who shall be bound accordingly.

Service on a procurator or agent of a defendant State shall be deemed good service on a defendant subject or citizen of such State.

Service of notices, orders, summonses, and any other steps in the proceedings upon persons and entities outside the territory of the State in which the Court is situate shall be effected when necessary by means of letters of request. Compliance with such letters of request shall be obligatory if directed to a State which is a party to the proceedings, and such State shall forthwith report to the Registrar, through the said procurator or agent, the fulfilment of such letters of request, or otherwise, as the case may be.

### Article 28

#### *Letters of Request*

When it is necessary to take evidence out of Court the Court may issue letters of request for the taking of such evidence.

### Article 29

#### *Powers of the Court*

For the purposes of this Statute the Court may at any time:

(a) Order the disclosure and production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; and

(b) Order any witnesses to attend and be examined before the Court, or one or more of its Members, or order the examination of any such witnesses to be conducted in the manner provided by their own territorial law, and allow the admission of any depositions so taken as evidence before the Court or one or more of its Members; and

(c) Where any question arising in the case involves prolonged investigation which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of such question to a special Commissioner, appointed by the Court, for inquiry and report, and act upon the report of any such Commissioner as it thinks fit; and

(d) Summon any person with expert knowledge in military, naval, aerial or scientific matters to give evidence in any case where it appears to the Court that such special knowledge is required for the proper determination of the case; and

(e) Upon the application of any party before the Court or on its own motion the Court may add as a defendant any other State or any subject or citizen of the defendant State or of any other State upon such terms as it may deem just;

(f) Issue a *mandat d'amener* or a *mandat d'arrêt* against the defendant.

## Article 30

*Hearing in Public*

The hearing shall be in public, unless in view of the nature of the charge or evidence the Court shall otherwise decide.

## Article 31

*Oral Proceedings*

The oral proceedings shall consist of the hearing by the Court of witnesses, agents, counsel and advocates. All witnesses may be cross-examined and re-examined.

The Court may put any question which it thinks fit to any witness at any stage of the proceedings. A defendant subject or citizen may be a witness in his own behalf, but he shall not be subject to examination in any other character.

## Article 32

*Procès verbal of Trial*

A *procès verbal* of the trial signed by the presiding Judge and by the Registrar shall be prepared. The *procès verbal* shall contain a succinct statement of all the important incidents, and shall constitute the only evidence of the observance of formalities prescribed for the trial.

## Article 33

*Default of Appearance*

If a defendant subject or citizen or heimatlos fails to appear at the hearing the Court may either (1) after proof of due service of the charge proceed to hear the case, and pronounce judgment and pass sentence, if any, as if such defendant had appeared and pleaded not guilty; or as it thinks convenient (2) postpone the trial, issue a *mandat d'amener* or a *mandat d'arrêt* and continue the proceedings in the presence of the defendant.

The Court must satisfy itself, not only that it has jurisdiction in accordance with article 25 but also that the charge is well founded in fact and law.

## Article 34

*Delivery of Judgment*

When the case for the prosecution and defence is completed the presiding Judge shall declare the hearing closed. The Court may deliver judgment forthwith or may retire to consider its judgment or may reserve judgment. Any deliberation by the Court shall take place in private and remain secret.

## Article 35

*Judgment by Majority*

All questions shall be decided by a majority of the Judges present at the hearing; provided that the charge and the actual punishment are agreed to by a qualified majority of two-thirds of the Judges.

In the case of equal division of opinion the charge shall be dismissed.

## Article 36

*Contents of Judgment*

Every judgment, whether of conviction or acquittal, shall state the reasons upon which the judgment is based and the law applicable thereto.

The judgment of the Court shall be pronounced by the presiding Judge, and no judgment shall be pronounced by any other Member of the Court. The judgment shall be read in open Court. It shall be signed by the presiding Judge and the Registrar, and shall be filed in the archives of the Court.

## Article 37

*Execution of Sentences and Orders of Court*

The execution of the sentence pronounced by the Court shall be carried out by the State of which the defendant convicted is a subject or citizen or if the defendant convicted is a *heimatlos* by the State in which he resides. The defendant State shall make a report to the Court as to the due execution of the sentence.

In case of a judgment given against a State or of orders of the Court each contracting State shall upon request execute the judgment or orders.

## Article 38

*Setting Aside and Variation*

An application for setting aside or varying a judgment can be made only by a defendant State or its subject or citizen and then only upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when judgment was given, unknown to the Court and also to the applicant, always provided that such ignorance was not due to negligence on his part.

## Article 39

The right of pardon shall be exercised by (            ).

## Article 40

*Costs*

All costs of and in connection with the proceedings shall be in the discretion of the Court.

**5. Resolution of the Inter-Parliamentary Union on the criminality of wars of aggression and the organization of international repressive measures (1925)<sup>1</sup>**

*Rapporteur*: M. V. V. PELLA, Professor at the University of Bucharest, Member of the Romanian Parliament.

The XXIIIrd Inter-Parliamentary Conference, having heard the report of M. V. V. Pella,

<sup>1</sup>Text taken from *Union Interparlementaire, compte rendu de la XXIIIème Conférence* (Washington, 1925), pp. 46-50; see also p. 801.

*Realizing* the possibility of a collective criminality of States and believing that that criminality should be studied from a scientific standpoint in order to determine the natural laws governing it and to decide upon methods for its prevention and suppression,

*Resolves,*

To institute a permanent sub-committee within the Committee for the Study of Juridical Questions:

(a) To undertake the study of all the social, political, economic and moral causes of wars of aggression to find practical solutions for the prevention of that crime;

(b) To draw up a preliminary draft of an International Legal Code.

For this purpose the Conference calls the attention of the sub-committee to the principles laid down by M. V. V. Pella in his report and summarized in the annex to the present resolution.

### *Annex*

#### FUNDAMENTAL PRINCIPLES OF AN INTERNATIONAL LEGAL CODE FOR THE REPRESSION OF INTERNATIONAL CRIMES

1. The International Legal Code must apply to all nations.
2. Measures of repression should apply not only to the act of declaring a war of aggression, but also to all acts on the part of individuals or of bodies of persons with a view to the preparation or the setting in motion of a war of aggression.
3. The principle should be recognised that individuals, independently of the responsibility of States, are answerable for offences against public international order and the law of nations.
4. The offences committed by States or by individuals should be laid down and penalties provided for in advance in enactments drawn in precise terms. International repression should be founded on the principle *nulla poena sine lege*.
5. It would be desirable to indicate clearly in the general part of the preliminary draft of the International Legal Code the material, moral and unjust elements in an international offence, and in that way to determine the conditions of constraint, necessity and lawful defence in the sphere of international law.
6. Causes which may aggravate or diminish the responsibility of States must similarly be determined with special reference to the case of provocation, reparation of injury, repetition of the offence and premeditation.
7. In the event of there being two or more criminal States, special provision should be made for repressive measures in the case of complicity or partnership in a criminal design revealed by the conclusion of offensive alliances.
8. The sanctions imposed should be of two kinds:
  - A. Sanctions applicable to States;
    - (a) Diplomatic sanctions: warning that diplomatic relations will be broken off; revocation of the exequatur granted to the consuls of the

guilty State; withdrawal of the right to benefit by international agreements;

(b) Legal sanctions: sequestration of property belonging to nationals of the guilty State in the territory of the other States; withdrawal from these nationals of the rights of industrial, literary, artistic, scientific and other property; prohibition to appear as a party in the Courts of the associated States; deprivation of civil rights;

(c) Economic sanctions: application to the guilty State of measures depriving it of the advantages resulting from the economic solidarity of the nations and severing it from the economic life of the world by means of blockade, boycott, embargo, refusal to furnish foodstuffs or raw material, increased customs duties on products coming from the guilty State, refusal to grant loans, refusal to allow the securities of the delinquent State to be quoted on the Stock Exchanges, prohibition to use means of communication;

(d) Resort to armed force;

B. Sanctions applicable to individuals:

(a) Warning;

(b) Fine;

(c) Admonition;

(d) Prohibition of residence;

(e) Incapacity in the future to hold diplomatic functions abroad;

(f) Imprisonment;

(g) Exile.

9. Provision must be made in the special part of the preliminary draft of the International Legal Code for all positive or negative acts which are regarded as prejudicial to international public order.

Penalties will thus have to be provided for the following offences:

A. Offences committed by States:

(a) The international crime of aggressive war;

(b) Violation of demilitarised zones;

(c) Non-fulfilment of the obligation to submit serious disputes to the Permanent Court of International Justice in cases in which that Court has compulsory jurisdiction;

(d) Military, naval, air, industrial and economic mobilisation in the event of a dispute arising;

(e) Preparing or permitting to be prepared on its territory attacks directed against the internal security of another State, or aiding or abetting bands of evil-doers making raids on the territories of other States;

(f) Interference by one State in the internal political struggles of another by supplying grants of money or giving support of any kind to political parties;

(g) The mere unjustified threat of a war of aggression, a procedure which in the past took the form of an ultimatum;

(h) Raising effectives or arming beyond the limits laid down in conventions or treaties;

(i) Manœuvres or mobilisations carried out for purposes of military demonstration or preparation for war;

(j) Violation of the diplomatic immunity of foreign representatives;

(k) Counterfeiting of money and bank notes, and any other disloyal acts committed or connived at by one State for the purpose of injuring the financial credit of another State.

B. Offences committed by individuals:

(a) Declaration by a sovereign of a war of aggression;

(b) Abuse of his privileges by a diplomatic agent for the purpose of committing acts which are in flagrant contradiction to the fundamental principles of international public order, or which constitute acts preparatory to a war of aggression;

(c) International military offences and all other acts performed in time of war which are contrary to the rules and customs of international law;

(d) Ordinary common law offences committed by foreign armies in occupied territories (massacre, pillage, rape, theft, etc.);

(e) Dissemination of false news liable to endanger peace.

10. The Permanent Court of International Justice must have power to adjudicate upon all international crimes and offences.

11. With a view to the proper working of the International Legal Code, provision should be made at the Permanent Court for an International Public Prosecutor's Department and a Chamber before which offenders can be arraigned.

12. The preliminary investigations and the preparation of the evidence should be entrusted to *ad hoc* commissions of enquiry set up to discharge legal police duties.

13. Offences committed by States shall be heard and determined by the Chambers of the Permanent Court in combined session.

14. Cases in which individuals are the responsible parties should be dealt with in a special criminal Chamber set up in accordance with Article 26 of the Statute of the Court. This Chamber would have jurisdiction over all international offences committed by individuals and all offences which by their nature would not come within the jurisdiction of the national courts.

15. The Court shall pronounce judgment both on the public accusation and on the claims for compensation filed by the injured States prejudiced by the international offence.

16. In the case of violent aggression, the Council of the League of Nations will take urgent counter police measures.

The Council of the League of Nations shall also have jurisdiction in regard to the execution of the decisions of the Permanent Court of International Justice.

It will indicate the methods by which these decisions are to be executed.

17. In order to reconcile the idea of general security with the special needs of individual States, all States Members of the League of Nations should be declared to be under a virtual obligation to take part in carrying out sanctions.

This obligation would become operative in the case of each State only from the moment that the Council of the League of Nations called upon it to take part in repressive measures, and indicated to it the sanctions which it was bound to apply.

The part which each State will take in the carrying out of sanctions will be decided by the Council, which will have regard to the geographical, political and economic position of each State. The Council will decide, by reference to the nature of the dispute, which States are to intervene immediately. Should the necessity arise, other States would also be called upon to apply the sanctions.

18. States which have been called upon by the Council of the League of Nations to apply sanctions and which have refused to participate or do not participate loyally in putting the sanctions into effect shall also be liable under the International Legal Code.

## 6. *Vœu* of the International Congress of Penal Law concerning an international criminal court (Brussels, 1926)<sup>1</sup>

The Congress recommends :

1. That the Permanent Court of International Justice be given repressive powers.

2. That the Court be consulted on the settlement of disputes relating to judicial or legislative competence which may arise between States, and also on the review of incompatible judgments, constituting *res judicatae*, pronounced in connexion with the same crime or offence by the courts of different States.

3. That the Permanent Court be competent to judge any penal liability incurred by a State as a result of an unjust aggression or any violation of international law. The Court will impose penal sanctions and take security measures against the guilty State.

4. That in addition the Permanent Court be competent to judge individual liabilities incurred as a result of crimes of aggression, and similar crimes or offences and any violation of international law committed in time of peace or war; and more particularly common law crimes which, by reason of the nationality of the victim or the presumptive offender, may be considered, by themselves or by other States, as international offences, and which constitute a threat to world peace.

5. That likewise individuals guilty of crimes or offences who cannot be brought before the courts of a particular State, either because the territory where the crime or offence was committed is unknown, or

<sup>1</sup> Translation of the French text contained in *Premier congrès international de droit pénal, Actes du congrès*, p. 634.

because sovereignty over that territory is in dispute, be amenable to the Permanent Court.

6. All violations committed by States or by individuals should be provided for and sanctioned in advance by precise texts. International conventions will define the crimes and offences within the jurisdiction of the Court, and prescribe penal sanctions and security measures.

7. The number of judges on the Court should be increased. The new members should be chosen from amongst acknowledged experts on the science and practice of criminal law. The membership of the Court should be supplemented by the institution of a prosecutor's department (*parquet*). Public international proceedings should be initiated by the Council of the League of Nations. A special organ should be set up for preliminary investigation.

8. Procedure should be written and oral, and should provide for public debates with argument on both sides.

No appeal against decisions of the Court should be admissible other than review under the terms of the present Statute of the Court.

9. Decisions of the Court should be binding. Sentences pronounced against States should be enforced through the agency of the Council of the League of Nations. Sentences involving individuals should be passed by the Council for enforcement to a particular country which will be responsible for taking the necessary action, in accordance with its own legislation, and under the supervision of the Council.

10. The Council of the League of Nations should have the right to suspend or commute sentences.

11. A special commission set up by the Governing Council of the *Association internationale de droit pénal* should be entrusted with the task of preparing a draft statute.

12. In conclusion, the Congress considers that the end in view, namely, the inauguration of a system of international penal justice, should be realized progressively through separate agreements concluded between States and acceded to by other States.

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**7. Draft Statute for the Creation of a Criminal Chamber of the International Court of Justice prepared by Professor V. V. Pella and adopted by the International Association for Penal Law, Paris, 16 January 1928, and revised in 1946<sup>1</sup>**

INTRODUCTORY MATTERS

*Article 1*

There shall be established a Criminal Chamber of the International Court of Justice.

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<sup>1</sup> Translated from the French text in V. V. Pella, *La Guerre-Crime et les Criminels de Guerre*, Geneva, 1946, p. 129.

## CHAPTER I

## ORGANIZATION OF THE CRIMINAL CHAMBER

*1. Composition of the Criminal Chamber; number and election of Judges**Article 2*

The Criminal Chamber shall be made up of a body of judges chosen without distinction of nationality from persons who are either

(a) Penologists possessing the necessary qualifications for high judicial office in their own countries or who are or who have been judges of criminal courts; or

(b) Specialists in international penal law.

*Article 3*

The Criminal Chamber shall consist of fifteen titular and eight supplementary members.

*Article 4*

The provisions of Article 4 and of Article 5, paragraph 1, of the Statute of the International Court of Justice shall apply to the election of members of the Criminal Chamber.

The groups referred to in Articles 4 and 5 of the said Statute shall not in any event nominate more than four persons of whom at the most two shall be of their own nationality.

In no case shall a greater number of candidates be nominated than double the vacancies to be filled.

*Article 5*

Before making these nominations each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies or institutions devoted to the study of penal law.

*Article 6*

The General Assembly and the Security Council of the United Nations shall proceed independently of one another to the election of judges on the basis of a list drawn up in accordance with Article 7 of the Statute of the International Court of Justice.

The election of titular judges shall precede that of supplementary judges.

It is recommended that equal numbers of candidates shall be nominated from the two categories of persons referred to in article 2.

The provisions of Articles 9 to 14 inclusive of the present Statute of the International Court of Justice shall apply to the members of the Criminal Chamber.

*Article 7*

Titular judges and supplementary judges shall receive a daily allowance when they are called upon to sit as judges or to discharge the functions referred to in articles 16, 17 and 18.

The same daily allowance shall be paid to national judges appointed in accordance with articles 53 and 54 as well as to judges called upon to sit in supplementary divisions in conformity with the provisions of article 14.

Judges referred to in the preceding paragraphs who do not reside at the seat of the Court shall be reimbursed in respect to the expenses of travel necessary for the performance of their duties.

The President of the Criminal Chamber shall receive an annual salary.

The amount of payments referred to in this article shall be fixed by the General Assembly.

The provisions of Article 33 of the Statute of the International Court of Justice shall apply also to the necessary expenses of the Criminal Chamber.

## *2. Disqualifications, deprivation of office and diplomatic immunity*

### *Article 8*

No member of the Criminal Chamber may act as agent, counsel or advocate in any case of an international character.

The Chamber shall resolve any doubt in this connexion. The provisions of Article 17, paragraphs 2 and 3, and of Articles 18, 19 and 20 of the Statute of the Court shall apply to members of the Criminal Chamber.

## *3. Election of the President, Vice-President and Registrar of the Criminal Chamber*

### *Article 9*

The President of the Criminal Chamber shall be elected from among the members of the Chamber by the International Court of Justice in plenary session at the beginning of each year.

In the absence of the President the Chamber shall be presided over by a Vice-President, also elected in accordance with the preceding paragraph.

The President and Vice-President shall be eligible for re-election. The Criminal Chamber shall nominate its Registrar.

The office of Registrar of the Criminal Chamber shall not be incompatible with that of the Secretary-General of the Permanent Court of Arbitration.

The President of the Criminal Chamber and the Registrar shall reside at The Hague.

### *Article 10*

The Criminal Chamber shall sit during the three months following the institution of any proceedings and shall continue to sit until any such proceedings are terminated.

The President of the Criminal Chamber, or in his absence the Vice-President, shall summon a session of the Chamber whenever circumstances require it.

#### 4. Divisions of the Criminal Chamber. Plenary sessions

##### Article 11

There shall be created a Permanent Division of the Criminal Chamber consisting of five titular judges for the trial of individuals or for the entertainment of any matter referred to in article 38.

Four members of the Permanent Division shall be elected for three years by the International Court of Justice in plenary session from amongst the titular judges of the Criminal Chamber. They shall not be immediately eligible for re-election.

The President of the Criminal Chamber is *ex-officio* President of the Permanent Division:

In the absence of the President his duties shall be discharged by the Vice-President of the Criminal Chamber.

The provisions of paragraph 3 shall not apply to judges who are members of the Permanent Division in their capacity as President or Vice-President of the Criminal Chamber.

The International Court of Justice in plenary session shall likewise elect for the same period of three years two supplementary members of the Permanent Division from amongst the supplementary judges of the Criminal Chamber.

Where the presence of five titular judges cannot be assured their number shall be made up from amongst the supplementary judges by the drawing of lots.

The members of the Permanent Division shall continue to dispose of cases of which they are already seized notwithstanding the expiration of their terms of office.

##### Article 12

All the titular judges of the Criminal Chamber shall sit in plenary session for the trial of any matter involving the penal responsibility of States.

Where the presence of fifteen titular judges cannot be assured their number shall be made up from amongst the supplementary judges by the drawing of lots.

##### Article 13

In any matter to which the provisions of article 36 (b) applies and whenever the Permanent Division provided for by Article 11 is unable to deal with an accumulation of business the Criminal Chamber shall set up *ad hoc* (supplementary) divisions.

Each such division shall consist of five judges.

Each such division shall be presided over by a titular judge of the Criminal Chamber, elected by the totality of titular judges of the said Chamber.

The remaining titular judges shall be assigned amongst the different divisions by the drawing of lots and where their number is insufficient the divisions shall be completed from amongst the supplementary judges likewise by the drawing of lots.

*Article 14*

If, owing to the accumulation of business, the number of titular or supplementary judges is insufficient to complete all the divisions set up, the vacant places shall be assigned by the drawing of lots amongst persons named in the electoral list of members of the International Criminal Chamber drawn up by the Secretary-General of the United Nations in accordance with Article 7 of the Statute of the International Court of Justice. Whatsoever the number of divisions created, however, every division should be presided over by a titular judge of the Criminal Chamber.

Wheresoever death or other cause shall create vacancies in the list referred to in article 14, paragraph 1, such list shall be made up again at the beginning of each year, the national groups corresponding to the nationalities of persons whose names have been removed from the list proposing other persons in their place to this end.

5. *The Registry**Article 15*

There shall be established a special Registry for the Criminal Chamber which shall be responsible in particular for the transmission to the Chamber or to the divisions thereof of any matter referred to them by the Security Council.

The Registry shall consist of three persons designated by the Security Council.

## CHAPTER II

## PRELIMINARY ENQUIRY

*Article 16*

For preliminary enquiry into matters involving the penal responsibility of States there shall be set up a special organ consisting of three judges chosen at the beginning of each year by the drawing of lots from amongst the titular and supplementary judges of the Criminal Chamber.

Three supplementary judges shall likewise be chosen by the drawing of lots.

*Article 17*

Preliminary enquiry into matters involving the penal responsibility of individuals shall be entrusted to a titular or supplementary judge of the Criminal Chamber chosen at the beginning of each year by the drawing of lots.

Two supplementary judges shall be simultaneously chosen by the same method. The judge chosen to conduct preliminary enquiries shall sit in the Permanent Division provided for in article 11.

*Article 18*

In every case provided for in article 13 when the setting up of supplementary *ad hoc* divisions is decided upon a titular judge and two

supplementary judges shall be chosen by lot for the exercise in each division of the function referred to in the preceding article.

In every case provided for in articles 16 and 17 and in the present article members of the Court belonging to the same nationality as defendants shall abstain.

In any case provided for by the preceding paragraph, as well as in any case where the judge chosen to conduct preliminary enquiries is absent or considers that in a given case he cannot act he shall be replaced by a supplementary judge chosen in accordance with articles 16 and 17 and the present article. Such supplementary judges shall be chosen by lot when the number of supplementary judges exceeds that of vacancies.

The drawing of lots provided for in articles 11, 12, 13, 14, 15, 16, 17 and the present article shall be conducted by the Criminal Chamber in plenary session.

### *Article 19*

Judges of the Criminal Chamber chosen in accordance with articles 16, 17 and 18 may sit as judges in any case in which they have not themselves conducted the preliminary enquiry.

## CHAPTER III

### PROCEEDINGS

#### *1. International criminal proceedings*

### *Article 20*

International criminal proceedings shall be undertaken by the Security Council of the United Nations.

They may equally be undertaken by any State if the Security Council authorises the taking of any given case to the Criminal Chamber or any division thereof.

### *Article 21*

No subject or citizen of a State shall have the right to institute international criminal proceedings.

### *Article 22*

States shall alone have the right to prefer complaints before the Security Council of the United Nations in their own behalf or in that of their citizens.

Such complaints may be made against a given State or against the citizens of that State.

Such complaints may equally be made by the complainant State against its own nationals in respect of offences constituted by international conventions where such nationals are in the territory of a third State which refuses their extradition.

### *Article 23*

Every complaint or accusation on the part of a State shall be addressed in writing to the Security Council of the United Nations.

Such complaint or accusation shall contain a succinct account of the facts relied on to establish an offence over which the Criminal Chamber has jurisdiction by international convention. Complaints or accusations shall be accompanied by the evidence upon which they are based.

#### Article 24

The Security Council shall decide whether or not a complaint or accusation is to be proceeded with.

The Security Council shall likewise decide whether the Criminal Chamber or any division thereof shall be seized of the matter as a whole or only of a part thereof. It shall likewise decide whether in regard to any person, physical or moral, designated in a complaint or accusation the appropriate national law shall apply.

#### Article 25

The Security Council shall have the right to consider whether it will adopt any accusation and sustain it by means of its own representative or whether it will leave its presentation to the State concerned.

In any case contemplated in the present Statute the decisions of the Security Council shall be taken in accordance with Article 27, paragraph 3, of the Charter of the United Nations, and subject to the exclusion of the representative of any party to the dispute.

Before making any decision the Security Council shall request from the Registry referred to in article 15 its legal advice in the matter. Such advice shall have a purely consultative character.

#### Article 26

The Criminal Chamber or any division thereof shall be seized of proceedings only when they are transmitted by the Security Council through the agency of the Registry referred to in article 15.

The Registry shall send a copy of the indictment to the defendant State or to any individual accused or implicated through the agency of the State to which he belongs or in the territory of which he may be.

#### Article 27

If a State or an individual defendant enters a defence it should be notified in due time to the Registry, which shall send a copy thereof to the complainant State.

### 2. *Actions for damages arising out of international offences*

#### Article 28

Any State which as a result of an offence within the jurisdiction of the Criminal Chamber has suffered direct damage may within thirty days from the date on which the Registry has, in accordance with article 20, caused the Criminal Chamber to be seized of proceedings undertaken by the Security Council, constitute itself *partie civile* to the proceedings.

*Article 29*

The same right shall on the same conditions belong to any State any of whose nationals has suffered direct and personal damage as the result of an offence of which the Criminal Chamber is seized.

*Article 30*

In any case contemplated by articles 28 and 29 the Criminal Chamber or the appropriate division thereof shall decide the question of the damages to be awarded to the injured party at the same time and in the same judgment whereby it disposes of the criminal proceedings.

*Article 31*

In the case of criminal proceedings undertaken against an individual alone, where it appears from the circumstances of the case that the State of which such individual is a national can be declared jointly responsible for the damages due, the competent division shall suspend and remit the case to the Security Council.

*Article 32*

If the Security Council is of opinion that an additional remedy against a State responsible for the act of its national ought to be given, the case shall be removed from the competent division to the Criminal Chamber in plenary session.

In the contrary case, the matter shall proceed before the competent division which shall not decide the matter of the responsibility of the State in question.

*Article 33*

Where judgments for damages or restitution are given against individuals alone, the States in which such individuals are resident, or on the territory of which property belonging to such individuals is to be found, shall take all such measures for the execution of such judgment as their own law may provide.

*Article 34*

A State which has not, within the period referred to in articles 28 and 29, constituted itself a claimant to damages is debarred from taking any other measures for the reparation of damage occasioned by an international offence.

## CHAPTER IV

## JURISDICTION

*Article 35*

The Criminal Chamber has jurisdiction over every State which has declared its acceptance of the jurisdiction upon the terms and conditions laid down in this Statute, and over the nationals of any such State.

Offences within the jurisdiction of the Criminal Chamber shall be defined in an international penal statute or in particular treaties between individual States to which other States may adhere.

Such international penal statute and particular agreements shall, save in the cases provided for by article 36, paragraphs (a) and (b), indicate exactly the elements of any offence within the jurisdiction of the Criminal Chamber and the preventive and punitive measures applicable thereto.

#### Article 36

In addition to offences committed by States and to international offences committed by individuals which by their nature are incapable of being declared crimes or of being made punishable by national criminal codes, the Criminal Chamber shall have jurisdiction over such offences committed by individuals, in respect of which jurisdiction may be renounced by individual States by international convention. These shall include in particular:

(a) Crimes and offences committed in time of peace and likely to endanger the peaceful relations of States or which ought, by reason of the circumstances in which they are committed, to be made subject to international criminal jurisdiction for their effective repression.

(b) Crimes and offences committed during war, especially international military offences and offences *communis juris* committed by military persons in occupied territories.

#### Article 38

The Criminal Chamber shall be resorted to for the solution of conflicts of jurisdiction of courts or legislatures arising between different States and for the revision of inconsistent sentences imposed in the same case by courts of more than one State.

#### Article 39

Notwithstanding the general principles of the present statute, in any case contemplated in article 38 the Criminal Chamber shall be seized when a matter is remitted to it by any interested State.

### CHAPTER V

### ENQUIRIES

#### 1. *Commissions of enquiry*

#### Article 40

The Security Council may, either before or after instituting proceedings in consequence of the complaint or accusation of a State, set up *ad hoc* commissions of enquiry.

#### Article 41

States shall assist such commissions in the assembling of any material of which they may stand in need. Members of such commissions shall enjoy diplomatic immunity in the exercise of their functions.

#### 2. *Procedure of proof and enquiry*

#### Article 42

All enquiries, proofs and reports undertaken, secured or made by the complainant State or by any commission of enquiry referred to in articles

40 and 41 shall be transmitted to the organs of preliminary enquiry referred to in articles 17 and 18.

#### *Article 43*

Proceedings leading to a judgment shall not be undertaken against any State or individual before a preliminary enquiry has been completed by the competent organ.

#### *Article 44*

Preliminary enquiries shall be null and void unless held in public.

No secret enquiries or hearings *in camera* shall be permitted.

The hearing of experts on the examination of persons accused or implicated shall be inadmissible unless conducted in the presence of counsel for the defendant State and for any accused person or claimant to damages or after due summons to attend has been given.

#### *Article 45*

Where proceedings are undertaken against individuals in respect of offences within the jurisdiction of the Criminal Chamber, the organs of preliminary enquiry shall be competent to request of the State where such individuals are resident that their persons shall be secured and brought to the seat of the Court, and the State concerned shall accede to any such request.

#### *Article 46*

Accused or implicated individuals brought before the Court shall not be allowed to leave the place or seat thereof.

They shall be required to bind themselves to appear at the hearing and to hear sentence pronounced and if they refuse so to do they may be placed in arrest.

In case of default in their undertakings they shall be sentenced to a term of imprisonment of from one to six months by the tribunal concerned and if necessary be kept in arrest until the end of the proceedings.

Permission to leave the place or seat of the Court may be granted by the tribunal concerned.

The State wherein the tribunal concerned is sitting shall assign a place of imprisonment and the necessary staff for the effecting of arrest and imprisonment.

#### *Article 47*

The organs of preliminary enquiry established in pursuance of this statute shall be competent to request from States such documents and evidence as may be deemed necessary in any case, and to call all witnesses save Heads of State, as well as military, naval, scientific or diplomatic experts.

#### *Article 48*

Such organs may likewise request by letters rogatory the taking of evidence in such manner as the local law may prescribe.

*Article 49*

Upon the completion of any preliminary enquiry the competent organ shall draw up a report of the facts which are found, which shall be transmitted to the tribunal of trial.

The registry of the tribunal of trial shall immediately communicate such report to the Security Council where proceedings have been instituted by that body, and to the complainant State, as well as to the defendant State and to any individual accused or implicated.

## CHAPTER VI

## JUDGMENT

1. *Abstentions**Article 50*

Where for any reason a judge of the Criminal Chamber or of the competent division thereof considers himself unable to take part in the trial of any case he shall abstain therefrom.

*Article 51*

In the event of any disagreement between the judge concerned and the President of the Court in regard to any such abstention, the Criminal Chamber or the competent division shall decide the matter.

2. *National judges**Article 52*

Judges of the nationality of the complainant or defendant State or of any individual indicted shall be competent to sit in any case of which the Criminal Chamber or any division thereof is seized.

*Article 53*

The provisions of Article 31, paragraphs 2, 3 and 5 of the Statute of the International Court of Justice shall apply in regard to the giving of judgment in the Criminal Chamber or any Division thereof except that:

(a) Where in any case there are more than one State complainant (or, in cases in which the Security Council has instituted the proceedings, where more than one State have advanced complaints or accusations) and the Criminal Chamber or the competent division contains more than one judge of the nationality of any of the complainant States or designated as a national judge, only one such judge shall have deliberative vote.

In case of disagreement between the complainant States as to the selection of such judge with deliberative vote, he shall be designated by the drawing of lots in general meeting of the Criminal Chamber.

(b) Where proceedings are entertained against more than one State or the nationals of more than one State, the provisions of paragraph (a) above shall apply in the event that more than one judge belongs to any of the nationalities of the accused States or individuals.

*Article 54*

In any case involving the criminal responsibility of States the Criminal Chamber shall consist of thirteen judges of nationalities other than those

of the parties; in any case involving the criminal responsibility of individuals there shall be in the competent division three judges of nationalities other than those of the parties.

Where there are insufficient titular judges the numbers referred to in the preceding paragraph shall be completed by the co-option of supplementary judges chosen by the drawing of lots in plenary session of the Criminal Chamber from judges of nationalities other than those of the parties.

The Criminal Chamber or the competent division shall be completed by two national judges with deliberative vote selected in accordance with the provisions of the preceding article.

To the judges so chosen shall be added the other national judges who shall participate in all the proceedings of the tribunal of trial with consultative status.

### 3. Procedure

#### *Article 55*

Hearings shall be public.

The Criminal Chamber or the competent division may address to any accused or witness any question deemed relevant.

The manner of hearing shall be determined by the President or in his absence the Vice-President or in the absence of the latter by the eldest of the judges present.

#### *Article 56*

If the tribunal of trial is of the opinion that a case is not ready to go to trial it shall order the conducting of a complementary preliminary enquiry.

In any such case the functions of an enquiring magistrate shall be discharged where a State is defendant by three members of the tribunal of trial, or where an individual is defendant by one member thereof.

Judges entrusted with such enquiry shall continue to sit as members of the tribunal of trial.

#### *Article 57*

If a national court has been seized of the same case the international tribunal of trial shall at the request of one of the parties or of its own motion resolve the resultant conflict.

#### *Article 58*

When both prosecution and defence have made their submissions and closed their pleadings the presiding judge shall declare the hearings finished and the case duly heard.

#### *Article 59*

The tribunal of trial may give judgment at once or retire in order to deliberate. Its deliberations shall be private.

#### *Article 60*

There shall be drawn up a record of each hearing signed by the President and the Registrar. Such record shall alone be authoritative.

#### 4. Judgments

##### *Article 61*

Decisions of the Criminal Chamber or of any division thereof shall be taken by the vote of the majority of judges present at the hearing.

If a judgment is not unanimous in whole or in part the dissenting judges shall have the right to append thereto their individual opinions.

##### *Article 62*

Judgments of guilt, acquittal or innocence shall state the reasons upon which they are based and the law applicable.

The tribunal of trial may in any case give a declaratory judgment without imposing any penalty.

Every judgment shall be read by the President of the tribunal of trial or by the judge deputizing for him. Judgments shall be read in public session, signed by the President and Registrar, and enrolled in the archives of the Criminal Chamber.

##### *Article 63*

Whatsoever the result of the preliminary enquiry the tribunal of trial shall try only such State or individuals as is named in the indictment transmitted to the Court by the Security Council in accordance with article 26.

#### CHAPTER VII

#### APPEALS AND EXECUTIONS OF JUDGMENTS

##### *Article 64*

There shall be no appeal against the judgment given in a case of an offence committed by a State otherwise than by way of application for revision of the judgment in accordance with Article 61 of the Statute of the International Court of Justice.

##### *Article 65*

Where a defendant State is not represented at the hearings or an individual implicated or accused does not appear, the Criminal Chamber or the appropriate division thereof, having satisfied itself that the indictment was duly served shall proceed to the hearing of the case and shall give judgment.

The tribunal of trial shall in every case satisfy itself not merely as to its jurisdiction, but also as to the validity of the accusation in both fact and law.

##### *Article 66*

The provisions of article 64 shall apply also to judgments given in the presence of individuals found guilty of international offences.

##### *Article 67*

Where an individual does not appear, such procedure as the national law of the accused or convicted shall prescribe for the case of absent defendants shall be applied.

*Article 68*

The judgments of the Court shall have an obligatory character.

They shall be communicated to the Security Council which is charged with taking the measures necessary for the execution of judgments given against States.

*Article 69*

The execution of monetary judgments given against individuals is entrusted to the States on whose territory goods belonging to the convicted individuals are to be found.

*Article 70*

Where a sentence of imprisonment is imposed the Security Council shall designate the State on whose territory the sentence is to be carried out. Such State may not be any of the prosecuting States nor that of which the convicted person is a national.

## **8. Convention for the Creation of an International Criminal Court, opened for signature at Geneva, 16 November 1937<sup>1</sup>**

*Article 1.* An International Criminal Court for the trial, as hereinafter provided, of persons accused of an offence dealt with in the Convention for the Prevention and Punishment of Terrorism is hereby established.

*Article 2. 1.* In the cases referred to in articles 2, 3, 9 and 10<sup>2</sup> of the Convention for the Prevention and Punishment of Terrorism, each High Contracting Party to the present Convention shall be entitled, instead of prosecuting before his own courts, to commit the accused for trial to the Court.

2. A High Contracting Party shall further, in cases where he is able to grant extradition in accordance with article 8<sup>2</sup> of the said Convention,

<sup>1</sup>Text taken from Hudson, *International Legislation*, vol. VII, p. 862, f.

<sup>2</sup>The text of the relevant articles of the Convention on the Prevention and Punishment of Terrorism is as follows:

*Article 1. 1.* The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose.

2. In the present Convention, the expression "acts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.

*Article 2.* Each of the High Contracting Parties shall, if this has not already been done, make the following acts committed on his own territory criminal offences if they are directed against another High Contracting Party and if they constitute acts of terrorism within the meaning of article 1:

- (1) Any wilful act causing death or grievous bodily harm or loss of liberty to:
  - (a) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;
  - (b) The wives or husbands of the above-mentioned persons;
  - (c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

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be entitled to commit the accused for trial to the Court if the State demanding extradition is also a Party to the present Convention.

3. The High Contracting Parties recognize that other Parties discharge their obligations towards them under the Convention for the Prevention and Punishment of Terrorism by making use of the right given them by the present article.

*Article 3.* The Court shall be a permanent body but shall sit only when it is seized of proceedings for an offence within its jurisdiction.

*Article 4.* The Seat of the Court shall be established at The Hague. For any particular case, the President may take the opinion of the Court and the Court may decide to meet elsewhere.

*Article 5.* The Court shall be composed of judges chosen from among jurists who are acknowledged authorities on criminal law and who are or have been members of courts of criminal jurisdiction or possess the qualifications required for such appointments in their own countries.

*Article 6.* The Court shall consist of five regular judges and five deputy judges, each belonging to a different nationality, but so that the regular judges and deputy judges shall be nationals of the High Contracting Parties.

*Article 7.* 1. Any Member of the League of Nations and any non-member State, in respect of which the present Convention is in force, may nominate not more than two candidates for appointment as judges of the Court.

2. The Permanent Court of International Justice shall be requested to choose the regular and deputy judges from the persons so nominated.

*Article 8.* Every member of the Court shall, before taking up his duties, give a solemn undertaking in open Court that he will exercise his powers impartially and conscientiously.

(2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.

(3) Any wilful act calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.

(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.

*Article 3.* Each of the High Contracting Parties shall make the following acts criminal offences when they are committed on his own territory with a view to an act of terrorism falling within article 2 and directed against another High Contracting Party, whatever the country in which the act of terrorism is to be carried out:

(1) Conspiracy to commit any such act.

(2) Any incitement to any such act, if successful.

(3) Direct public incitement to any act mentioned under heads (1), (2) or (3) of article 2, whether the incitement be successful or not.

(4) Wilful participation in any such act.

(5) Assistance, knowingly given, towards the commission of any such act.

*Article 4.* Each of the offences mentioned in article 3 shall be treated by the law as a distinct offence in all cases where this is necessary in order to prevent an offender escaping punishment.

*Article 9.* The High Contracting Parties shall grant the members of the Court diplomatic privileges and immunities when engaged on the business of the Court.

*Article 10.* 1. Judges shall hold office for ten years.

2 Every two years, one regular and one deputy judge shall retire.

3. The order of retirement for the first period of ten years shall be determined by lot when the first election takes place.

4. Judges may be re-appointed.

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

6. Nevertheless, judges, though replaced, shall finish any cases which they have begun.

*Article 11.* 1. Any vacancy, whether occurring on the expiration of a judge's term of office or for any other cause, shall be filled as provided in article 7.

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

3. If a seat on the Court becomes vacant more than eight months before the date at which a new election to that seat would normally take place, the High Contracting Parties shall within two months nominate candidates for the seat in accordance with article 7, paragraph 1.

*Article 12.* A member of the Court cannot be dismissed unless in the unanimous opinion of all the other members, including both regular and deputy judges, he has ceased to fulfil the required conditions.

*Article 5.* Subject to any special provisions of national law for the protection of the persons mentioned under head (1) of article 2, or of the property mentioned under head (2) of article 2, each High Contracting Party shall provide the same punishment for the acts set out in articles 2 and 3, whether they be directed against that or another High Contracting Party.

*Article 6.* 1. In countries where the principle of the international recognition of previous convictions is accepted, foreign convictions for any of the offences mentioned in articles 2 and 3 will, within the conditions prescribed by domestic law, be taken into account for the purpose of establishing habitual criminality.

2. Such convictions will, further, in the case of High Contracting Parties whose law recognises foreign convictions, be taken into account, with or without special proceedings, for the purpose of imposing, in the manner provided by that law, incapacities, disqualifications or interdictions whether in the sphere of public or of private law.

*Article 7.* In so far as *parties civiles* are admitted under the domestic law, foreign *parties civiles*, including, in proper cases, a High Contracting Party shall be entitled to all rights allowed to nationals by the law of the country in which the case is tried.

*Article 8.* 1. Without prejudice to the provisions of paragraph 4 below, the offences set out in articles 2 and 3 shall be deemed to be included as extradition crimes in any extradition treaty which has been, or may hereafter be, concluded between any of the High Contracting Parties.

2. The High Contracting Parties who do not make extradition conditional on the existence of a treaty shall henceforward, without prejudice to the provisions of paragraph 4 below and subject to reciprocity, recognise the offences set out in articles 2 and 3 as extradition crimes as between themselves.

3. For the purposes of the present article, any offence specified in articles 2 and 3, if committed in the territory of the High Contracting Party against whom it is directed, shall also be deemed to be an extradition crime.

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*Article 13.* A judge appointed in place of a judge whose period of appointment has not expired shall hold the appointment for the remainder of his predecessor's term.

*Article 14.* The Court shall elect its President and Vice-President for two years; they may be re-elected.

*Article 15.* The Court shall establish regulations to govern its practice and procedure.

*Article 16.* The work of the Registry of the Court shall be performed by the Registry of the Permanent Court of International Justice, if that Court consents.

*Article 17.* The Court's archives shall be in the charge of the Registrar.

*Article 18.* The number of members who shall sit to constitute the Court shall be five.

*Article 19.* 1. Members of the Court may not take part in trying any case in which they have previously been engaged in any capacity whatsoever. In case of doubt, the Court shall decide.

2. If, for some special reason, a member of the Court considers that he should not sit to try a particular case, he shall so notify the President as soon as he has been informed that the Court is seized of that case.

*Article 20.* 1. If the presence of five regular judges is not secured, the necessary number shall be made up by calling upon the deputy judges in their order on the list.

2. The list shall be prepared by the Court and shall have regard, first, to priority of appointment and, secondly, to age.

*Article 21.* 1. The substantive criminal law to be applied by the Court shall be that which is the least severe. In determining what that law is,

4. The obligation to grant extradition under the present article shall be subject to any conditions and limitations recognised by the law or the practice of the country to which application is made.

*Article 9.* 1. When the principle of the extradition of nationals is not recognised by a High Contracting Party, nationals who have returned to the territory of their own country after the commission abroad of an offence mentioned in articles 2 or 3 shall be prosecuted and punished in the same manner as if the offence had been committed on that territory, even in a case where the offender has acquired his nationality after the commission of the offence.

2. The provisions of the present article shall not apply if, in similar circumstances, the extradition of a foreigner cannot be granted.

*Article 10.* Foreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in articles 2 and 3 shall be prosecuted and punished as though the offence had been committed in the territory of that High Contracting Party, if the following conditions are fulfilled—namely, that:

(a) Extradition has been demanded and could not be granted for a reason not connected with the offence itself;

(b) The law of the country of refuge recognises the jurisdiction of its own courts in respect of offences committed abroad by foreigners;

(c) The foreigner is a national of a country which recognises the jurisdiction of its own courts in respect of offences committed abroad by foreigners.

*Article 11.* 1. The provisions of articles 9 and 10 shall also apply to offences referred to in articles 2 and 3 which have been committed in the territory of the High Contracting Party against whom they were directed.

2. As regards the application of articles 9 and 10, the High Contracting Parties do not undertake to pass a sentence exceeding the maximum sentence provided by the law of the country where the offence was committed.

the Court shall take into consideration the law of the territory on which the offence was committed and the law of the country which committed the accused to it for trial.

2. Any dispute as to what substantive criminal law is applicable shall be decided by the Court.

*Article 22.* If the Court has to apply, in accordance with article 21, the law of a State of which no sitting judge is a national, the Court may invite a jurist who is an acknowledged authority on such law to sit with it in a consultative capacity as a legal assessor.

*Article 23.* A High Contracting Party who avails himself of the right to commit an accused person for trial to the Court shall notify the President through the Registry.

*Article 24.* The President of the Court, on being informed by a High Contracting Party of his decision to commit an accused person for trial to the Court in accordance with article 2, shall notify the State against which the offence was directed, the State on whose territory the offence was committed and the State of which the accused is a national.

*Article 25.* 1. The Court is seized so soon as a High Contracting Party has committed an accused person to it for trial.

2. The document committing an accused person to the Court for trial shall contain a statement of the principal charges against him and the allegations on which they are based, and shall name the agent by whom the State will be represented.

3. The State which committed the accused person to the Court shall conduct the prosecution unless the State against which the offence was directed or, failing that State, the State on whose territory the offence was committed expresses a wish to prosecute.

*Article 26.* 1. Any State entitled to seize the Court may intervene, inspect the file, submit a statement of its case to the Court and take part in the oral proceedings.

2. Any person directly injured by the offence may, if authorised by the Court, and subject to any conditions which it may impose, constitute himself *partie civile* before the Court; such person shall not take part in the oral proceeding except when the Court is dealing with the damages.

*Article 27.* The Court may not entertain charges against any person except the person committed to it for trial, or try any accused person for any offences other than those for which he has been committed.

*Article 28.* The Court shall not proceed further with the case and shall order the accused to be discharged if the prosecution is abandoned and not at once recommenced by a State entitled to prosecute.

*Article 29.* 1. Accused persons may be defended by advocates belonging to a Bar and approved by the Court.

2. If provision is not made for the conduct of the defence by a barrister chosen by the accused, the Court shall assign to each accused person a counsel selected from advocates belonging to a Bar.

*Article 30.* The file of the case and the statement of the *partie civile* shall be communicated to the person who is before the Court for trial.

*Article 31.* 1. The Court shall decide whether a person who has been committed to it for trial shall be placed or remain under arrest. Where necessary, it shall determine on what conditions he may be provisionally set at liberty.

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

*Article 32.* The parties may submit to the Court the names of witnesses and experts, but the Court shall be free to decide whether they shall be summoned and heard. The Court may always, even of its own motion hear other witnesses and experts. The same rules shall apply as regards any other kind of evidence.

*Article 33.* Any letters of request which the Court considers it necessary to have despatched shall be transmitted to the State competent to give effect thereto by the method prescribed by the regulations of the Court.

*Article 34.* No examination, no hearing of witnesses or experts and no confrontation may take place before the Court except in the presence of the counsel for the accused and for the representatives of the States which are taking part in the proceedings or after these representatives have been duly summoned.

*Article 35.* 1. The hearings before the Court shall be public.

2. Nevertheless, the Court may, by a reasoned judgment, decide that the hearing shall take place *in camera*. Judgment shall always be pronounced at a public hearing.

*Article 36.* The Court shall sit in private to consider its judgment.

*Article 37.* The decisions of the Court shall be by majority of the judges.

*Article 38.* Every judgment or order of the Court shall state the reasons therefor and be read at a public hearing by the President.

*Article 39.* 1. The Court shall decide whether any object is to be confiscated or be restored to its owner.

2. The Court may sentence the persons committed to it to pay damages.

3. High Contracting Parties in whose territory objects to be restored or property belonging to convicted persons is situated shall be bound to take all the measures provided by their own laws to ensure the execution of the sentences of the Court.

4. The provisions of the preceding paragraph shall also apply to cases in which pecuniary penalties imposed by the Court or costs of proceedings have to be recovered.

*Article 40.* 1. Sentences involving loss of liberty shall be executed by a High Contracting Party chosen with his consent by the Court. Such consent may not be refused by the State which committed the convicted person to the Court for trial. The sentence shall always be executed by the State which committed the convicted person to the Court if this State expresses the wish to do so.

2. The Court shall determine the way in which any fines shall be dealt with.

*Article 41.* If sentence of death has been pronounced, the State designated by the Court to execute the sentence shall be entitled to substitute therefor the most severe penalty provided by its national law which involves loss of liberty.

*Article 42.* The right of pardon shall be exercised by the State which has to enforce the penalty. It shall first consult the President of the Court.

*Article 43.* 1. Against convictions pronounced by the Court no proceedings other than an application for revision shall be allowable.

2. The Court shall determine in its rules the cases in which an application for revision may be made.

3. The States mentioned in article 25, and the persons mentioned in article 29, shall have the right to ask for a revision.

*Article 44.* 1. The salaries of the judges shall be payable by the States of which they are nationals on a scale fixed by the High Contracting Parties.

2. There shall be created by contributions from the High Contracting Parties a common fund from which the costs of the proceedings and other expenses involved in the trial of cases, including any fees and expenses of counsel assigned to the accused by the Court, shall be defrayed, subject to recovery from the accused if he is convicted. The special allowance to the Registrar and the expenses of the Registry shall be met out of this fund.

*Article 45.* 1. The Court shall decide any questions as to its own jurisdiction arising during the hearing of a case; it shall for this purpose apply the provisions of the present Convention and of the Convention for the Prevention and Punishment of Terrorism and the general principles of law.

2. If a High Contracting Party, not being the Party who sent the case in question for trial to the Court, disputes the extent of the Court's jurisdiction in relation to the jurisdiction of his own national courts and does not see his way to appear in the proceedings in order that the question may be decided by the International Criminal Court, the question shall be treated as arising between such High Contracting Party and the High Contracting Party who sent the case for trial to the Court, and shall be settled as provided in article 48.

*Article 46.* 1. The representatives of the High Contracting Parties shall meet with a view to taking all necessary decisions concerning:

(a) The constitution and administration of the common fund, the division among the High Contracting Parties of the sums considered necessary to create and maintain such fund and, in general, all questions bearing on the establishment and the working of the Court;

(b) The organisation of the meetings referred to below in paragraph 3.

2. At their first meeting, the representatives of the High Contracting Parties shall also decide what modifications are necessary in order to attain the objects of the present Convention.

3. The Registrar of the Court shall convene subsequent meetings in conformity with the rules established to that effect.

4. All questions of procedure that may arise at the meetings referred to in the present article shall be decided by a majority of two-thirds of the High Contracting Parties represented at the meeting.

*Article 47.* 1. Until the present Convention is in force between twelve High Contracting Parties, it shall be possible for a judge and a deputy judge to be both nationals of the same High Contracting Party.

2. Article 18 and article 20, paragraph 1, shall not be applied in such a manner as to cause a judge and a deputy judge of the same nationality to sit simultaneously on the Court.

*Article 48.* 1. If any dispute should arise between the High Contracting Parties relating to the interpretation or application of the present Convention, and if such dispute has not been satisfactorily solved by diplomatic means, it shall be settled in conformity with the provisions in force between the Parties concerning the settlement of international disputes.

2. If such provisions should not exist between the parties to the dispute, the parties shall refer the dispute to an arbitral or judicial procedure. If no agreement is reached on the choice of another court, the parties shall refer the dispute to the Permanent Court of International Justice, if they are all parties to the Protocol of December 16th, 1920, relating to the Statute of that Court; and if they are not all parties to that Protocol, they shall refer the dispute to a court of arbitration constituted in accordance with the Convention of The Hague of October 18th, 1907, for the Pacific Settlement of International Disputes.

*Article 49.* 1. The present Convention, of which the French and English texts shall both be authentic, shall bear to-day's date. Until May 31st, 1938, it shall be open for signature on behalf of any Member of the League of Nations or any non-member State on whose behalf the Convention for the Prevention and Punishment of Terrorism has been signed.

2. The present Convention shall be ratified. The instruments of ratification shall be transmitted to the Secretary-General of the League of Nations to be deposited in the archives of the League. The Secretary-General shall notify their deposit to all the Members of the League and to the non-member States mentioned in the preceding paragraph. The deposit of an instrument of ratification of the present Convention shall be conditional on the deposit by the same High Contracting Party of an instrument of ratification of, or accession to, the Convention for the Prevention and Punishment of Terrorism.

*Article 50.* 1. After June 1st, 1938, the present Convention shall be open to accession by any Member of the League of Nations and any non-member State which has not signed this Convention. Nevertheless, the deposit of an instrument of accession shall be conditional on the deposit by the same High Contracting Party of an instrument of ratification of, or accession to, the Convention for the Prevention and Punishment of Terrorism.

2. The instruments of accession shall be transmitted to the Secretary-General of the League of Nations to be deposited in the archives of the League; the Secretary-General shall notify their deposit to all the Members of the League and to the non-member States referred to in article 49.

*Article 51.* Signature, ratification or accession to the present Convention may not be accompanied by any reservations except in regard to article 26, paragraph 2.

*Article 52.* 1. Any High Contracting Party may declare, at the time of signature, ratification or accession, that, in accepting the present Convention, he is not assuming any obligation in respect of all or any of his colonies, protectorates or oversea territories, territories under his suzerainty or territories in respect of which a mandate has been entrusted to him; the present Convention shall, in that case, not be applicable to the territories named in such declaration.

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

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

4. The Secretary-General of the League of Nations shall communicate to all the Members of the League of Nations and to the non-member States mentioned in articles 49 and 50 the declarations and notifications received in virtue of the present article.

*Article 53.* 1. The Government of the Netherlands is requested to convene a meeting of representatives of the States which ratify or accede to the present Convention. The meeting is to take place within one year after the receipt of the seventh instrument of ratification or accession by the Secretary-General of the League of Nations and has for object to fix the date at which the present Convention shall be put into force. The decision shall be taken by a majority which must be a two-thirds majority and include not less than six votes. The meeting shall also take any decisions necessary for carrying out the provisions of article 46.

2. The entry into force of the present Convention shall, however, be subject to the entry into force of the Convention for the Prevention and Punishment of Terrorism.

3. The present Convention shall be registered by the Secretary-General of the League of Nations in accordance with article 18 of the Covenant on the day fixed by the above-mentioned meeting.

*Article 54.* A ratification or accession by a State which has not taken part in the meeting mentioned in article 53 shall take effect ninety days after its receipt by the Secretary General of the League of Nations, provided that the date at which it takes effect shall not be earlier than ninety days after the entry into force of the Convention.

*Article 55.* The present Convention may be denounced on behalf of any High Contracting Party by a notification in writing addressed to the Secretary-General of the League of Nations, who shall inform all the Members of the League and the non-member States referred to in articles 49 and 50. Such denunciation shall take effect one year after the date of its receipt by the Secretary-General of the League of Nations, and shall be operative only in respect of the High Contracting Party on whose behalf it was made.

*Article 56.* 1. A case brought before the Court before the denunciation of the present Convention, or the making of a declaration as provided in article 52, paragraph 3, shall nevertheless continue to be heard and judgment be given by the Court.

2. A High Contracting Party who before denouncing the present Convention has under the provisions thereof incurred the obligation of carrying out a sentence shall continue to be bound by such obligation.

*In faith whereof* the Plenipotentiaries have signed the present Convention.

DONE AT GENEVA, the sixteenth day of November, one thousand nine hundred and thirty-seven, in a single copy, which shall be deposited in the archives of the Secretariat of the League of Nations; a certified true copy thereof shall be transmitted to all the Members of the League of Nations and all the non-member States represented at the Conference.

#### **9. A. Extract from the Conclusions adopted by the London International Assembly on Monday, 21 June 1943**

"3. That an International Criminal Court shall be instituted, and that it shall have jurisdiction over the following categories of war crimes:

"(a) Crimes in respect of which *no* national court of any of the United Nations has jurisdiction (e.g. crimes committed in Germany against Jews and stateless persons and possibly against Allied nations);

"(b) Crimes in respect of which a national court of any of the United Nations has jurisdiction but which the State concerned elects not to try in its own courts (for reasons such as the following:

"Where a trial in the country concerned might lead to disturbances,

"Where a national court would find it difficult to obtain evidence);

"(c) Crimes which have been committed or which have taken effect in several countries or against nationals of different countries;

"(d) Crimes committed by Heads of States;"

#### **9. B. Draft Convention for the Creation of an International Criminal Court (London International Assembly, 1943)**

##### CHAPTER I

##### INSTITUTION AND JURISDICTION

##### Article 1

##### *Establishment of the Court*

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

## Article 2

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

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

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

## Article 3

### *Scope of Jurisdiction*

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

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

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

## Article 4

### *Committal for Trial*

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

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

## Article 5

### *Legal nature of the handing over to the I.C.C. of Accused Persons*

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

## CHAPTER II

## ORGANISATION OF THE COURT, AND OF ITS AUXILIARIES

## Article 6

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

## Article 7

*Language*

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

## Article 8

*Qualifications of Judges*

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

## Article 9

*Number of Judges*

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

## Article 10

*Election of Judges*

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

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

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

## Article 11

*Declaration on Assuming Office*

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

## Article 12

*Diplomatic Privileges*

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

## Article 13

*Duration of Appointment*

1. Judges shall hold office for seven years, unless the Court has ceased to exist before the lapse of such period.
2. Every year, a number of judges shall retire. This number shall be adjusted in order to allow for a renewal of the Court after seven years.
3. Judges may be re-elected.
4. Judges shall continue to discharge their duties until their places have been filled.
5. Judges, though replaced, shall finish any cases they have begun.

## Article 14

*Vacancies*

1. Any vacancy, whether occurring on the expiration of a judge's term of office or for any other cause, shall be filled as provided in article 10.
2. In the event of the resignation of a member of the Court, the resignation shall take effect on notification being received by the Registrar.
3. If a seat on the Court becomes vacant more than eight months before the date at which a new election to that seat would normally take place, the H.C.Ps. shall within two months nominate candidates for the seat in accordance with article 10, section 1.

## Article 15

*Unexpired Term of Office*

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

## Article 16

*Judges Emeriti*

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

## Article 17

*Loss of Office*

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

## Article 18

*Election of President and Vice-President*

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

## Article 19

*Division of the Court*

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

## Article 20

*Disabilities of Judges*

1. Judges may not take part in trying any case in which they have previously been engaged in any private capacity whatsoever, except with permission of the Court.
2. Judges who have, in the case which is before the Court, acted as counsel to one of the parties or otherwise, in any capacity other than official shall not take part in trying that case.
3. If, for some special reason, a judge considers that he should not sit to try a particular case, he shall so notify the President and the Court shall decide.

## Article 21

*Prosecuting Authority*

1. The prosecuting authority near the Court shall be the United Nations Procurator General. He shall act on behalf of the United Nations as a whole. He shall be chosen by the Court among candidates of any nationality possessing the qualifications required in article 8 and nominated in the manner prescribed in article 10, section 1. He shall hold his office for three years and may be re-appointed by the Court. The provisions of articles 11, 12, 14, 15 and 16 shall apply to him. The appointment of the original Procurator General shall be made in the way prescribed in article 10, section 3, for the judges.
2. A number of deputies may be appointed to the Procurator General as the need arises. Their number is limited. They are appointed in the same manner and are submitted to the same provisions as the Procurator General. They act under his direction.
3. In respect of specific cases, the H.C.P. concerned may appoint an officer who will assist the Procurator General with his advice and act under his direction.

## Article 22

*Functions of the Procurator General*

1. The functions of the Procurator General will be among others:
  - (a) To receive the complaints, conduct the preliminary investigations, collect the evidence, describe the charges, prepare the case for the prosecu-

tion, call witnesses and in general do all that is necessary to bring the case before the Court;

(b) To summon a person accused by a H.C.P. to appear before the Court in conformity with article 31, section 1;

(c) To demand, whenever necessary, the arrest and the handing over of persons mentioned in (b) hereabove;

(d) To give his opinion as to whether a person committed for trial shall be placed in custody by operation of article 39;

(e) To appear and act on behalf of the prosecution whenever necessary;

(f) To bring before the Court on his own authority any person whom he accuses of a war crime, and to conduct the prosecution in any case which is sent to the Court by the United Nations Commission for the Investigation of War Crimes;

(g) To ensure the carrying out of the Court's decisions and orders; such decisions will be carried out in the name of the United Nations.

### Article 23

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

### Article 24

#### *Registry*

1. The work of the Registry of the Court shall be performed by a Registrar appointed by the Court.

2. The Court's archives shall be in the charge of the Registrar.

### Article 25

#### *International Constabulary*

1. Near the Court there shall be a body of International Constabulary which will be charged with the execution of the orders of the Court and of the Procurator General.

2. The members of this body shall be chosen by the Court among candidates belonging to different nationalities, in the manner prescribed for the nomination of the judges.

3. The H.C.Ps. will confer upon the Constabulary the necessary power to call the assistance of the local police, when such assistance is necessary for the performance of its duties.

## CHAPTER III

### PRACTICE, PROCEDURE AND LAW

### Article 26

#### *Powers of the Court to enact Regulations*

1. Within the limits traced by chapter IV of the present Convention, the Court shall establish regulations to govern its practice and internal procedure. These rules shall be decided by a majority of the judges, meeting to this effect.

2. The Court shall decide any questions as to its own jurisdiction arising during the hearing of a case; it shall for this purpose apply the provisions of the present Convention and the generally accepted principles of law.

### Article 27

#### *Law to be Applied*

1. Until a convention laying down the main principles of international criminal law, defining the crimes and affixing penalties to them has been agreed upon, the Court shall apply:

(a) International custom, as evidence of a general practice accepted as law;

(b) International treaties, conventions and declarations, whether general or particular, recognised by the H.C.Ps.;

(c) The general principles of criminal law recognised by the United Nations;

(d) Judicial decisions and doctrines of highly qualified publicists as subsidiary means for the determination of rules of law.

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

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

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

### Article 28

#### *Superior Order*

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

(i) An order given by a superior to an inferior to commit a crime is not in itself a defence;

(ii) The Court may consider in individual cases whether the accused was placed in a state of irresistible compulsion and acquit him or mitigate the punishment accordingly;

(iii) The defence that the accused was placed in a state of compulsion is excluded:

(a) If the crime was of a revolting nature;

(b) If the accused was, at the time when the alleged crime was committed, a member of an organization, the membership of which implied the execution of criminal orders.

#### CHAPTER IV

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

#### Article 29

##### *Service of Charge*

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

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

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

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

5. The Procurator General may request that the H.C.P. shall arrest an accused who is present in his territory and hand him over to the Court for trial. If the accused is in Axis territory the Procurator General shall issue a warrant for his arrest by the International Constabulary.

#### Article 30

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

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

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

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

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

#### Article 31

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

1. A High Contracting Party who availing himself of the right conceded him by operation of article 4, section 2, requests the Procurator General to summon an accused person to appear before the Court, shall state all the

charges against him and the allegations on which they are based. The Procurator General shall deliver a summons requesting the accused to appear before the Court.

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

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

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

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

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

#### Article 32

##### *Rights of States to Intervene*

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

#### Article 33

No accused shall be tried *in absentia*.

#### Article 34

##### *Previous Trial of Accused*

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

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

#### Article 35

##### *Partie civile*

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

## Article 36

*Scope of the Trial*

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

## Article 37

*Abandonment of the Prosecution*

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

## Article 38

*Rights of the Defence*

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

2. If provision is not made for the conduct of the defence by an advocate chosen by the accused, the Court shall assign to each accused person a counsel selected from persons admitted as advocates by the Court.

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

## Article 39

*Arrest of Accused*

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

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

## Article 40

*Evidence, Witnesses, Experts*

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

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

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

4. Any evidence shall be recorded.

#### Article 41

##### *Letters of Request*

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

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

#### Article 42

##### *Hearings of the Court: Presence of the Accused*

Except when the Court decides otherwise, no examination, no hearing of witnesses or experts and no confrontation may take place before the Court in the absence of the accused, and his advocate. The operations mentioned in article 41 are not subjected to the conditions of this article.

#### Article 43

##### *Publicity of Hearings*

1. The hearings before the Court shall be public.

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

#### CHAPTER V

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

#### Article 44

##### *Delivery of Judgment*

1. The Court shall sit in private to consider its judgment, and the judges are bound to secrecy as to their deliberations.

2. The decisions of the Court shall be by a majority of the judges sitting in the case, and the decisions shall be deemed to be the opinion of the Court as a whole.

3. Every judgment or order of the Court shall state the reasons therefor and be read at a public hearing by the Chairman. Only the reasons which carry the decision of the majority shall be included in the sentence, and no dissenting opinion shall be published or divulged in any way.

## Article 45

*Confiscations and Damages*

1. The Court shall decide whether any object is to be confiscated or be restored to its owner.

2. The Court may sentence the persons committed to it to pay damages, and costs of proceedings.

## Article 46

*Restitutions and Recoveries*

1. H.C.Ps. in whose territory objects to be restored or property belonging to convicted persons are situated, shall be bound to take all the measures provided by their own laws to ensure the execution of the sentence of the Court.

2. The provision of this article shall also apply to cases in which pecuniary penalties imposed by the Court, compensation for damages or costs of proceedings have to be recovered.

## Article 47

*Fines*

The Court shall determine the way in which any fines shall be dealt with: failing special determination any amounts collected as fines or costs shall be credited to the common fund established by article 53 hereafter. Costs shall be in the discretion of the Court.

## Article 48

*Execution of Sentences*

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

## Article 49

*Capital Punishment*

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

## Article 50

*Pardon*

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

## Article 51

*Revision*

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

## CHAPTER VI

## MEASURES FOR THE APPLICATION OF THE PRESENT CONVENTION

## Article 52

*Assistance*

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

## Article 53

*Common Fund*

1. There shall be created by contributions from the H.C.Ps. a common fund from which the salaries and pensions of all members and officers of the Court, the costs of the proceedings and other expenses involved in the trial of cases, including any fees and expenses of counsel assigned to the accused by the Court, shall be defrayed, subject to recovery from the accused if he is convicted. The expenses of the Court, of the Procurator's office and of the Registry shall be met out of this fund.
2. The salaries of the judges, of the Procurator General and of the other officers of the Court shall be payable from this fund on a scale fixed by the H.C.Ps, as well as any pensions which may be payable to their widows.

## Article 54

*Transitional Measure*

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

## Article 55

*Meetings with Representatives of H.C.Ps.*

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

(a) The constitution and administration of the common fund and the division among the H.C.Ps. of the sums considered necessary to create and to maintain such fund;

(b) The appointment of additional judges in the event provided in article 10, section 2;

(c) The appointment of additional deputies-Procurator General as provided in article 21, section 2;

(d) All other questions bearing on the establishment and the working of the Court;

(e) The prolongation or curtailment of the Court's existence.

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

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

### Article 56

#### *Contestations or Disputes*

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

2. If such provisions should not exist between the parties to the dispute, the parties shall refer the dispute to an arbitral or judicial procedure. If no agreement is reached on the choice of another court, the parties shall refer the dispute to the Permanent Court of International Justice, if they are all parties to the Protocol of December 16th, 1920, relating to the Statute of that Court; and if they are not all parties to that Protocol, they shall refer the dispute to a court of arbitration constituted in accordance with the Convention of The Hague of October 18th, 1907, for the Pacific Settlement of International Disputes.

### Article 57

#### *Date, Signature, and Ratification of the present Convention*

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

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

### Article 58

#### *Accession to the Convention*

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

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

### Article 59

#### *Territorial Reservations*

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

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

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

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

### Article 60

#### *Registration of this Convention*

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

### Article 61

#### *Denunciation*

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

### Article 62

#### *Effects of Denunciation upon Specific Cases*

1. A case brought before the Court before the denunciation of the present Convention, or the making of a declaration as provided in article

59, section 3, shall nevertheless continue to be heard and judgment be given by the Court.

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

(Texts taken from *London International Assembly, Reports on Punishment of War Crimes*, 1943, pp. 324-346.)

C.50(1)

30 September 1944

**10. United Nations War Crimes Commission. Draft convention for the establishment of a United Nations war crimes court with an explanatory memorandum**

[Names of the High Contracting Parties . . .] desirous of ensuring that the perpetrators of war crimes committed by the enemy shall be brought to justice,

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

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

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

For this purpose have appointed as their plenipotentiaries: (names of the plenipotentiaries) who, having communicated their full powers found in good and due form,

Have agreed as follows:

*Article 1*

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

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

3. The jurisdiction of the Court as defined above shall extend to offences committed by the members of the armed forces, the civilian authorities or other persons acting under the authority of, or claim or colour of authority of, or in concert with a State or other political entity engaged in war or armed hostilities with any of the High Contracting

Parties, or in hostile occupation of territory of any of the High Contracting Parties.

### *Article 2*

The judges of the Court and members of the Court shall be chosen in accordance with the following provisions:

(a) Within thirty days after the coming into force of the Convention, each of the High Contracting Parties shall appoint three persons as members of the Court. The names of the persons so appointed shall be transmitted to His Britannic Majesty's Principal Secretary of State for Foreign Affairs in the United Kingdom, who shall communicate them forthwith to the other High Contracting Parties.

(b) Within fifteen days after the communication of the said names to the High Contracting Parties, His Britannic Majesty's Principal Secretary of State for Foreign Affairs shall call a conference of representatives of the High Contracting Parties to meet in London at such time and place as he may direct.

(c) The conference shall proceed to the election of the judges of the Court from among the members of the Court. The election shall take place by secret ballot and by such method of voting as the conference may determine. The number of judges to be elected shall be determined by the conference.

(d) Any State which becomes a party to the convention after it has come into force, shall appoint three members of the Court as provided in paragraph (a). These names shall in the same manner be communicated to the other High Contracting Parties.

### *Article 3*

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

### *Article 4*

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

### *Article 5*

1. In the event of a vacancy among the judges, the Court shall proceed to the election of a judge from among the members of the Court.

2. In the event of a vacancy among the members of the Court the High Contracting Party who appointed the member whose place is vacated shall designate his successor.

*Article 6*

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

*Article 7*

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

*Article 8*

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

*Article 9*

1. A judge of the Court who desires to resign his post shall arrange with the President as to the date on which his resignation shall take effect.

2. The Court, with the concurrence of not less than three-fourths of the judges, may retire a judge who has ceased to be able adequately to perform the functions of his office.

*Article 10*

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

*Article 11*

1. The responsibility for the conduct of prosecutions before the Court will in general rest with the Government of the United Nations by which the case is brought before the Court.

2. The conference referred to in article 2, paragraph (b), shall appoint an officer to whom may be entrusted the conduct of the prosecution in any case in which the Government of the United Nations primarily concerned prefers that the prosecution should not be undertaken by its own representatives.

3. This officer shall be assisted by such staff as the Court may think necessary.

4. The expenses incurred in connexion with the prosecution of cases entrusted to the officer appointed by the Court shall be borne by the State which has transmitted the case to the Court.

*Article 12*

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

2. Each Division shall consist of not less than five judges who shall be designated from time to time by the President of the Court. The Divisions shall sit at such places, and shall continue to exist for such periods, as the President may determine.

3. Not less than five judges shall sit to hear and determine each case.

*Article 13*

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

*Article 14*

The Court may:

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

*Article 15*

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

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

*Article 16*

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

*Article 17*

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

gone shall be taken into account in fixing any sentence which may be imposed.

*Article 18*

The Court shall apply:

(a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing laws of war between the parties thereto;

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

(c) The principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience;

(d) The principles of criminal law generally recognized by civilized nations;

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

*Article 19*

1. The Court shall sit in private to consider its judgment. The judges shall observe secrecy as to the nature of their deliberations.

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

3. The decisions shall be by a majority of the judges participating.

*Article 20*

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

*Article 21*

Sentences shall be executed as directed by the Court.

*Article 22*

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

*Article 23*

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

*Article 24*

The Convention shall be ratified.

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

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

*Article 25*

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

*Article 26*

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

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

*Article 27*

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

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

*Article 28*

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

*Article 29*

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

6th October, 1944

## UNITED NATIONS WAR CRIMES COMMISSION

## EXPLANATORY MEMORANDUM

*To accompany the draft convention for the establishment of a United Nations war crimes court*

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

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

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

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

of the Court shall be English and French and/or any other language of the country in which the Court may sit.

**11. Draft proposal for the establishment of an international criminal court. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by the representative of France<sup>1</sup>**

The repression, pursuant to the principles of the Nürnberg judgment, of international crimes against peace and humanity, which the General Assembly of the United Nations confirmed by its resolution of 11 December 1946, can only be ensured by the establishment of an international criminal court.

This would avoid any future recurrence of the criticism often levelled against the International Military Tribunal for the trial of major war criminals, that it was an *ad hoc* court which only imperfectly represented the international community.

This need was realized immediately after the First World War. The proposals then submitted to the League of Nations Assembly were not, unfortunately, followed up. But the idea was taken up by private bodies such as the International Law Association and the *Association internationale de droit pénal*, and concrete proposals were formulated. These proposals may be divided into two categories:

1. Those in favour of giving the Permanent Court of International Justice (now the International Court of Justice) jurisdiction in criminal matters.

2. Those providing for the establishment of an international criminal court to try offences. This latter system was applied in the Geneva Convention of 16 November 1937 on the international repression of terrorism.

It would appear desirable to combine the two systems, to merge their respective advantages by providing for two distinct fields of jurisdiction:

1. Jurisdiction conferred on a criminal chamber to be established as part of the International Court of Justice. This would deal with:

(a) Juridical matters such as disputes regarding judicial and legislative competence, and any questions relating to jurisdiction over a *res judicata* which might arise between courts of different States.

(b) Indictments for crimes against peace (the crime of aggression in all its forms) brought against a State or its constitutionally responsible rulers.

(c) Indictments for crimes against humanity which might be brought against a State or its constitutionally responsible rulers.

The criminal chamber might be composed of fifteen judges elected under the same conditions as the other members of the International Court of Justice. Sections might be established. A procedure for preliminary investigation would be set up. The prosecution (*parquet*) responsible for instituting public international proceedings would be in liaison with the

<sup>1</sup> This text is a revised translation of A/AC.10/21.

Security Council. A power of initiative, to be defined, would be left to the Governments concerned. Following trial the criminal chamber would apportion liability and would inflict appropriate penalties upon the constitutionally responsible rulers.

2. Jurisdiction conferred on an international court of justice to deal with:

(a) All *international offences* capable of being committed in time of peace, and in particular those known as *offences against the law of nations*.

(b) *War crimes*, that is to say violations *communis juris* which constitute also violations of the laws of war.

(c) All offences *communis juris* connected with crimes against humanity committed by the rulers of a State.

The organization might be based on the Convention of 1937 on the international repression of terrorism, mentioned above. The jurisdiction vested in the international court might be optional, the State holding the offender having the option, according to the case, of trying him before its own tribunals, of extraditing him (if its jurisdiction is subsidiary), or of handing him over to the international tribunal.

One or more international criminal courts of this nature would be established, as required.

The creation of such an international court would ensure the repression of the various international offences, and would thus give effect to the General Assembly's resolution of 11 December 1946 which "takes note of the agreement for the establishment of an International Military Tribunal" and "affirms the principles of international law recognized by the charter of the Nürnberg Tribunal and the judgment of the Tribunal."

## 12. Extract from draft convention on the crime of genocide prepared by the Secretary-General (E/447) (with two annexes)

### ARTICLE VII

*(Universal enforcement of municipal criminal law)*

The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

#### *Comments on article VII*

##### *Preliminary remarks*

Articles VII, VIII and IX should be considered as a whole. They lay down rules providing for trial of persons guilty of genocide by the courts of the one or other State or by an international court.

When persons guilty of acts of genocide are in territory under the jurisdiction of a State, such State is bound to arrest these individuals and either to bring them before its own courts (article VII), or to hand them over to another State which has requested their extradition (article VIII), or to bring them before an international court (article IX).

*Article VII* provides for the first obligation.

This article lays down the principle of the universality of punishment, which means that the Contracting Parties undertake to punish those persons guilty of genocide who are in their territory, irrespective of their nationality or of the place where the crime was committed.

#### ARTICLE VIII

*(Extradition)*

The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition.

The High Contracting Parties pledge themselves to grant extradition in cases of genocide.

#### *Comments on article VIII*

##### *Paragraph 1*

This paragraph lays down the principle that genocide should not be considered as a political crime. It therefore constitutes grounds for extradition.

##### *Paragraph 2*

The High Contracting Parties pledge themselves to grant extradition for acts of genocide, which means that in such cases they would be released of their duty to bring the offenders before their own courts.

Needless to say, the High Contracting Parties will not be obliged to grant extradition on a simple request. In such cases, they would be influenced by the general principles of international law in deciding whether to accede to a request for extradition. The two main contingencies in which a State would be justified in requesting extradition would be if the crime had been committed in its territory or if the victims of genocide were its nationals, even if the crime was not committed in its territory.

#### ARTICLE IX

*(Trial of genocide by an international court)*

The High Contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial to an international court in the following cases:

1. When they are unwilling to try such offenders themselves under article VII or to grant their extradition under article VIII.

2. If the acts of genocide have been committed by individuals acting as organs of the State or with the support or toleration of the State.

#### *Comments on article IX*

Article IX refers to cases in which the acts of genocide can or must be brought before an international court.

*First case.* The State which has arrested the persons guilty of genocide is free to bring them before an international court, although not obliged to do so.

The State may refuse to try these persons for various reasons. It may not consider itself capable of seeing that justice is done; for instance, if the decision of the jury empanelled for the case is open to criticism. The State may also fear lest the trial further disturb its divided and excited public opinion, or it may be reluctant to risk the possibility of a decision by its courts attracting the animosity of other Powers, however unjustified.

The State may refuse to grant extradition on request, either because public opinion in the country, rightly or wrongly, objects; because the State requesting it does not appear capable of ensuring justice; because the latter State is in fact endeavouring to let the offender whose extradition it is requesting go unpunished; or because the State requesting extradition proposes to take revenge on political opponents under cover of punishing genocide.

In all these cases, the State will have the option of being released from its responsibility without prejudicing the punishment of genocide by bringing the offenders before the international court.

Whereas Mr. Donnedieu de Vabres and Mr. Pella were in favour of paragraph 1 of article IX, Mr. Lemkin spoke in favour of its omission, since he thought that persons, other than rulers and leaders of criminal organizations, responsible for the acts defined by the Convention should not be brought before the international court, but should be tried or extradited. He said that as the cases of these other persons were of lesser importance, no action should lie in an international court, since this involved the use of complicated procedure. The danger would be that the complexities of the procedure might eventually result in the offenders going unpunished.

*Second case.* The State is obliged to bring acts of genocide before an international court, if these acts of genocide have been committed by individuals acting as organs of the State or with the support or toleration of the State.

This relates to the trial of the rulers of a State, or of persons who conspired with these rulers; these constitute serious cases, of the greatest interest to the whole international community. The international court would be the final authority in such cases.

#### ARTICLE X

*(International court competent to try genocide)*

Two drafts are submitted for this section:

*First draft.* The court of criminal jurisdiction under article IX shall be the international court having jurisdiction in all matters connected with international crimes.

*Second draft.* An international court shall be set up to try crimes of genocide (*vide annexes*).

#### *Comments on article X*

Two drafts have been submitted:

*First draft. Trial by an international court of criminal jurisdiction having general competence.*

If an international court having general competence is established, the trial of crimes of genocide will, of course, be one of its functions.

Mr. Donnedieu de Vabres thought that, on the basis of the distinction he had drawn between the trial of rulers and of agents, rulers should be justiciable in a criminal chamber to be set up within the International Court of Justice. Mr. Pella was in favour of creating such a chamber and agreed with Mr. Donnedieu de Vabres that if this idea were adopted, the draft adopted in 1928 by the International Association for Penal Law might be taken as a basis of discussion. Mr. Lemkin, however, thought that in the existing circumstances, and in the absence of a sufficiently developed international criminal law, the establishment of a permanent court of criminal jurisdiction having general competence would be premature.

In any case, the question whether such a court should be established is a general problem, outside the scope of the special problem of the punishment of genocide.

*Second draft. Trial by a special international court to be set up under the present Convention.*

There may be two views on such an international court, with jurisdiction limited to cases of genocide: a permanent court (see annex I) or an *ad hoc* court (see annex II).

Mr. Donnedieu de Vabres and Mr. Pella thought that the choice between these two types of special courts should be left to the Assembly.

In order to facilitate the study of this problem, Mr. Donnedieu de Vabres, Mr. Pella and Mr. Lemkin amended the aforementioned annexes concerned with these two variants.

#### ANNEX I<sup>1</sup>

*Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide*

##### ARTICLE 1

*(Article 1 amended)*

An International Criminal Court for the trial, as hereinafter provided, of persons accused of an offence dealt with in the Convention for the Prevention and Punishment of *Genocide* is hereby established.

##### ARTICLE 2

1. In cases of acts of genocide committed by individuals acting as organs of the State or having been supported or tolerated by the State, each High Contracting Party and any other State which arrested such individuals on

<sup>1</sup> Some articles of annexes I and II reproduce textually articles from the Convention of 16 November 1937 for the Creation of an International Criminal Court for the Prevention and Punishment of Terrorism, whilst others reproduce articles from the said Convention with amendments printed in italics. Article numbers in small type and enclosed within parentheses refer to articles of that Convention.

its territory may, if unwilling to extradite or punish the said individuals, request . . .<sup>1</sup> to commit them for trial to the Court.

2. The act whereby a State requests . . .<sup>1</sup> to commit an accused for trial to the Court shall contain a statement of the main charges and evidence in support thereof.

3. If the . . .<sup>1</sup> is of the opinion that the accused should be committed for trial to the Court, it shall designate the persons instructed to act for the prosecution.

4. The . . .<sup>1</sup> shall transmit to the Court all of the dossiers containing the incriminating evidence. Upon such transmission the matter shall be deemed to be before the Court.

### ARTICLE 3

(Article 3)

The Court shall be a permanent body, but shall sit only when it is seized of proceedings for an offence within its jurisdiction.

### ARTICLE 4

(Article 4 amended)

1. The seat of the Court shall be established at . . .

2. For any particular case, the President may take the opinion of the Court and the Court may decide to meet elsewhere *subject to the consent of the State on whose territory such meeting is to be held.*

### ARTICLE 5

(Article 5 abridged)

The Court shall be composed of judges chosen from among jurists who are acknowledged authorities on criminal law.

### ARTICLE 6

(Article 6 amended)

The Court shall consist of *seven* regular judges and *seven* deputy judges, each belonging to a different nationality, but so that the regular judges and deputy judges shall be nationals of the High Contracting Parties.

### ARTICLE 7

(Article 7 amended)

1. Any Member of the *United Nations* and any non-member State, in respect of which the *Convention for the Prevention and Punishment of Genocide* is in force, may nominate not more than two candidates for appointment as judges of the Court. *A panel of all the candidates so nominated shall be drawn up for this purpose.*

2. *The International Court of Justice* shall be requested to choose the regular and deputy judges from the persons so nominated.

<sup>1</sup> Request to be addressed to the Economic and Social Council or to the Security Council of the United Nations.

## ARTICLE 8

*(Article 8)*

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

## ARTICLE 9

*(Article 9)*

The High Contracting Parties shall grant the members of the Court diplomatic privileges and immunities when engaged on the business of the Court.

## ARTICLE 10

*(Article 10 amended)*

1. Judges shall hold office for *seven* years.
2. Every two years, one regular and one deputy judge shall retire.
3. The order of retirement for the first period of seven years shall be determined by lot when the first election takes place.
4. Judges may be re-appointed.
5. Judges shall continue to discharge their duties until their places have been filled.
6. Nevertheless, judges, though replaced, shall finish any cases which they have begun.

## ARTICLE 11

*(Article 11 amended)*

1. Any vacancy, whether occurring on the expiration of a judge's term of office or for *any other reason*, shall be filled as provided in article 7.
2. In the event of the resignation of a member of the Court, the resignation shall take effect on notification being received by the Registrar.
3. If a seat on the Court becomes vacant more than *twelve* months before the date at which a new election to that seat would normally take place, *the vacancy shall not be filled before that date.*

## ARTICLE 12

*(Article 12)*

A member of the Court cannot be dismissed unless in the unanimous opinion of all the other members, including both regular and deputy judges, he has ceased to fulfil the required conditions.

## ARTICLE 13

*(Article 13)*

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

## ARTICLE 14

(Article 14 amended)

The Court shall elect its President and Vice-President from its members for a term of *seven* years. *In the event of the President or Vice-Presidency becoming vacant, the Court shall hold fresh elections which may be conducted by correspondence.*

## ARTICLE 15

(Article 15)

The Court shall establish regulations to govern its practice and procedure.

## ARTICLE 16

(Article 17)

The Court's archives shall be in the charge of the Registrar.

## ARTICLE 17

(Article 18 amended)

The number of members who shall sit to constitute the Court shall be *seven*.

## ARTICLE 18

(Article 19 (1))

Members of the Court may not take part in trying any case in which they have previously been engaged in any capacity whatsoever. In case of doubt, the Court shall decide.

## ARTICLE 19

(Article 19 (2))

If, for some special reason, a member of the Court considers that he should not sit to try a particular case, he shall so notify the President as soon as he has been informed that the Court is seized of that case.

## ARTICLE 20

(Article 20 amended)

1. If the presence of *seven* regular judges is not secured, the necessary number shall be made up by calling upon the deputy judges in their order on the list.

2. The list shall be prepared by the Court and shall have regard, first, to priority of appointment and, secondly, to age.

## ARTICLE 21

(Article 21 amended)

1. The substantive criminal law to be applied by the Court shall be that of the territory on which the offence was committed if the country concerned is a party to the Convention and, in other cases, the law of the country which applied to the Court under article 3.

2. Any dispute as to what substantive criminal law is applicable shall be decided by the Court.

#### ARTICLE 22

(Article 22 amended)

If the Court has to apply, in accordance with article 21, the law of a State of which no sitting judge is a national, the Court may invite a jurist *who is a national of the said State* and an acknowledged authority on such law to sit with it in a consultative capacity as a legal assessor.

#### ARTICLE 23

(Article 26 (2))

Any person directly injured by the offence may, if authorized by the Court, and subject to any conditions which it may impose, constitute himself *partie civile* before the Court; such person shall not take part in the oral proceeding except when the Court is dealing with the damages.

#### ARTICLE 24

(Article 27)

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

#### ARTICLE 25

(Article 28 amended)

The Court shall not proceed further with the case and shall order the accused to be discharged if the prosecution is withdrawn by...<sup>1</sup>

#### ARTICLE 26

(Article 29 amended)

1. Accused persons may be defended by advocates belonging to a Bar and approved by the Court.

2. If provision is not made for the conduct of the defence by a barrister chosen by the accused, the Court shall assign to each accused *or group of accused* a counsel selected from advocates belonging to a Bar.

#### ARTICLE 27

(Article 30)

The file of the case and the statement of the *partie civile* shall be communicated to the person who is before the Court for trial.

#### ARTICLE 28

(Article 31)

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

<sup>1</sup>The Economic and Social Council or the Security Council of the United Nations.

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

ARTICLE 29

(Article 32)

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

ARTICLE 30

(Article 33)

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

ARTICLE 31

(Article 34 amended)

No examination, no hearing of witnesses or experts and no confrontation may take place before the Court except in the presence of the counsel for the accused and the representatives of...<sup>1</sup>

ARTICLE 32

(Article 35 (1))

The hearings before the Court shall be public.

ARTICLE 33

(Article 36)

The Court shall sit in private to consider its judgment.

ARTICLE 34

(Article 37)

The decisions of the Court shall be by majority of the judges.

ARTICLE 35

(Article 38)

Every judgment or order of the Court shall state the reasons therefor and be read at a public hearing by the President.

ARTICLE 36

(Article 39)

1. The Court shall decide whether any object is to be confiscated or be restored to its owner.

2. The Court may sentence the persons committed to it to pay damages.

<sup>1</sup> The Economic and Social Council or the Security Council.

3. High Contracting Parties in whose territory objects to be restored or property belonging to convicted persons are situated shall be bound to take all the measures provided by their own laws to ensure the execution of the sentences of the Court.

4. The provisions of the preceding paragraph shall also apply to cases in which pecuniary penalties imposed by the Court or costs of proceedings have to be recovered.

#### ARTICLE 37

(Article 40 amended)

1. Sentences involving loss of liberty shall be executed by a High Contracting Party chosen with his consent by the Court. Such consent may not be withheld by the State which *brought the matter before the . . .<sup>1</sup> under article 2.*

2. The Court shall determine the way in which any fines shall be dealt with.

#### ARTICLE 38

(Article 41 amended)

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

#### ARTICLE 39

(Article 42 amended)

The right of pardon shall be exercised by the State which has to enforce the penalty *unless within a period of one month from the date on which the State concerned has informed it of its desire to exercise such right the . . .<sup>1</sup> shall have entered an objection.*

#### ARTICLE 40

(Article 43 amended)

1. Against convictions pronounced by the Court, no proceedings other than an application for revision shall be allowable.

2. The Court shall determine in its rules the cases in which an application for revision may be made.

3. The States mentioned in article 2, and the persons *committed for trial of the court*, shall have the right to ask for a revision.

#### ARTICLE 41

(Article 44 amended)

1. *The judges shall while sitting receive allowances to be borne by the respective State of which each judge is a national, on the basis of a scale established by the High Contracting Parties.*

2. There shall be created by contributions from the High Contracting Parties a common fund from which the costs of the proceedings and

<sup>1</sup> The Economic and Social Council or the Security Council.

other expenses involved in the trial of cases, including any fees and expenses of counsel assigned to the accused by the Court, shall be defrayed, subject to recovery from the accused if he is convicted. The special allowance to the Registrar and the expenses of the Registry shall be met out of this fund.

#### ARTICLE 42

(Article 45 amended)

1. The Court shall decide any questions as to its own jurisdiction arising during the hearing of a case; it shall for this purpose apply the provisions of the present *Convention for the Prevention and Punishment of Genocide* and the general principles of law.

2. If a High Contracting Party, not being the Party who sent the case in question for trial to the . . .<sup>1</sup>, disputes the extent of the Court's jurisdiction in relation to the jurisdiction of his own national courts and does not see his way to appear in the proceedings in order that the question may be decided by the International Criminal Court, the question shall be treated as arising between such High Contracting Party and the High Contracting Party who sent the case for trial to the Court, and shall be settled as provided in *article 14 of the Convention for the Prevention and Punishment of Genocide*.<sup>2</sup>

#### Article 43

Whenever the Court is unable to deal with a possible accumulation of actions it may establish additional sections. Such sections shall consist of seven judges. Each section shall be presided over by a regular judge of the Court elected by the regular and deputy judges of the Court in general assembly.

Lots shall be drawn to elect the other judges to the various sections.

If, owing to an accumulation of actions the number of regular or deputy judges is insufficient to produce a full complement of all the sections created, vacancies may be filled by lot by persons appearing on the panel referred to in article 7, paragraph 1.

In all cases, however, and irrespective of the number of sections created, such sections may not be presided over except by a regular judge or, in the absence of a regular judge, by a deputy judge of the International Criminal Court.

#### ANNEX II<sup>3</sup>

#### *Establishment of an ad hoc International Criminal Court for the Punishment of Acts of Genocide*

#### ARTICLE 1

Each State shall, within a period of one month from the date on which the Convention for the Prevention and Punishment of Genocide comes

<sup>1</sup> The Economic and Social Council or the Security Council.

<sup>2</sup> Article 14 of the Secretariat draft read as follows: "Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice".

<sup>3</sup> See footnote on page 123 above.

into force with reference to such State, designate two persons who are acknowledged authorities on criminal law to hold the office of judge in an International Criminal Court for the Punishment of Genocide if called upon.

2. No person may be designated who is not a national of one of the High Contracting Parties to the said Convention.

3. The names of the persons so designated shall be communicated to the President of the International Court of Justice who shall place them on the panel.

#### ARTICLE 2

1. In the case of acts of genocide committed by individuals acting as organs of the State or with the support or toleration of the State, each High Contracting Party and any other State which arrested such individuals on its territory may, if unwilling to extradite or punish the said individuals, request . . .<sup>1</sup> to commit them for trial to the Court.

2. The instrument whereby a State requests . . .<sup>1</sup> to commit an accused for trial to the Court shall contain a statement of the main charges and evidence in support thereof.

3. If the . . .<sup>2</sup> is of the opinion that such request should be complied with, it shall forthwith approach the International Court of Justice requesting it to select seven regular and seven deputy judges from the panel provided for in article 1.

4. The . . .<sup>2</sup> shall also designate the persons instructed to act for the prosecution.

#### ARTICLE 3

The . . .<sup>2</sup> shall at the same time decide where the Court is to sit. If such place shall be in territory other than that where the permanent headquarters of the United Nations is established or in territory where the seat of the International Court of Justice is established, the consent of the State to which such territory belongs shall be required.

#### ARTICLE 4

For the purposes of constituting the International Criminal Court, the President of the International Court of Justice shall forthwith summon the persons designated under article 1.

#### ARTICLE 5

*(Article 8 amended)*

*The first meeting of the International Criminal Court shall be presided over either by the President or Vice-President of the International Court of Justice or by a judge of that Court designated for that purpose.*

<sup>1</sup>Request to be addressed to the Economic and Social Council or to the Security Council of the United Nations.

<sup>2</sup>The Economic and Social Council or the Security Council of the United Nations.

*At such first meeting which shall be public, the members of the International Criminal Court shall before taking up their duties give a solemn undertaking to exercise their powers impartially and conscientiously.*

## ARTICLE 6

*(Article 9)*

The High Contracting Parties shall grant the members of the Court diplomatic privileges and immunities when engaged on the business of the Court.

## ARTICLE 7

*(Article 12)*

A member of the Court cannot be dismissed unless in the unanimous opinion of all the other members, including both regular and deputy judges, he has ceased to fulfil the required conditions.

## ARTICLE 8

*(Article 14 amended)*

The Court shall elect its President and Vice-President *from its members.*

## ARTICLE 9

*(Article 15)*

The Court shall establish regulations to govern its practice and procedure.

## ARTICLE 10

*(Article 17)*

The Court's archives shall be in the charge of the Registrar.

## ARTICLE 11

*(Article 18 amended)*

The number of members who shall sit to constitute the Court shall be *seven.*

## ARTICLE 12

*(Article 19 (1))*

Members of the Court may not take part in trying any case in which they have previously been engaged in any capacity whatsoever. In case of doubt, the Court shall decide.

## ARTICLE 13

*(Article 19 (2))*

If, for some special reason, a member of the Court considers that he should not sit to try a particular case, he shall so notify the President as soon as he has been informed that the Court is seized of that case.

## ARTICLE 14

(Article 20 (1) amended)

If the presence of *seven* regular judges is not secured, the necessary number shall be made up by calling upon the deputy judges in their order on the list.

## ARTICLE 15

(Article 21 amended)

1. The substantive criminal law to be applied by the Court shall be that of the territory on which the offence was committed if the country concerned is a party to the Convention and, in other cases, the law of the country which applied to the Court under article 2.

2. Any dispute as to what substantive criminal law is applicable shall be decided by the Court.

## ARTICLE 16

(Article 22 amended)

If the Court has to apply, in accordance with article 15, the criminal law of a State of which no sitting judge is a national, the Court may invite a jurist *who is a national of the said State* and an acknowledged authority on such law to sit with it in a consultative capacity as a legal assessor.

## ARTICLE 17

(Article 26 (2))

Any person directly injured by the offence may, if authorized by the Court, and subject to any conditions which it may impose, constitute himself *partie civile* before the Court; such person shall not take part in the oral proceeding except when the Court is dealing with the damages.

## ARTICLE 18

(Article 27)

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

## ARTICLE 19

(Article 28 amended)

The Court shall not proceed further with the case and shall order the accused to be discharged if the prosecution is *withdrawn by . . .*<sup>1</sup>

## ARTICLE 20

(Article 29 amended)

1. Accused persons may be defended by advocates belonging to a Bar and approved by the Court.

<sup>1</sup> The Economic and Social Council or the Security Council of the United Nations.

2. If provision is not made for the conduct of the defence by a barrister chosen by the accused, the Court shall assign to each accused or *group of accused* a counsel selected from advocates belonging to a Bar.

ARTICLE 21

(Article 30)

The file of the case and the statement of the *partie civile* shall be communicated to the person who is before the Court for trial.

ARTICLE 22

(Article 31)

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

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

ARTICLE 23

(Article 32)

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

ARTICLE 24

(Article 33)

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

ARTICLE 25

(Article 34 amended)

No examination, no hearing of witnesses or experts and no confrontation may take place before the Court except in the presence of the counsel for the accused and of the representatives . . .<sup>1</sup>

ARTICLE 26

(Article 35 (1))

The hearings before the Court shall be public.

ARTICLE 27

(Article 36)

The Court shall sit in private to consider its judgment.

<sup>1</sup> The Economic and Social Council or the Security Council,

## ARTICLE 28

*(Article 37)*

The decisions of the Court shall be by majority of the judges.

## ARTICLE 29

*(Article 38)*

Every judgment or order of the Court shall state the reasons therefor and be read at a public hearing by the President.

## ARTICLE 30

*(Article 39)*

1. The Court shall decide whether any object is to be confiscated or be restored to its owner.

2. The Court may sentence the persons committed to it to pay damages.

3. High Contracting Parties in whose territory objects to be restored or property belonging to convicted persons are situated shall be bound to take all the measures provided by their own laws to ensure the execution of the sentences of the Court.

4. The provisions of the preceding paragraph shall also apply to cases in which pecuniary penalties imposed by the Court or costs of proceedings have to be recovered.

## ARTICLE 31

*(Article 40 amended)*

1. Sentences involving loss of liberty shall be executed by a High Contracting Party chosen with his consent by the Court. Such consent may not be withheld by the State which *brought the matter before the . . .<sup>1</sup> under article 2.*

2. The Court shall determine the way in which any fines shall be dealt with.

## ARTICLE 32

*(Article 41 amended)*

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

## ARTICLE 33

*(Article 42 amended)*

The right of pardon shall be exercised by the State which has to enforce the penalty *unless within a period of one month from the date on which the State concerned has informed it of its desire to exercise such right the . . .<sup>1</sup> shall have entered an objection.*

<sup>1</sup>The Economic and Social Council or the Security Council.

## ARTICLE 34

*(Article 43 amended)*

1. Against convictions pronounced by the Court, no proceedings other than an application for revision shall be allowable.
2. The Court shall determine in its rules the cases in which an application for revision may be made.
3. The States mentioned in article 2, and the persons *committed for trial of the Court*, shall have the right to ask for a revision.

## ARTICLE 35

*(Article 44 amended)*

1. *The judges shall while sitting receive allowa... to be borne by the respective State of which each judge is a national, on the basis of a scale established by the High Contracting Parties.*

2. There shall be created by contributions from the High Contracting Parties a common fund from which the costs of the proceedings and other expenses involved in the trial of cases, including any fees and expenses of counsel assigned to the accused by the Court, shall be defrayed, subject to recovery from the accused if he is convicted. The special allowance to the Registrar and the expenses of the Registry shall be met out of this fund.

## ARTICLE 36

*(Article 45 amended)*

The Court shall decide any questions as to its own jurisdiction arising during the hearing of a case; it shall for this purpose apply the provisions of the present *Convention for the Prevention and Punishment of Genocide* and the general principles of law.

**13. Extracts from comments by Governments on the draft convention on genocide prepared by the Secretary-General (from documents E/623, E/623/Add. 2 and E/623/Add. 3)**

## ARTICLE VI

The High Contracting Parties shall make provision in their municipal law for acts of genocide as defined by articles I, II, and III, above, and for their effective punishment.

*Comments by Governments**United States of America*

"Here again it is submitted that some such formula as 'acts prohibited in this Convention' is broader and therefore more desirable than 'genocide as defined by articles I, II, and III above'. It is suggested that the article (renumbered article V) be rephrased to read:

"The High Contracting Parties shall make provision in their laws for the effective punishment, as crimes, of the acts prohibited in this Convention, which laws shall take into account all of the provisions of this Convention and each such High Contracting Party shall, subject to articles VII and VIII, try and upon conviction punish offences committed within its jurisdiction.'"

## ARTICLE VII

The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

*Comments by Governments*1. *United States of America*

"This article contains a broad jurisdictional provision.

"The United States agrees with the principle set forth in the draft Convention, in article IX, that where genocide is committed by or with the connivance of the State the accused individuals should be tried by an international court. All other cases would involve acts against the laws of the State where they are perpetrated.

"A second reason for opposing this provision as submitted is that it is obviously liable to be abused. The broad scope of genocide would make it relatively easy for a State to claim jurisdiction of aliens on this ground when the real purpose is political retribution.

"A third reason for opposing the provision is that it would apparently seek to establish a rule of law applicable to nationals of States which have not consented to it, namely, such States as may not ratify the Convention.

"A suggested text on jurisdiction is contained above under the 'Comment' on the preceding article. It is suggested that the following be added to this suggested article:

"Where such acts were committed outside its jurisdiction, the High Contracting Party having an offender within its jurisdiction may, subject to articles VI, VII and VIII, and with the express consent of the State where the act was committed, itself try and upon conviction punish such offender."

2. *Venezuela*

See under article X.

3. *Norway*

"The Norwegian Ministry of Justice therefore recommends that crimes of genocide committed by persons acting in an official capacity be punished under penal provisions of international law to be laid down in the convention or in the statute of the proposed international criminal court."

4. *Netherlands*

"It will have to be certain that the jurisdiction equally applies to citizens of non-signatory Powers.

"Furthermore it should be prevented—as has been justly pointed out by the United States Government—that a State might, for purposes of political retaliation, usurp jurisdiction over aliens. Hence a limitation of the jurisdiction as proposed by the United States of America seems desirable."

## ARTICLE VIII

The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition.

The High Contracting Parties pledge themselves to grant extradition in cases of genocide.

*Comments by Governments*

1. *United States of America*

"The United States accepts the principle that the crimes defined in this Convention (not merely 'genocide') shall not be deemed to be political offences.

"Because of the fact that extradition is a technical process, involving as it does the safeguarding of human rights and the promotion of the administration of justice, with respect to which a large network of laws and treaties have been evolved, it is believed that instead of incorporating an entire extradition convention on the subject of the crimes covered by this agreement, it would be preferable to provide that each High Contracting Party pledges itself to grant extradition in these cases in accordance with its laws or treaties. The United States therefore suggests that this article (renumbered VI) be recast to read:

"The High Contracting Parties agree that the crimes defined in this Convention shall not be considered political crimes and shall be grounds for extradition.

"Each High Contracting Party pledges itself to grant extradition in such cases, in accordance with its laws or treaties."

2. *Venezuela*

"The application of such extensive co-operation as that proposed by the instrument in question, is also subject to technical difficulties which appear difficult to overcome. For example, many States, Venezuela among them, maintain as a fundamental principle, the non-extradition of their nationals in any circumstances and in return, undertake to try them in their own territory when the act is punishable under their own law. Such States could not accept the wording of article 8 under which extradition must be granted in all cases, nor could they surrender their nationals to international jurisdiction without violating the basic principles of their legal system. Even where foreigners are concerned, Venezuela does not grant extradition when the penalty of death or life-imprisonment may be imposed on the accused, in the country applying for it. Consequently, the provision contained in article 38 of the annex does not appear to provide sufficient guarantee to a State in such a position for the safeguarding of its cardinal principles in criminal matters."

3. *Netherlands*

"As proposed by the United States Government, the clause about extradition will have to be slightly limited; addition of the words 'in accordance with its laws or treaties' would be recommendable. Notably the liberty not to extradite its own subjects will have to be retained."

## ARTICLE IX

The High Contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial to an international court in the following cases:

1. When they are unwilling to try such offenders themselves under article VII or to grant their extradition under article VIII.

2. If the acts of genocide have been committed by individuals acting as organs of the State or with the support or toleration of the State.

*Comments by Governments**1. United States of America*

"It is submitted that the wording of the Article, as drafted, is faulty. The person is apparently to be found 'guilty' of the crime before he is delivered up for trial by the international tribunal. It is suggested that a better wording would be a text reading somewhat as follows (numbered article VIII):

"Each High Contracting Party pledges itself to commit to such permanent or *ad hoc* international penal tribunal as is established pursuant to article VII, persons charged with offences under this Convention in the following cases:

"1. Where the High Contracting Party is unwilling itself to try such alleged offenders, be they nationals or non-nationals, in conformity with article V, or to grant their extradition in conformity with article VI.

"2. Where the alleged acts have been committed by individuals acting as organs of the State or with its support or toleration.

"The provisions of the present Convention shall not prejudice such jurisdiction as may be conferred upon the permanent international penal tribunal herein referred to."

"The final paragraph of this proposed article recognizes that it is desirable that the jurisdiction of the contemplated permanent international penal tribunal should not be prejudiced by provisions of the present Convention."

*2. Haiti*

"If none but the contracting parties are to report genocide committed by or in complicity with one of them, the normal development of the Organization may be seriously prejudiced and the final establishment of international peace materially endangered.

"It is proposed to add the following paragraph to the two at present contained in this article:

"In both cases, in addition to the State on whose territory acts of genocide have been committed, any one of the High Contracting Parties or the Secretary-General acting on his own initiative, or in the name of members of the human group victims of such acts, may report the authors of such acts to the Economic and Social Council or the Security Council."

### 3. *Venezuela*

"The whole system envisaged for the establishment of international justice in regard to genocide also appears to be imbued with the same spirit, which seems clearly inconsistent with the principle laid down in paragraph 7 of Article 2 of the United Nations Charter."

### 4. *Netherlands*

See under article X.

## ARTICLE X

Two drafts are submitted (by the Secretariat) for this section:

*First draft.* The court of criminal jurisdiction under article IX shall be the International Court having jurisdiction in all matters connected with international crimes.

*Second draft.* An international court shall be set up to try crimes of genocide (*vide annexes*).

### *Comments by Governments*

#### 1. *United States of America*

"The provisions contained in the respective annexes with reference to the subject of conferring on an international tribunal jurisdiction 'in all matters connected with international crimes,' or jurisdiction 'to try crimes of genocide' are extremely detailed. The task of drafting such a convention at least equals that of drafting a convention on genocide. That task should be undertaken as a task separate and apart from the drafting of a convention on genocide. The report of the Committee on the Progressive Development of International Law and its Codification draws attention to the possible desirability of an international penal authority. Moreover, the attachment of such a convention to the instant agreement might well provoke such controversy as to cause the failure of adoption of the convention on genocide. For these reasons, the position is taken that it would be preferable to provide for the establishment of *ad hoc* tribunals to be superseded by a permanent international penal tribunal with appropriate jurisdiction at such time as this may be possible. That this is feasible, is demonstrated by the fact that the Nürnberg Tribunal was an *ad hoc* tribunal. While it would probably have been preferable for the nations to have had a previously established international penal tribunal to which those cases could have been referred, it is submitted that the problem of the institution of such a tribunal, competent to try international crimes generally, is of such a magnitude as to necessitate a separate project, having the most careful consideration, and inviting the largest number of States possible to become party thereto.

"So far as the establishment of a permanent international penal tribunal is concerned, consideration should be given in the first instance to the subject by the proposed International Law Commission. The International Law Commission might well give consideration, in this connexion, to the possible desirability of providing for injunctive relief and also of providing for recovery of damages on behalf of the victims or survivors of acts made unlawful by the present Convention.

"It is therefore suggested that an article be included in the Convention, reading somewhat as follows (article VII) :

"The High Contracting Parties agree to take steps, through negotiation or otherwise, looking to the establishment of a permanent international penal tribunal, having jurisdiction to deal with offences under this Convention. Pending the establishment of such tribunal, and whenever a majority of the States party to this Convention agree that the jurisdiction under article VIII has been or should be invoked, they shall establish by agreement an *ad hoc* tribunal to deal with any such case or cases.

"Such an *ad hoc* tribunal shall be provided with the necessary authority to indict, to try, and to sentence persons or groups who shall be subject to its jurisdiction, and to summon witnesses and demand production of papers and documents, and shall be provided with such other authority as may be needed for the conduct of a fair trial and the punishment of the guilty."

## 2. *Haiti*

"The Government of Haiti favours the first draft in order to avoid the difficulties inherent in the constitution of provisional tribunals. It also considers that the International Court of Justice should have jurisdiction in all matters connected with international crimes or coming within the scope of international law."

## 3. *Venezuela*

"Nevertheless, the jurists' impression of the United Nations draft is that it goes beyond the General Assembly's resolution of 11 December 1946. The Assembly affirmed that genocide is a crime under international law: invited the Member States to enact the necessary legislation for its prevention and punishment, and confined itself to recommending that international co-operation be organized for this purpose. It therefore appears that the spirit of this resolution was to ensure that Members should prevent and punish the hateful acts that constitute genocide and establish a principle of international co-operation with this object in view, without demanding from Members a grave sacrifice of their sovereignty and a surrender of the criminal jurisdiction they exercise in their territory. The drafts of the Secretariat, on the other hand, appear to involve a partial surrender of these traditional principles of national and international law in favour of the establishment of an international repressive jurisdiction which may result in serious danger to Members and wound national feelings that are still over-sensitive. In the course of time, it is probable that future solutions of this type will be found; but they may be premature in the present phase of international life and politics and liable to cause friction, differences and disputes between States, which might be more dangerous to the cause of common peace and harmony than the very crimes which it is intended to suppress . . .

"The establishment of international criminal jurisdiction to deal with these cases seems to be a step that should be reserved for the future, when the circumstances of international life are more favourable and the spirit of international co-operation in the legal sphere has, as is to be hoped, made further progress."

#### 4. *Netherlands*

"With regard to the trial of persons guilty of genocide the Netherlands Government, although accepting national jurisdiction as primary principle, agrees with the idea of international penal jurisdiction, especially for those cases where the authorities themselves have perpetrated the crime, national jurisdiction therefore being excluded. The Netherlands Government would prefer to confer jurisdiction in this field upon the International Court of Justice, which will, however, only be possible after amendment of the Court's Statute. The Netherlands Government would prefer this solution to the creation of a special judicial administration for genocide or to the creation of a tribunal for each separate case. If it should prove possible for the convention on the crime of genocide to materialize before the power of international jurisdiction could be conferred upon the International Court of Justice, then a temporary *ad hoc* jurisdiction might be created as proposed by the United States Government. If this supposition should come true, the decision about the character and the amount of the indemnity to be awarded to victims of genocide and the surviving members of their group could be entrusted to the International Court."

#### 14. Extract from report and draft convention prepared by the *Ad Hoc Committee on Genocide (E/794)*

##### ARTICLE VII

##### *(Jurisdiction)*

Persons charged with genocide or any of the other acts enumerated in article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.

##### *Observations*

Several problems were solved directly or indirectly by this article which deals with repression by national courts and by an international court.

##### A. *Repression by national courts*

All members of the Committee agreed to recognize the jurisdiction of the courts of the State on the territory of which the offence was committed.

The first part of the article, up to ". . . in the territory of which the offence was committed . . ." was voted by all *seven members of the Committee*.

##### B. *Repression by an international court*

The establishment of international jurisdiction gave rise to a lengthy discussion.

For some representatives the granting of jurisdiction to an international court was an essential element of the convention. They claimed that in almost every serious case of genocide it would be impossible to rely on the courts of the States where genocide had been committed to exercise

effective repression because the Government itself would have been guilty, unless it had been, in fact, powerless. The principle of universal repression having been set aside for the reasons indicated below the absence of an international court would result in fact in impunity for the offenders. The supporters of an international court merely requested that the international jurisdiction be expressly provided for by the convention without the latter setting up the actual organization of the court.

The members opposing this proposal first declared that the intervention of an international court would defeat the principle of the sovereignty of the State because this court would be substituted for a national court.

Secondly, they claimed that mere reference in the convention to an international court would have no practical value. What would this court be? There is for the moment no international court with criminal jurisdiction. It would be necessary either to create a new court or to add a new criminal chamber to the International Court of Justice and all the members of the Committee had agreed that they had neither the authority nor the time necessary for settling these problems.

During the discussion of principles, the Committee adopted by *four votes* (China, France, Lebanon, United States of America) *against two* (Poland, Union of Soviet Socialist Republics) with *one abstention* (Venezuela), the principle of an international criminal jurisdiction (eighth meeting, Tuesday, 13 April 1948).

The Committee voted by *four votes* (China, France, Lebanon, United States of America) *against three* (twentieth meeting, Monday 26 April 1948) the final provision of article VII "or by a competent international tribunal".

The United States representative proposed the following additional paragraph to article VII:

"Assumption of jurisdiction by the international tribunal shall be subject to a finding by the tribunal that the State in which the crime was committed has failed to take adequate measures to punish the crime."

The Committee decided by *four votes and three abstentions* in favour of this principle (eighth meeting, Tuesday, 13 April 1948).

However, the inclusion of this principle in the convention was rejected by *five votes against one* (United States of America) with *one abstention* (Union of Soviet Socialist Republics) on the ground that the inclusion of this paragraph in the convention might prejudice the question of the court's jurisdiction.

The article as a whole was voted by *four votes to three*.

The representatives of Poland,<sup>1</sup> of the Union of Soviet Socialist

<sup>1</sup> Declaration of the representative of Poland (concerning articles VII and X):

"The inclusion in the Convention of the principle of an international criminal tribunal constitutes an obligation of the parties to this Convention, the contents of which are wholly unknown to them.

"The creation of an international criminal court whose jurisdiction could only be compulsory and not optional, is contrary to the principles on which the International Court of Justice and its Statute are based."

Republics<sup>1</sup> and of Venezuela<sup>2</sup> respectively, made declarations with regard to their negative vote.

### REJECTED PROPOSAL

#### *The Principle of Universal Repression*

The principle of universal repression by a national court in respect to individuals who had committed genocide abroad was discussed when the Committee considered the fundamental principles of the convention.

Those in favour of the principle of universal repression held that genocide would be committed mostly by the State authorities themselves or that these authorities would have aided and abetted the crime. Obviously in this case the national courts of that State would not enforce repression of genocide. Therefore, whenever the authorities of another State had occasion to arrest the offenders they should turn them over to their own courts. The supporters of the principle of universal repression added that, since genocide was a crime in international law, it was natural to apply the principle of universal repression. They quoted conventions on the repression of international offences such as traffic in women and children, counterfeiting currency, etc.

The opposite view held that universal repression was against the traditional principles of international law and that permitting the courts of one State to punish crimes committed abroad by foreigners was against the sovereignty of the State. They added that, as genocide generally implied the responsibility of the State on the territory of which it was committed, the principle of universal repression would lead national courts to judge the acts of foreign Governments. Dangerous international tension might result.

A member of the Committee, while he agreed that the right to prosecute should not be left exclusively to the courts of the country where genocide had been committed, declared himself opposed to the principle of universal repression in the case of genocide. It is a fact, he said, that the courts of the various countries of the world do not offer the same guarantee. Moreover, genocide is distinguished from other crimes under international conventions (traffic in women, traffic in narcotic drugs, counterfeiting

<sup>1</sup> Declaration of the representative of the Union of Soviet Socialist Republics:

"The representative of the Union of Soviet Socialist Republics considers that the decision of a majority of the Committee to place cases of genocide under the jurisdiction of a competent international court is wrong, since the establishment of an international court would constitute intervention in the internal affairs of States and a violation of their sovereignty, an important element of which is the right to try all crimes without exception, committed in the territory of the State concerned.

"The representative of the Union of Soviet Socialist Republics considers that article VII of the convention should be drafted as follows:

"The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, the case to be heard by the national courts in accordance with the domestic legislation of the country."

<sup>2</sup> Declaration of the representative of Venezuela:

"The representative of Venezuela has opposed the inclusion in article VII of the sentence 'or by a competent international tribunal', because he considered that therein was a vague allusion to a possible international jurisdiction the constitutive elements of which are not known to the signatories of the Convention. He has made a similar objection to the sentence 'by a competent international criminal tribunal', contained in article X."

currency) by the fact that, though in itself it is not a political crime, as stated in article IX of the draft convention, it nevertheless has or may have political implications. Therefore, there is a danger that the principle of universal repression might lead national courts to exercise a biased and arbitrary authority over foreigners. This representative therefore proposed that jurisdiction be given to an international court to which States would surrender the authors of genocide committed abroad whom they had arrested and whom they would be unwilling to extradite.

The principle of universal repression was rejected by the Committee by *four votes* (among which were France, the United States of America and the Union of Soviet Socialist Republics) *against two with one abstention* (eighth meeting, Tuesday, 13 April 1948).

During the discussion of article VII the proposal to reverse the foregoing decision was rejected by *four votes against two with one abstention* (twenty-second meeting, Monday, 26 April 1948).

### **15. Draft convention on genocide submitted to the Sixth Committee by the French delegation<sup>1</sup>**

#### ARTICLE 1

The crime against humanity known as genocide is an attack on the life of a human group or of an individual as a member of such group, particularly by reason of his nationality, race, religion or opinions,

Which is committed, encouraged or tolerated by the rulers of a State.

It may be committed and punished in times of war or peace.

Its authors or their accomplices shall be responsible before international justice.

#### ARTICLE 2

Any attempt, provocation or instigation to commit genocide is also a crime.

#### ARTICLE 3

Genocide shall be punished by the International Criminal Court.

#### ARTICLE 4

The International Criminal Court shall sit at The Hague.

Its composition and the status of its judges are the subject of an annex to the present draft.<sup>1</sup>

#### ARTICLE 5

The International Criminal Court shall include an International Prosecutor's Office with its seat at The Hague and remaining in permanent contact with the organs of the United Nations:

General Assembly, Security Council, Economic and Social Council, Secretariat.

<sup>1</sup>Originally issued as A/C.6/211.

The composition of this International Prosecutor's Office and the status of its members are defined in an annex to the present draft.<sup>1</sup>

#### ARTICLE 6

All indictments shall be addressed to the International Prosecutor's Office.

Before the opening of legal proceedings, an inquiry shall be ordered by the International Prosecutor's Office, which shall be fully empowered to name those conducting the inquiry, to determine its procedure and to ensure, in the absence of a contrary decision, the secrecy of its meetings.

According to the findings of the inquiry and in the absence of guarantees or agreements, the International Prosecutor's Office shall open proceedings before one or more judge-rapporteurs, appointed by the Court from amongst its members, who shall preside over an investigation to be conducted in the presence of the State whose rulers or nationals are implicated.

In the absence of a contrary decision by the judge-rapporteur or rapporteurs, the investigation shall be held in secret.

#### ARTICLE 7

According to the conclusions of the investigation, and in the absence of guarantees or agreement, the dossier shall be passed to the Court by the judge-rapporteur or rapporteurs, who may not themselves pronounce judgment.

In the absence of a contrary decision by the Court, the proceedings before the Court shall be public.

Before passing any sentence, the Court may, particularly in cases where the proceedings have gone by default, make an informal or official recommendation to the State whose rulers or nationals are accused.

The Court shall pronounce judgment in public. Judgment may include a penal sentence on the authors and accomplices, and, where appropriate provision for reparations to the victims, whose safety the Court shall be empowered to secure in advance and at any stage of the proceedings, in cases of necessity and urgency, by means of conservatory measures.

#### ARTICLE 8

Each Member of the United Nations signatory to the present Convention undertakes to comply with the decisions of the International Criminal Court.

#### ARTICLE 9

Cases of non-compliance with the award may be brought before the Security Council by any Member of the United Nations and the Council may make recommendations or decide on the measures to be taken to ensure the execution of the judgment.

<sup>1</sup> This annex was not submitted to the Sixth Committee.

## ARTICLE 10

Any action calculated to impede the execution of the judgment may be considered as an act of aggression under Article 51 of the Charter.

## ARTICLE 11

The present Convention shall be ratified by the signatory States in conformity with their respective constitutional procedures. Ratifications shall be deposited with the Secretary-General of the United Nations.

## ARTICLE 12

The present Convention shall come into force on the day following the receipt by the Secretary-General of at least . . . ratifications.

## ARTICLE 13

Any Member of the United Nations may accede to the present Convention.

## ARTICLE 14

States ratifying the present Convention after its entry into force shall be bound by its provisions as from the date on which they deposit their respective ratifications.