

REPORT OF ROBERT H. JACKSON
UNITED STATES REPRESENTATIVE

TO THE
International
Conference on
Military Trials

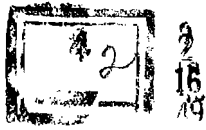
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LONDON, 1945,

*Representative from the
United States*



A documentary record of negotiations of the Representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal.

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LETTER OF TRANSMITTAL

The Honorable
The Secretary of State

SIR:

I have the honor to submit a record of negotiations which I conducted as Representative of the United States at the London Conference, held June 26 to August 8, 1945, at which representatives of the United Kingdom, the Provisional Government of France, the Union of Soviet Socialist Republics, and the United States made formal statement of the principles of substantive law and agreed upon methods of procedure for the prosecution and trial of the major European war criminals.

Those who engage in future efforts to codify international law or conduct trials, hearings, or arbitrations on an international level may find the origins, evolution, and background of this agreement instructive. Students of comparative law, as well as the legal profession, will find both the conflicts and harmonies between legal systems disclosed by those negotiations of interest.

It has therefore seemed fitting to assemble and lay before you a comprehensive report, including not only the deliberations of the Conference but all preliminary negotiations, drafts, and documents necessary to an understanding of the initiation and development of the agreement of London and the annexed charter of the International Military Tribunal, without an understanding of which an appraisal of the Nürnberg trial would be difficult.

Very truly yours,

ROBERT H. JACKSON

Associate Justice of the United States Supreme Court

WASHINGTON, D.C.

December 15, 1947

P R E F A C E

THE decision of the Department of State to publish the record of negotiations resulting in the London agreement of August 8, 1945, for the trial of major European war criminals and the accompanying charter of the International Military Tribunal makes appropriate some introductory information to help the reader integrate the separate documents and discussions into a general plan.

The United States, at the close of World War II, found itself in possession of high-ranking prisoners. Many of them had been publicly branded with personal blame for precipitating the war and for incitement or perpetration of acts of barbarism in connection with its preparation and conduct. This country, through President Franklin D. Roosevelt, had joined in rather definite commitments to bring such men to justice, but no treaty, precedent, or custom determined by what method justice should be done. The latter problem seems to have been given little consideration by any of the Allied governments until discussion of possible procedures was initiated early in 1945 at the Yalta Conference. Thereafter, as the documents set forth herein show, the United States proposal was expanded and refined into a draft of a proposed agreement which the United States submitted to the Foreign Ministers of France, Great Britain, and the Union of Soviet Socialist Republics at the San Francisco Conference. This American draft was again revised and on June 14 was resubmitted to the other governments. On June 26 representatives of the four nations met in London to chart a common course of action.

The four nations whose delegates sat down at London to reconcile their conflicting views represented the maximum divergence in legal concepts and traditions likely to be found among occidental nations. Great Britain and the United States, of course, are known as common-law countries and, with some variations between their procedures, they together exemplify the system of law peculiar to English-speaking peoples. On the other hand, France and the Soviet Union both use variations of what generally may be called the Continental system. But between French and Soviet practice there are significant variations, occasioned perhaps by the different derivations of the two systems, the French having its roots in Roman law of the Western Empire and the Russian having been influenced by Roman ideas chiefly from the Eastern Empire by way of Byzantium. It was to be ex-

pected that differences in origin, tradition, and philosophy among these legal systems would beget different approaches to the novel task of dealing with war criminals through the judicial process.

A fundamental cleavage, which persisted throughout the negotiations, was caused by the difference between the Soviet practice, under which a judicial inquiry is carried on chiefly by the court and not by the parties, and the Anglo-American theory of a criminal trial, which the Soviet jurist rejects and stigmatizes as the "contest theory". The Soviets rely on the diligence of the tribunal rather than on the zeal and self-interest of adversaries to develop the facts. Another fundamental opposition concerns the function of a judiciary. The Soviet views a court as "one of the organs of government power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests". It is not strange that those trained in that view should find it difficult to accept or to understand the Anglo-American idea of a court as an independent agency responsible only before the law. It will not be difficult to trace in the deliberations of the Conference the influence of these antagonistic concepts. While the Soviet authorities accept the reality and binding force of international law in general, they do not submit themselves to the general mass of customary law deduced from the practice of western states. With dissimilar backgrounds in both penal law and international law it is less surprising that clashes developed at the Conference than that they could be reconciled.

That these discords were stubborn and deep, the minutes of the conferences adequately disclose. They do not and cannot disclose all the efforts at conciliation, for there were many personal conversations between members of differing delegations, outside the formal meetings, which aimed to gain knowledge of each other's viewpoints and clear up misunderstandings. Since the press was not admitted to the conferences there was no public exploitation of our divergencies and no temptation to differ merely for reasons of home politics; indeed, in no delegation was there any disposition to do so.

Much of these conference minutes will impress the reader as embodying vain repetition. And much of the exposition of rival legal systems is too cryptic and general to be satisfying to the student of comparative law. How much of the obvious difficulty in reaching a real meeting of minds was due to the barrier of language and how much to underlying differences in juristic principles and concepts was not always easy to estimate. But when difference was evident, from whatever source, we insisted with tedious perseverance that it be reconciled as far as possible in the closed conferences and not be glossed over only to flare up again in the public trials.

On some points, however, no agreement was reached. An example is the oft-repeated American proposal to include in the charter a definition of "aggression", which was one of the most controversial crimes dealt with. This omission may well be regarded as a defect, at least in theory, in the charter. In practice it had no harmful consequences, largely because the evidence of Hitler's own conferences with his High Command showed the attacks which began with Poland to be so blatantly aggressive by any permissible definition that almost no denial of the aggressive character of the war was heard at the trial, and some of the defendants even characterized it as such.

Much of the Conference was given to discussion of the American proposal for a procedure whereby the Tribunal in the main trial would declare certain Nazi organizations to be criminal as a basis for reaching the members in later trials of individuals at which the Tribunal's finding as to the criminal character of the organizations would be conclusive of that question. This was one of the essential features of the Yalta proposal put forth by Secretary of State Edward R. Stettinius, Jr., Secretary of War Henry L. Stimson, and Attorney General Francis J. Biddle. No other plan had been devised for reaching the multitudes who, as members of such organizations as the Gestapo and SS, promoted and executed the Nazi criminal program. At the time of the London Conference it was not known what, if any, steps the Allied Control Council would take to deal with these organizations. Therefore, this plan seemed to have an importance which somewhat diminished as the denazification program unfolded after the Nürnberg trial began.

Another point on which there was a significant difference of viewpoint concerned the principles of conspiracy as developed in Anglo-American law, which are not fully followed nor always well regarded by Continental jurists. Continental law recognizes the criminality of aiding and abetting but not all the aspects of the crime of conspiracy as we know it. But the French and Soviet Delegations agreed to its inclusion as appropriate to the kind of offenses the charter was designed to deal with. However, the language which expressed this agreement seems not to have conveyed to the minds of the judges the intention clearly expressed by the framers of the charter in conference, for, while the legal concept of conspiracy was accepted by the Tribunal, it was given a very limited construction in the judgment.

The most serious disagreement, and one on which the United States declined to recede from its position even if it meant the failure of the Conference, concerned the definition of crimes. The Soviet Delegation proposed and until the last meeting pressed a definition which, in our view, had the effect of declaring certain acts crimes only when com-

mitted by the Nazis. The United States contended that the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen of any nation guilty of the proscribed conduct. At the final meeting the Soviet qualifications were dropped and agreement was reached on a generic definition acceptable to all.

The agreement and charter of London, as finally signed by representatives of the four conferring powers on August 8, 1945, has been formally adhered to by 19 additional nations: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia. The principles of the charter thus constitute the solemn judgment of 23 governments representing some 900 million people. In addition, the principles of the Nürnberg trial have been given general approval by the General Assembly of the United Nations.

The principles of the charter, no less than its wide acceptance, establish its significance as a step in the evolution of a law-governed society of nations. The charter is something of a landmark, both as a substantive code defining crimes against the international community and also as an instrument establishing a procedure for prosecution and trial of such crimes before an international court. It carries the conception of crime against the society of nations far beyond its former state and to a point which probably will not be exceeded, either through revision in principle or through restatement, in the foreseeable future. There is debate as to whether its provisions introduce innovations or whether they merely make explicit and unambiguous what was previously implicit in international law. But whether the London Conference merely codified existing but inchoate principles of law, or whether it originated new doctrine, the charter, followed by the international trial, conviction, and punishment of the German leaders at Nürnberg, marks a transition in international law which calls for a full exposition of the negotiations which brought it forth.

Three broad categories of acts are defined as criminal in this code. The first, *crimes against peace*, consists of planning, preparing, initiating, or waging a war of aggression or a war in violation of international undertakings, or participating in a common plan or conspiracy to accomplish any of the foregoing acts. The second category, *war crimes*, embraces violations of the laws and customs of land and sea warfare, including plunder, wanton destruction, and all forms of mistreatment of inhabitants of occupied territories and prisoners of war. The third class of offenses, *crimes against humanity*, consists of murder, extermination, enslavement, deportation, and other inhumane

acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with crimes against peace or war crimes, whether or not in violation of domestic law of the country where perpetrated. The most significant results of applying these definitions as the law of nations are to outlaw wars of aggression and to lift to the level of an international offense the persecution of minorities for the purpose of clearing the road to war.

The charter also enacts the principle that individuals rather than states are responsible for criminal violations of international law and applies to such lawbreakers the principle of conspiracy by which one who joins in a common plan to commit crime becomes responsible for the acts of any other conspirator in executing the plan. In prohibiting the plea of "acts of state" as freeing defendants from legal responsibility, the charter refuses to recognize the immunity once enjoyed by criminal statesmanship. Finally, the charter provides that orders of a superior authority shall not free a defendant from responsibility, though they may be considered in mitigation of punishment if justice so requires. The codification of these principles and their adoption by so many nations would seem to close the chapter on that era when all wars were regarded as legally permissible even though morally reprehensible. It ushers international law into a new era where it is in accord with the common sense of mankind that a war of deliberate and unprovoked attack deserves universal condemnation and its authors condign penalties. It is quite evident that the law of the charter pierces national sovereignty and presupposes that statesmen of the several states have a responsibility for international peace and order, as well as responsibilities to their own states. It would be idle to deny that this concept carries far-reaching implications.

Nor will the ultimate influence of this doctrine of international responsibility depend on its merits alone. If the nations which command the great physical forces of the world want the society of nations to be governed by law, these principles may contribute to that end. If those who have the power of decision revert to the concept of unlimited and irresponsible sovereignty, neither this nor any charter will save the world from international lawlessness.

But if the ultimate influence of the charter's substantive law provisions will have to await the verdict of time, the significance of the charter as a procedural document has already been proved. The international trial procedure established in the charter was subjected to a practical test at Nürnberg. It won vindication when a long trial of complex issues, carried on jointly by lawyers of five nations, proceeded with a surprising absence of friction and controversy over procedure.

The significance of the charter's procedural provisions is emphasized by the fact that they represent the first tried and successful effort by lawyers from nations having profoundly different legal systems, philosophies, and traditions to amalgamate their ideas of fair procedure so as to permit a joint inquiry of judicial character into criminal charges. Legal systems exhibit disparities in their methods of procedure greater than in the principles of law they serve. Members of the legal profession acquire a rather emotional attachment to forms and customs to which they are accustomed and frequently entertain a passionate conviction that no unfamiliar procedure can be morally right. It has often been thought that because of these deep-seated differences of procedure the use of the judicial process by and among the community of nations is inherently limited. That these differences present grave difficulties in so adapting the judicial process, the minutes of these conferences amply attest. That the conference was able to reconcile these divergencies and prescribe on paper a procedure acceptable to all four nations was gratifying evidence that our fundamental concepts of fair procedure are not in hopeless conflict. That these paper provisions could be made to work in actual practice demonstrated that we had not achieved theoretical reconciliations in disregard of practical considerations. Hope for an effective world government, even of limited powers, has largely been predicated on internationalizing the processes of legislation and administration. It will also require equivalent internationalizing of the judicial process. The success of this multipartite effort in using trial procedures to find facts and to apply law offers grounds for the belief that the nations can employ the processes of judicial hearing more widely than has been done in the past when there is a will to do so.

It was recognized at the outset as fundamental that, whatever other criticisms might be made of any international trial, it would be fatal to its acceptance if the defendants were not provided with a full and fair opportunity to defend themselves on every charge. The only problem was that a procedure that is acceptable as a fair trial in countries accustomed to the Continental system of law may not be regarded as a fair trial in common-law countries. What is even harder for Americans to recognize is that trials which we regard as fair and just may be regarded in Continental countries as not only inadequate to protect society but also as inadequate to protect the accused individual. However, features of both systems were amalgamated to safeguard both the rights of the defendants and the interests of society.

While it obviously was indispensable to provide for an expeditious hearing of the issues, for prevention of all attempts at unreasonable delay and for elimination of every kind of irrelevancy, these necessary

measures were balanced by other provisions which assured to the defendants the fundamentals of procedural "due process of law." Although this famous phrase of the American Constitution bears an occasionally unfamiliar implication abroad, the Continental countries joined us in enacting its essence—guaranties securing the defendants every reasonable opportunity to make a full and free defense. Thus the charter gives the defendant the right to counsel, to present evidence, and to cross-examine prosecution witnesses. It requires the indictment to include full particulars specifying the charges in detail—more fully than in our own practice. It gives the defendant the right to make any explanation relevant to the charge against him and to have all proceedings conducted in or translated into his own language.

At least one of the procedural divergencies among the conferring nations worked to the advantage of defendants. The Anglo-American system gives a defendant the right, which the Continental system usually does not grant, to give evidence in his own behalf under oath. However, Continental procedure allows a defendant the right, not accorded him under our practice, to make a final unsworn statement to the tribunal at the conclusion of all testimony and after summation by lawyers for both sides without subjecting himself to cross-examination. The charter resolved these differences by giving defendants both privileges, permitting them not only to testify in their own defense but also to make the final statement to the court.

Another feature of the charter is its simplification of evidentiary requirements. The peculiar and technical rules of evidence developed under the common-law system of jury trials to prevent the jury from being influenced by improper evidence constitute a complex and artificial science to the minds of Continental lawyers, whose trials usually are conducted before judges and do not accord the jury the high place it occupies in our system. We saw no occasion at the London Conference to insist upon jury rules for a trial where no jury would be used. Accordingly, the charter adopted the principle that the Tribunal should admit any evidence which it deemed to have probative value and should not be bound by technical rules of evidence. While this left a large and somewhat unpredictable discretion to the Tribunal, it enabled both prosecution and defense to select their evidence on the basis of what it was worth as proof rather than whether it complied with some technical requirement. The record of the trial would seem to vindicate the use of this principle.

Acknowledgment is due of the indispensable contributions made by conferees representing other nations to the difficult task of reconciling conflicts in legal concepts and procedures. Judge Robert Falco of the Cour de Cassation, the highest court of France, and Professor

André Gros, a distinguished scholar of French jurisprudence and international law, were eminently qualified to expound their own practice. The Soviet Union's representatives, General I. T. Nikitchenko, vice president of the Soviet Supreme Court and presiding officer of its criminal division, and Professor A. N. Trainin, author and teacher in fields of Soviet and international law, were authoritative exponents of Soviet legal practice and philosophy. At the beginning and during the greater part of the Conference Great Britain's chief representative, aided by an able staff, was the Attorney-General, Sir David Maxwell Fyfe. After the Churchill government was superseded, the final work of the Conference was conducted for the United Kingdom by the new Lord Chancellor, William Viscount Jowitt of Stevenage. The success of the negotiations was due no less to the patience and good will of these eminent lawyers than to their learning and vision.

Acknowledgment also is due to the contributions of members of the American staff, in addition to those whose names appear in the proceedings, who are too numerous to be here delivered from willing anonymity but who gave not only wise counsel but tireless support, whether with research, drafting, typing, or any of the other drudgery that sustains an effort of this kind.

The conference deliberations were stenographically recorded by Mrs. Elsie L. Douglas, whose minutes and notes constitute the core of this record; and she, together with Miss Alma Soller, has borne the chief burden of preparing these records for publication.

These negotiations are not offered for consideration in any hope that this or any other codification of international criminal law will be enough to prevent future aggressions when the stakes are so high that men will risk any sanction if they think their armadas will prevail. But all who have shared in this work have been united and inspired in the belief that at long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right. And we are encouraged to believe that the achievement of this accord with representatives of the legal systems of continental Europe, from whose legal thought our profession has remained insulated, both because of the barriers of language and because of our nonparticipation in some of the international endeavors of the century, will do something toward overcoming our jurisprudential isolationism.

ROBERT H. JACKSON

WASHINGTON, D.C.

December 29, 1947

FOREWORD

SOME explanation concerning the minutes and documents of the London Conference for the establishment of the International Military Tribunal seems fitting.

The minutes set forth herein are transcriptions of my stenographic notes of what was spoken in English at all sessions except a preliminary one on the morning of June 26. The exact text of all statements by the Soviet Delegation and of many by members of the French Delegation is that of an interpreter, but in each instance in the minutes it is attributed to the person whose statements were being interpreted. Preliminary exchanges before taking up the business of the day and matters of transient interest, such as discussion of the time to which adjournment should be taken, were not recorded.

The Conference was informal throughout, and its sessions were private. It took place around a large square table, each nation's delegation being allotted one side. There were no prepared speeches, and the Conference took the form of general conversations in which sometimes a gesture or a nod of the head took the place of spoken words.

As the conferences were immediately followed, or in fact overlapped, by preparations for the Nürnberg trial, it was not possible at once to transcribe these notes, except such as were needed in the course of negotiation. The minutes have not been submitted to the French, Soviet, or British Delegations for verification or editing. Our own editing has been done only in the interest of accuracy as to statements by all delegations and not in any effort to polish informal modes of expression.

As the conversations make frequent reference to documents before the Conference, they would be scarcely intelligible if the documents were not also before the reader. The general rule has been to include only documents that were circulated among the delegations and to include all documents that were so circulated, regardless of which delegation originated them. It has not been thought advisable to reproduce the many and repetitious writings that did not get beyond the stage of being working papers of the American staff. Certain preliminary documents formed the background of the meeting. Although some of them, such as the Cabinet memorandum for President Roosevelt's guidance at Yalta in June 1945, and Mr. Justice Jackson's report were American rather than international documents, their

influence in initiating and shaping the negotiations seems to require their inclusion.

In general, the documents are arranged in chronological order. Documents developed and distributed during the Conference are set forth at the place considered most convenient for the reader, generally preceding the minutes of the meeting in which they were discussed. Such documents as are included are set out in full unless otherwise noted.

From time to time certain events outside of the Conference entered into or influenced discussion or action in the meetings. Brief notes are inserted to supplement the information in the record on such events. Notes also are supplied where it has seemed necessary to show the relation of a particular document to the course of negotiation.

ELSIE L. DOUGLAS
Secretary to Mr. Justice Jackson

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INTERNATIONAL CONFERENCE
ON MILITARY TRIALS

London, 1945

I. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945

Note: While Justice Jackson was considering acceptance of the designation to represent the United States, the following memorandum was furnished to him as a statement of the position already taken by the Government. It had been prepared to guide President Roosevelt when he attended the Yalta Conference. For early planning which it embodies see Henry L. Stimson, *On Active Service in Peace and War*, New York, 1948, vol. II, p. 584; Murray C. Bernays, "Legal Basis of the Nürnberg Trials", *Survey Graphic*, Jan. 1946, vol. 35, p. 4; and Robert H. Jackson, *The Nürnberg Case*, New York, 1947, p. v. At Yalta no action was taken other than an agreement for later consideration by the governments there represented.

The memorandum is initialed by H.L.S.—Henry L. Stimson, Secretary of War; E.S.—Edward R. Stettinius, Jr., Secretary of State; and F.B.—Francis Biddle, Attorney General. It formed the groundwork of the later drafts submitted by the United States for an international agreement.

This is sometimes referred to as the "Yalta memorandum" and sometimes as the "Crimean proposal."

MEMORANDUM FOR THE PRESIDENT

January 22, 1945.

Subject: Trial and Punishment of Nazi War Criminals.

This memorandum deals with ways and means for carrying out the policy regarding the trial and punishment of Nazi criminals, as established in the statements on that subject which are annexed.

I. The Moscow Declaration

In the Moscow Declaration the United Kingdom, the United States, and the Soviet Union took note of the atrocities perpetrated by the Germans and laid down the policy: (1) that those German officers and men who have been responsible for or have taken a consenting part in these atrocities "will 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 created therein"; and (2) that the above declaration "is without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."

II. United Nations War Crimes Commission

The United Nations War Crimes Commission is located in London, and consists of representatives of some fifteen of the United Nations. The Soviet Government is not a member.

This Commission has been charged with the collection of lists of the criminals referred to, the recording of the available supporting proof, and the making of recommendations as to the tribunals to try and the procedure for trying such criminals. The Commission has no investigative or prosecuting authority or personnel. It has no authority to try offenders of any kind.

The War Crimes Commission receives its lists of war criminals from the investigating authorities, if any, set up by the respective United Nations. The first unofficial meeting of the Commission was held in London on October 26, 1943, and the first official meeting was held there on January 18, 1944. Up to this time, the cases of approximately 1,000 offenders have been docketed with the Commission. The labors of the Commission have not resulted in any governmental agreement as to the tribunals to try or the procedures for trying war criminals.

The Commission has been widely and publicly criticized for the paucity of the results of its work. In recent months its activities have been marked by dissensions. The British representative, who was also Chairman of the Commission, and the Norwegian member, have resigned.

III. Scope and Dimensions of the War Crimes Problem

The crimes to be punished. The criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany, in the satellite Axis countries, and in the occupied countries of Europe. This conduct goes back at least as far as 1933, when Hitler was first appointed Chancellor of the Reich. It has been marked by mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of "total" war, its prosecution with utter and ruthless disregard for the laws and customs of war.

We are satisfied that these atrocities were perpetrated in pursuance of a premeditated criminal plan or enterprise which either contemplated or necessarily involved their commission.

The criminals to be punished. The outstanding offenders are, of course, those leaders of the Nazi Party and German Reich who since January 30, 1933, have been in control of formulating and executing Nazi policies.

In addition, the Nazi leaders created and utilized a numerous organization for carrying out the acts of oppression and terrorism which their program involved. Chief among the instrumentalities used by them are the SS, from the personnel of which the Gestapo is constituted, and the SA. These organizations consist of exactly screened volunteers who are pledged to absolute obedience. The members of these organizations are also the personnel primarily relied upon to carry on postwar guerilla and underground operations.

IV. Difficulties of an Effective War Crimes Program

Difficulties of identification and proof. The names of the chief German leaders are well known, and the proof of their guilt will not offer great difficulties. However, the crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender's identity or to connect him with the particular act charged. Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offenses one of appalling dimensions. It is evident that only a negligible minority of the offenders will be reached by attempting to try them on the basis of separate prosecutions for their individual offenses. It is not unlikely, in fact, that the Nazis have been counting on just such considerations, together with delay and war weariness, to protect them against punishment for their crimes if they lost the war.

Legal Difficulties. The attempt to punish the Nazi leaders and their associates for all of the atrocities committed by them also involves serious legal difficulties. Many of these atrocities, as noted in your statement on the subject of persecution dated 24 March 1944, were "*begun by the Nazis in the days of peace* and multiplied by them a hundred times in time of war." These pre-war atrocities are neither "war crimes" in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared

policy of the United Nations is that these crimes, too, shall be punished; and the interests of postwar security and a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.

V. Recommended Program

After Germany's unconditional surrender the United Nations could, if they elected, put to death the most notorious Nazi criminals, such as Hitler or Himmler, without trial or hearing. We do not favor this method. While it has the advantages of a sure and swift disposition, it would be violative of the most fundamental principles of justice, common to all the United Nations. This would encourage the Germans to turn these criminals into martyrs, and, in any event, only a few individuals could be reached in this way.

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.

We recommend the following:

The German leaders and the organizations employed by them, such as those referred to above (SA, SS, Gestapo), should be charged both with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about. The allegation of the criminal enterprise would be so couched as to permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the prewar atrocities and those committed against their own nationals, neutrals, and stateless persons, as well as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war. Such a charge would be firmly founded upon the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other. Under such a charge there are admissible in evidence the acts of any of the conspirators done in furtherance of the conspiracy, whether or not these acts were in themselves criminal and subject to separate prosecution as such.

The trial of this charge and the determination of the guilty parties would be carried out in two stages:

The United Nations would, in the first instance, bring before an international tribunal created by Executive Agreement, the highest ranking German leaders to a number fairly representative of the groups and organizations charged with complicity in the basic criminal plan. Adjudication would be sought not only of the guilt of those individuals physically before the court, but also of the complicity of the members of the organizations included within the charge. The court would make findings adjudicating the facts established, including the nature and purposes of the criminal plan, the identity of the groups and organizations guilty of complicity in it, and the acts committed in its execution. The court would also sentence those individual defendants physically before it who are convicted.

The above would complete the mission of this international tribunal.

Thereafter, there would be brought before occupation courts the individuals not sent back for trial under the provisions of the Moscow Declaration, and members of the organizations who are charged with complicity through such membership, but against whom there is not sufficient proof of specific atrocities. In view of the nature of the charges and the representative character of the defendants who were before the court in the first trial, the findings of that court should justly be taken to constitute a general adjudication of the criminal character of the groups and organizations referred to, binding upon all the members thereof in their subsequent trials in occupation courts. In these subsequent trials, therefore, the only necessary proof of guilt of any particular defendant would be his membership in one of those organizations. Proof would also be taken of the nature and extent of the individual's participation. The punishment of each defendant would be made appropriate to the facts of his particular case. In appropriate cases, the penalty might be imprisonment at hard labor instead of the death penalty, and the offenders could be worked in restoring the devastated areas.

Individual defendants who can be connected with specific atrocities will be tried and punished in the national courts of the countries concerned, as contemplated in the Moscow Declaration.

VI. Nature and Composition of Tribunals

We favor the trial of the prime leaders by an international military commission or military court, established by Executive Agreement of the heads of State of the interested United Nations. This would require no enabling legislation or treaty. If deemed preferable the tribunal could be established by action of the Supreme Authority (Control Council for Germany).

The court might consist of seven members, one each to be appointed

by The British Commonwealth, the United States, the Soviet Union and France, and three to be appointed by agreement among the other United Nations who become parties to the proposed procedure.

The court may consist of civilian or military personnel, or both. We would prefer a court of military personnel, as being less likely to give undue weight to technical contentions and legalistic arguments.

The subsequent trials would be had, as noted, in occupation courts; or in the national courts of the country concerned or in their own military courts; or, if desired, by international military courts.

VII. Preparation of Case

A successful prosecution of the basic charge will manifestly depend upon early, careful, and thorough compilation of the necessary evidence. This is particularly important with regard to so much of the case as involves the basic criminal plan. Success will depend, further, upon cooperative action in this regard among the interested United Nations, and the early establishment of a competent executive and technical staff to carry out the project.

In our opinion, the United Nations War Crimes Commission cannot be satisfactorily employed for this purpose, and having performed its mission, may now be dissolved.

We recommend that there be set up a full time executive group consisting of one military representative each of the British Commonwealth, the United States, the Soviet Union, and France. This group should have under it an adequate staff of attorneys and research personnel to search out the available data, analyze them, prepare the charges to conform to the proof, and arrange the evidence for presentation to the international military tribunal.

VIII. Soviet Attitude

The Soviet attitude, we believe, is indicated in the Note of M. Molotov attached hereto. The position taken therein is that the Soviet Union is ready to support all practical measures on the part of the Allied and friendly governments in bringing the Hitlerites and their accomplices to justice, and favors their trial before "the courts of the special international tribunal" and their punishment in accordance with applicable criminal law.

IX. British Attitude

In an Aide Memoire from the British Embassy to the Department of State dated October 30, 1944, the British Foreign Office indicates that it is prepared to agree and to cooperate in establishing Mixed Military Tribunals to deal with cases which for one reason or another

could not be tried in national courts. This would appear, according to the Aide Memoire, to include those cases where a person is accused of having committed war crimes against the nationals of several of the United Nations.

H.L.S.
E.S.
F.B.

Annexed

Statement by the President

[Released to the press by the White House, October 7, 1942]

On August twenty-first I said that this Government was constantly receiving information concerning the barbaric crimes being committed by the enemy against civilian populations in occupied countries, particularly on the continent of Europe. I said it was the purpose of this Government, as I knew it to be the purpose of the other United Nations, to see that when victory is won the perpetrators of these crimes shall answer for them before courts of law.

The commission of these crimes continues.

I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.

With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to cooperate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

The number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy populations. It is not the intention of this Government or of the Governments associated with us to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith.

Annexed

German Policy of Extermination of the Jewish Race

[Released to the press by the Department of State December 17, 1942]

The attention of the Belgian, Czechoslovak, Greek, Luxembourg, Netherlands, Norwegian, Polish, Soviet, United Kingdom, United States, and Yugoslav Governments and also of the French National

Committee has been drawn to numerous reports from Europe that the German authorities, not content with denying to persons of Jewish race in all the territories over which their barbarous rule has been extended the most elementary human rights, are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people in Europe. From all the occupied countries Jews are being transported in conditions of appalling horror and brutality to eastern Europe. In Poland, which has been made the principal Nazi slaughter-house, the ghettos established by the German invader are being systematically emptied of all Jews except a few highly skilled workers required for war industries. None of those taken away are ever heard of again. The able-bodied are slowly worked to death in labor camps. The infirm are left to die of exposure and starvation or are deliberately massacred in mass executions. The number of victims of these bloody cruelties is reckoned in many hundreds of thousands of entirely innocent men, women, and children.

The above-mentioned Governments and the French National Committee condemn in the strongest possible terms this bestial policy of cold-blooded extermination. They declare that such events can only strengthen the resolve of all freedom-loving peoples to overthrow the barbarous Hitlerite tyranny. They reaffirm their solemn resolution to insure that those responsible for these crimes shall not escape retribution and to press on with the necessary practical measures to this end.

78th Congress
1st Session
S. Con. Res.

Annexed
House Calendar No. 53
[Report No. 252]

IN THE HOUSE OF REPRESENTATIVES

March 11, 1943

Referred to the Committee on Foreign Affairs

March 16, 1943

Referred to the House Calendar and ordered to be printed

Concurrent Resolution

Whereas the American people view with indignation the atrocities inflicted upon the civilian population in the Nazi occupied countries, and especially the mass murder of Jewish men, women, and children; and

Whereas this policy of the Nazis has created a reign of terror, brutality, and extermination in Poland and other countries in Eastern and Central Europe: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That these brutal and indefensible outrages against million of helpless men, women, and children should be, and they are hereby, condemned as unworthy of any nation or any regime which pretends to be civilized;

Resolved further, That the dictates of humanity and honorable con-

duct in war demand that this inexcusable slaughter and mistreatment shall cease and that it is the sense of this Congress that those guilty, directly or indirectly, of these criminal acts shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible.

Passed the Senate March 9, 1943.

Attest:

EDWIN A. HALSEY,
Secretary.

Annexed

*Statement Signed by President Roosevelt, Prime Minister
Churchill and Premier Stalin Regarding Atrocities*

[Released to the press by the Department of State, November 1, 1943¹]

The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled. The brutalities of Hitlerite domination are no new thing and all peoples or territories in their grip have suffered from the worst form of Government by terror. What is new is that many of these territories are now being redeemed by the advancing armies of the liberating powers and that in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from Hitlerites, and on French and Italian territory.

Accordingly, the aforesaid three Allied Powers, speaking in the interests of the thirty-three United Nations, hereby solemnly declare and give full warning of their declaration as follows: At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will 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. Lists will be compiled in all possible detail from all these countries, having regard especially to invaded parts of the Soviet

¹The four declarations drawn up at the Conference of Foreign Ministers in Moscow Oct. 19-30, 1943, were released to the press on Nov. 1. The date, Oct. 30, appeared on one of these declarations and is frequently used with reference to the others as well. The documents in this volume which cite the Moscow declaration on atrocities sometimes refer to "the declaration of October 30" and sometimes to "the declaration issued on November 1."

Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy.

Thus, Germans who take part in wholesale shooting of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of major criminals, whose offenses have no particular geographical localization and who will be punished by joint decision of the Governments of the Allies.

Annexed

Statement by the President

[Released to the press by the White House, March 24, 1944]

The United Nations are fighting to make a world in which tyranny and aggression can not exist; a world based upon freedom, equality and justice; a world in which all persons regardless of race, color or creed may live in peace, honor and dignity.

In the meantime in most of Europe and in parts of Asia the systematic torture and murder of civilians—men, women and children—by the Nazis and the Japanese continue unabated. In areas subjugated by the aggressors innocent Poles, Czechs, Norwegians, Dutch, Danes, French, Greeks, Russians, Chinese, Filipinos—and many others—are being starved or frozen to death or murdered in cold blood in a campaign of savagery.

The slaughters of Warsaw, Lidice, Kharkov and Nanking—the brutal torture and murder by the Japanese, not only of civilians but of our own gallant American soldiers and fliers—these are startling examples of what goes on day by day, year in and year out, wherever the Nazis and the Japs are in military control—free to follow their barbaric purpose.

In one of the blackest crimes of all history—begun by the Nazis in the day of peace and multiplied by them a hundred times in time of war—the wholesale systematic murder of the Jews of Europe goes on unabated every hour. As a result of the events of the last few days

hundreds of thousands of Jews, who while living under persecution have at least found a haven from death in Hungary and the Balkans, are now threatened with annihilation as Hitler's forces descend more heavily upon these lands. That these innocent people, who have already survived a decade of Hitler's fury, should perish on the very eve of triumph over the barbarism which their persecution symbolizes, would be a major tragedy.

It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished. The United Nations have made it clear that they will pursue the guilty and deliver them up in order that Justice be done. That warning applies not only to the leaders but also to their functionaries and subordinates in Germany and in the satellite countries. All who knowingly take part in the deportation of Jews to their death in Poland or Norwegians and French to their death in Germany are equally guilty with the executioner. All who share the guilt shall share the punishment.

Hitler is committing these crimes against humanity in the name of the German people. I ask every German and every man everywhere under Nazi domination to show the world by his action that in his heart he does not share these insane criminal desires. Let him hide these pursued victims, help them to get over their borders, and do what he can to save them from the Nazi hangman. I ask him also to keep watch, and to record the evidence that will one day be used to convict the guilty.

In the meantime, and until the victory that is now assured is won, the United States will persevere in its efforts to rescue the victims of brutality of the Nazis and the Japs. In so far as the necessity of military operations permit this Government will use all means at its command to aid the escape of all intended victims of the Nazi and Jap executioner—regardless of race or religion or color. We call upon the free peoples of Europe and Asia temporarily to open their frontiers to all victims of oppression. We shall find havens of refuge for them, and we shall find the means for their maintenance and support until the tyrant is driven from their homelands and they may return.

In the name of justice and humanity let all freedom loving people rally to this righteous undertaking.

Reply by the Soviet Government²

The Soviet Government replied on October 14th, 1942, by the following Note of M. Molotov, the People's Commissar for Foreign Affairs, to the Note Verbale presented to it by the Czechoslovak Minister

²This is a reply to a *note verbale* which was not included in the memorandum to the President.

and a representative of the French National Committee on behalf of the Belgian Government, the Czechoslovak Government, the French National Committee, the Greek Government, the Luxembourg Government, the Netherlands Government, the Norwegian Government, the Polish Government and the Yugoslav Government:

(Text)

MY DEAR MINISTER,

In reply to the Note of July 23rd which I received from you and M. Garraux, I have the honour to transmit to you herewith the text of the declaration by the Soviet Government on the responsibility of the Hitlerite interlopers and their henchmen for the crimes which they have committed in the occupied countries of Europe.

The Chairman of the Council of People's Commissars of the U.S.S.R., Joseph Vissarionovich Stalin, having acquainted himself with the collective appeal from representatives of countries temporarily occupied by Hitlerite Germany, and having given a solemn warning as to the responsibility for the crimes perpetrated by the Hitlerites on the territory seized by them, instructed the People's Commissariat for Foreign Affairs, to bring the notice of the Governments of Czechoslovakia, Poland, Yugoslavia, Norway, Greece, Belgium, Holland and Luxembourg and the French National Committee the following declaration of the Soviet Government:

The Soviet Government and the entire Soviet people are imbued with feelings of fraternal solidarity and profound sympathy for the sufferings and courageous struggle of the peoples of the countries of Europe occupied by the Hitlerites.

The misery, degradation and privation inflicted on these peoples by Hitlerite tyranny is all the more understood by the peoples of the Soviet Union since the Hitlerite invaders, in the Soviet areas temporarily occupied by them, are perpetrating crimes and atrocities on a monstrous scale; mass murders of civilians, destruction of towns and villages, plunder and ruin of the population, brutal violation of women, children and the aged, enslavement of hundreds of thousands of people.

The Soviet Government once more confirms the universal and deliberate character of the bloody crimes of the Hitlerite invaders, which prove that the German Fascist Government and its accomplices, in striving to enslave the peoples of the occupied countries, to destroy their culture and debase their national dignity, have also made it their aim to carry out the direct, physical annihilation of a considerable section of the population of the territories captured by them.

The Soviet Government at the same time puts on record that neither by their methods of annihilation and crime, nor by their incitement

to internecine strife, nor by their plunder and starvation, nor by their bloody crimes have the German Fascists succeeded in breaking the will of the European peoples to struggle against the invaders for the liberation and restoration of their independent countries.

Dauntless in the face of the inevitable sacrifices which the just, liberating struggle brings in its train, and knowing neither mercy to the enemy nor to his accomplices, the patriots of the countries oppressed by the Hitlerites are making use of all available means of struggle against the invaders, including the launching of popular guerilla warfare.

The courageous fighters for the honour, freedom and independence of the peoples oppressed by the Nazis make every effort to inflict the greatest possible losses on the Hitlerite invaders and the German war machine.

They sabotage war industry and production in occupied territories, using a variety of methods—from slowing down output, and lowering the quality of the work to the calling of strikes, to mass withdrawals from production, destruction of machinery and production, diversionist acts in workshops, power stations and mines.

They sabotage the deliveries of agricultural produce to the German oppressors. They frustrate the Hitlerite measures to recruit for Germany's factories foreign workers, doomed to slave labour on the production of guns intended for use against the Allies and the oppressed peoples of Europe.

They are fighters against the violent German brigands and imperialists and strive to despoil the war supplies and raw materials of the invaders. They break down enemy communications, tear up rails, blow up bridges, derail trains, inflict damage on mercantile and naval vessels, cut telegraph and telephone wires.

They give practical aid to operations by the Allied air forces over occupied Hitlerite territory. They sabotage the measures of military and civil occupation authorities. They punish with death these guilty of organizing and carrying out Hitlerite violence and terror, as well as those traitors who give aid to the invaders.

The most substantial losses have been inflicted on the enemy in those countries where, on the lines of the great movement of people's avengers—guerillas—who are fighting against the invaders in temporarily-occupied Soviet territories, armies of patriots have fearlessly taken this path of armed struggle against the invader, such as has occurred in particular in Yugoslavia.

There is not the slightest doubt that the successful development of this glorious liberating struggle in all its forms will become one of the most important conditions making for the final defeat of the common enemy, and will bring nearer the retribution justly demanded by the representatives of the countries occupied by Hitlerite Germany.

In the note of Vyacheslav Molotov, People's Commissar for Foreign Affairs of the U.S.S.R., dated November 25th, 1941, on the abominable crimes of the German authorities against Soviet prisoners of war, and that dated January 6th, 1942, on the universal plunder and ruin of the population and the monstrous atrocities of the German authorities in Soviet territories captured by them, and that dated April 27th, 1942, on the monstrous atrocities and brutal violence of the German Fascist invaders in Soviet districts occupied by them and on the responsibility of the German Government and Military Command for these crimes, sent to all Governments with which the Soviet Union has diplomatic relations, the Soviet Government laid full responsibility for the inhuman and brigandly acts of German troops on the criminal Hitlerite Government of Germany.

It declared that the Hitlerite Government and its accomplices would not escape responsibility and deserved punishment for all the unprecedented atrocities perpetrated against the peoples of the U.S.S.R. and against all the freedom-loving countries.

The Soviet Government declared in addition, that its organs would make a detailed record of these crimes and atrocities of the Hitlerite Army, for which the outraged Soviet people justly demand and will obtain retribution.

Having received information about the monstrous atrocities perpetrated and being perpetrated by the Hitlerites, by order of the Government and military and civil authorities of Germany, on the territories of France, Czechoslovakia, Poland, Yugoslavia, Norway, Greece, Belgium, Holland and Luxembourg, and giving the widest publicity to the information received from these countries, the Soviet Government once more declares to the world its inflexible determination that the criminal Hitlerite Government and all its accomplices must and shall suffer deserved, stern punishment for the crimes perpetrated against the peoples of the Soviet Union and against all freedom-loving peoples in territories temporarily occupied by the German army and its accomplices.

The Soviet Government approves and shares the just desire expressed in the collective Note received, that those guilty of the crimes indicated shall be handed over to judicial courts and prosecuted, and that the sentence passed on them shall be put into execution.

The Soviet Government is ready to support all practical measures to this end on the part of Allied and friendly Governments, and counts upon all interested States giving each other mutual assistance in seeking out, handing over, bringing to court and passing sentence on the Hitlerites and their accomplices guilty of the organization, promotion or perpetration of crimes on occupied territory.

The Soviet Government is in agreement with the declaration of Mr. Roosevelt, President of the United States of America, made in his

speech of October 12th, on the question of punishing the Nazi leaders concretely responsible for countless acts of brutality, i. e., that the clique of leaders and their cruel accomplices must be mentioned by name, arrested and tried according to the criminal code.

The whole of mankind knows the names and bloody crimes of the leaders of the criminal Hitlerite clique: Hitler, Goering, Hess, Goebbels, Himmler, Ribbentrop, Rosenberg and other organizers of German brutalities from among the leaders of Fascist Germany.

The Soviet Government considers that, like the governments of all states defending their independence against the Hitlerite hordes, it is obliged to regard the stern punishment of the aforesaid leaders of the criminal Hitlerite clique as its immediate duty to the countless widows, orphans, relatives and friends of all those innocent people who have been brutally tortured and killed by order of the criminals named.

The Soviet Government considers it essential to hand over without delay to the courts of the special international tribunal, and to punish according to all the severity of the criminal code, any of the leaders of Fascist Germany who in the course of the war have fallen into the hands of States fighting against Hitlerite Germany.

Renewing at the present time its warning of the full weight of responsibility which the criminal Hitlerite leaders and all their accomplices bear for the monstrous atrocities perpetrated by them, the Soviet Government considers it opportune to confirm the conviction, expressed in its official declaration, that the Hitlerite Government, which recognizes only brute force, must be smashed by the all-powerful forces of the freedom-loving peoples, since the interests of the whole of mankind demand that as soon as possible the band of barefaced murderers called the government of Hitlerite Germany, shall be finished with once and for all.

Thanking you in advance, I beg you to communicate this declaration to your Government, as well as the Governments of Poland, Yugoslavia, Greece, Belgium, Norway, Holland and Luxembourg.

Please accept the assurance of my profound regard.

People's Commissar for Foreign Affairs,
V. MOLOTOV.

To M. Z. FIERLINGER,

Envoy Extraordinary and Minister Plenipotentiary of Czechoslovakia,

Kuibishev.

II. Aide-Mémoire from the United Kingdom, April 23, 1945

Note: On April 23, 1945, the following *aide-mémoire* was handed to Judge Samuel Rosenman, assistant to the President, by Sir Alexander Cadogan.

1. H.M.G. assume that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetrated or have authorized in the conduct of the war. It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with with equal severity. This is really involved in the concluding sentence of the Moscow Declaration on this subject, which reserves for the arch-criminals whose offences have no special localization treatment to be determined in due course by the Allies.

2. It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of tribunal claiming to exercise judicial functions, or whether the decision taken by the Allies should be reached and enforced without the machinery of a trial. H.M.G. thoroughly appreciate the arguments which have been advanced in favour of some form of preliminary trial. But H.M.G. are also deeply impressed with the dangers and difficulties of this course, and they wish to put before their principal Allies, in a connected form, the arguments which have led them to think that execution without trial is the preferable course.

3. The central consideration for deciding this difficult choice must, in H.M.G.'s view, be reached by asking—what is the real charge which Allied people and the world as a whole makes against Hitler? It is the totality of his offences against the international standard which civilised countries try to observe which makes him the scoundrel that he is. If he were to be indicted for these offences in the manner that is necessary for reasons of justice in a criminal court, and if his fate is to be determined on the conclusion reached by the tribunal as to the truth of this bundle of charges and the adequacy of the proof, it seems

impossible to conceive that the trial would not be exceedingly long and elaborate. He, of course, must have in such a trial all the rights properly conceded to an accused person. He must be defended, if he wishes, by counsel, and he must call any relevant evidence. According to British ideas, at any rate, his defence could not be forcibly shut down or limited because it involves a great expenditure of time. There is nothing upon which British opinion is more sensitive in the realm of criminal procedure than the suspicion that an accused person—whatever the depths of his crime—has been denied his full defence.

4. There is a further consideration which, in the view of H.M.G. needs to be very carefully weighed. If the method of public trial were adopted, the comment must be expected from the very start to be that the whole thing is a "put-up job" designed by the Allies to justify a punishment they have already resolved on. Hitler and his advisers—if they decide to take part and to challenge what is alleged—may be expected to be very much alive to any opportunity of turning the tables. Public opinion as the trial goes on is likely to weary at the length of the process. It is difficult to think that anybody would in the course of time look on Hitler as an injured man, but it is by no means unlikely that a long trial will result in a change of public feeling as to the justification of trying Hitler at all. Will not some people begin to say "The man should be shot out of hand"? And if in the complicated and novel procedure which such a trial is bound to adopt—for Russian, American and British ideas must in some way be amalgamated—the defence secured some unexpected point, is there not a danger of the trial being denounced as a farce?

5. There is a further point. Reference has been made above to Hitler's conduct leading up to the war as one of the crimes on which the Allies would rely. There should be included in this the unprovoked attacks which, since the original declaration of war, he has made on various countries. These are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law. These would, however, necessarily have to be part of the charge and if the tribunal had—as presumably they would have—to proceed according to international law, an argument, which might be a formidable argument, would be open to the accused that this part of the indictment should be struck out. It may well be thought by some that these acts ought to be regarded as crimes under international law. Under the procedure suggested this would be a matter for the tribunal, and would at any rate give the accused the opportunity of basing arguments on what has happened in the past and what has been done by various countries in declaring war which resulted in acquiring new territory, which certainly were not regarded at the time as crimes against international law.

6. H.M.G. earnestly hope that their Allies will consider the arguments set out above for they are most anxious that a very early agreement should be reached as to the method of dealing with Hitler and his chief associates, and that the method should be one in which the principal Allies concur. It would in any case be valuable if a document could now be drawn up giving the reasoned basis for the punishment of the men concerned.

III. Executive Order by President Truman, May 2, 1945

EXECUTIVE ORDER 9547: PROVIDING FOR REPRESENTATION OF THE UNITED STATES in Preparing and Prosecuting Charges of ATROCITIES AND WAR CRIMES Against the Leaders OF THE EUROPEAN AXIS POWERS and Their Principal AGENTS AND ACCESSORIES

By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, it is ordered as follows:

1. Associate Justice Robert H. Jackson is hereby designated to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal. He shall serve without additional compensation but shall receive such allowance for expenses as may be authorized by the President.

2. The Representative named herein is authorized to select and recommend to the President or to the head of any executive department, independent establishment, or other federal agency necessary personnel to assist in the performance of his duties hereunder. The head of each executive department, independent establishment, and other federal agency is hereby authorized to assist the Representative named herein in the performance of his duties hereunder and to employ such personnel and make such expenditures, within the limits of appropriations now or hereafter available for the purpose, as the Representative named herein may deem necessary to accomplish the purposes of this order, and may make available, assign, or detail for duty with the Representative named herein such members of the armed forces and other personnel as may be requested for such purposes.

3. The Representative named herein is authorized to cooperate with, and receive the assistance of, any foreign Government to the extent deemed necessary by him to accomplish the purposes of this order.

HARRY S. TRUMAN

THE WHITE HOUSE,
May 2, 1945.

IV. American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945

Note: At the time of President Roosevelt's death in April 1945, Judge Samuel Rosenman was in Europe representing the President and endeavoring to obtain agreement by the United Kingdom to proceed with the trial of war criminals in general conformity with the plan outlined in the Yalta proposal. Under President Truman's direction Judge Rosenman continued these efforts at San Francisco at the time of the United Nations Conference on International Organization. Representatives of the State, War, and Justice Departments, in conference with Justice Jackson, had reduced the proposal to a draft protocol which Judge Rosenman, accompanied by representatives of the three Departments, took to San Francisco. At San Francisco minor revisions were made of the draft and, as revised, it was delivered to Foreign Ministers Eden of the United Kingdom, Molotov of the Union of Soviet Socialist Republics, and Bidault of the Provisional Government of France. This was the first submission of a proposed agreement by the United States and was the basis on which the Foreign Ministers accepted, in principle, the plan for trial.

No action was taken at San Francisco other than informal discussions held between May 2 and May 10. These resulted in acceptance by the four Governments of the following general principles: first, trial of the major war criminals rather than political disposition; second, return of criminals whose crimes had fixed geographic localization to the countries where their crimes were committed; third, an international military tribunal to hear the cases of the major war criminals; and fourth, a committee of four representatives or chiefs of counsel to prepare and manage the prosecutions, one to represent each of the four Governments, the United Kingdom, the French Republic, the Union of Soviet Socialist Republics, and the United States. It was agreed that after the San Francisco Conference, and probably at Washington, meetings of representatives would be held to formulate definitive agreements.

The draft of the proposed protocol as submitted at San Francisco follows:

EXECUTIVE AGREEMENT

PARTIES

1. This Executive Agreement is entered into by the Governments of the Union of Soviet Socialist Republics, the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, acting by their respective duly authorized representatives, on their own behalf and on behalf of any other members of the United Nations who shall adhere to this Agreement as hereinbelow provided.

2. All members of the United Nations shall be invited by the Government of the United Kingdom, acting on behalf of the other signatories hereto, to adhere to this Agreement. Such adherence shall in each case be notified to the Government of the United Kingdom which shall promptly inform the other parties to this Agreement.

3. For convenience, (a) the four signatories will sometimes be referred to as "the Signatories," (b) the members of the United Nations adhering hereto as provided in the preceding Article will sometimes be referred to as "the Adherents," and (c) the Signatories and all Adherents will sometimes be collectively referred to as "the parties to this Agreement."

POLICY AND PURPOSE

4. The United Nations have on various occasions pledged themselves that those responsible for the atrocities and crimes committed by the Axis Powers or any officer or agent thereof shall not escape punishment. These atrocities and crimes include those which will be charged as provided in Article 6 of this Agreement.

5. The United Kingdom, the United States, and the Soviet Union in the Declaration issued at Moscow November 1, 1943 stated:

(1) that those German officers and men who have been responsible for or have taken a consenting part in these atrocities "will 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"; and

(2) that the above declaration was "without prejudice to the case of major criminals, whose offenses have no particular geographical localization and who will be punished by joint decision of the Governments of the Allies".

This Agreement is entered into in order to establish the necessary measures for bringing to justice the major criminals referred to above, their principal agents and accessories, and all other offenders who are not sent back for trial to the countries in which their atrocities and crimes were committed.

**DECLARATION REGARDING THE CRIMINAL ACTS
TO BE CHARGED**

6. The parties to this Agreement agree to bring to trial, in the names of their respective peoples, the persons referred to in Article 5 for their responsibility for the following criminal acts:

- a.* Violation of the customs and rules of warfare.
- b.* Invasion by force or threat of force of other countries in violation of international law or treaties.
- c.* Initiation of war in violation of international law or treaties.
- d.* Launching a war of aggression.
- e.* Recourse to war as an instrument of national policy or for the solution of international controversies.

7. This declaration shall also include the right to charge and try defendants under this Agreement for violations of law other than those recited above, including but not limited to atrocities and crimes committed in violation of the domestic law of any Axis Power or satellite or of any of the United Nations.

DECLARATION REGARDING ACCESSORIAL LIABILITY

8. In any trial of charges pursuant to this Agreement, the prosecution may invoke where applicable and the tribunal before which the charges are tried shall recognize and apply the general rule of liability that those who participate in the formulation and execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and responsible for the acts of each other.

DECLARATION REGARDING DEFENSES

9. No indictment, statement of charges, or other document of arraignment shall be deemed legally insufficient which charges violation of law as set forth in this Agreement.

10. The parties to this Agreement declare that any defense based upon the fact that the accused is or was the head or purported head or other principal official of a state is legally inadmissible, and will not be entertained by any tribunal before which charges brought pursuant to this Agreement are tried.

11. The fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the tribunal before which the charges are being tried determines that justice so requires.

DUE PROCESS FOR DEFENDANTS

12. In order to insure fair trial for defendants charged with crime pursuant to this Agreement, it is declared that the following is required in order to constitute due process in their behalf:

a. Reasonable notice shall be given to the defendants of the charges against them and of the opportunity to defend. Such notice may be actual or constructive. Any tribunal before which charges are tried pursuant to this Agreement shall have the right to determine what constitutes reasonable notice in any given instance.

b. The defendants physically present before the tribunal (*a*) will be furnished with copies, translated into their own language, of any indictment, statement of charges or other document of arraignment upon which they are being tried, and (*b*) will be given fair opportunity to be heard in their defense personally and by counsel. The tribunal shall determine to what extent proceedings against defendants may be taken without their presence.

c. Organizations, official or unofficial, may be charged pursuant to this Agreement with criminal acts or with complicity therein by producing before the tribunal and putting on trial such of their number as the tribunal may determine to be fairly representative of the group or organization in question.

d. Upon conviction of an organization hereunder, the tribunal shall make written findings and enter written judgment finding and adjudicating the charges against such organization and the representative members on trial. Such findings and judgment shall be given full faith and credit with respect to the criminal purposes and activities of the organization in any subsequent trial hereunder of a person charged with criminal liability through membership in such organization. Upon proof of such membership the burden shall be upon the defendant to establish any circumstances relating to his membership or participation therein which are relevant either in defense or in mitigation.

EVIDENCE AND PROCEDURE

13. Tribunals established pursuant to this Agreement shall adopt and apply, to the greatest extent possible expeditious and non-technical procedures.

14. Such tribunals shall (*a*) admit any evidence which in their opinion has probative value, (*b*) confine trials strictly to an expeditious hearing of the issues raised by the charges, (*c*) disallow action by defendants the effect of which will be to cause unreasonable delay or the introduction of irrelevant issues or evidence, and (*d*) employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make proffers of proof; taking judicial notice of facts of common knowledge; and utilizing reasonable presumptions.

TRIBUNALS

15. There shall be set up one or more military tribunals, hereinafter referred to for convenience as "International Military Tribunal,"

which shall have jurisdiction to try the leaders of the European Axis powers and their principal agents and accessories. Each International Military Tribunal shall consist of four members and four alternates, to be appointed as follows: One member and one alternate each by the representatives of the Control Council for Germany of the Soviet Union, the United States, the United Kingdom, and France. The alternate, so far as practicable, shall be present at the sessions of the tribunal.

16. In the event of the death or incapacity of any member of an International Military Tribunal, his alternate shall sit in his stead, and the nation of which he is a citizen shall forthwith appoint another alternate. Three members of the Tribunal shall constitute a quorum, and all actions and decisions shall be taken by majority vote of the members of the Tribunal at any time sitting, except that sentence of death shall not be imposed on the vote of less than three members.

17. An International Military Tribunal may sit in any zone in Germany, Austria or Italy or in any other country with the consent of such country. It shall have the power to summon witnesses and to compel their attendance, to require the production of documents, to administer oaths, to appoint special masters and other officers, to hold hearings, and generally to exercise in a manner not inconsistent with the provisions of this Agreement plenary judicial authority with respect to the trial of charges brought pursuant to this Agreement.

18. An International Military Tribunal shall have the power to establish its own rules of procedure, which shall be not inconsistent with the provisions of this Agreement.

19. Occupation courts or other tribunals may be set up by the Signatories or any of them for the trial of offenders other than those tried before an International Military Tribunal who are not sent back for trial to the countries in which their atrocities and crimes were committed, including offenders charged with criminal liability through membership in any group or organization as provided in Article 12 (*d*) of this Agreement.

PUNISHMENT

20. Defendants brought to trial before an International Military Tribunal as provided in this Agreement shall, upon conviction, suffer death or such other punishment as shall be determined by the Tribunal before which they are tried and approved by the Control Council acting by majority vote. The Control Council, by such vote, may approve, reduce, or otherwise alter the sentences determined by the Tribunal, but may not increase the severity thereof.

21. The sentences, when and as approved by the Control Council, shall be carried into execution in accordance with the written orders of the Control Council.

PREPARATION OF CHARGES AND PROSECUTION

22. At the earliest possible time the Soviet Union, the United States, the United Kingdom and France shall each designate a representative, and such representatives acting as a group shall prepare the charges pursuant to Article 6 hereof and shall institute and conduct the prosecution. Such representatives shall also prepare and recommend to the Control Council plans for the prosecution and trial of persons charged with liability pursuant to Article 12 (*d*) through membership in organizations found criminal by an International Military Tribunal.

23. The representatives shall also be charged with:

- (a) recommending to appropriate governmental authorities agreements and measures supplemental to or in addition to this Agreement, necessary or appropriate to accomplish the objectives thereof, and
- (b) the maintenance of liaison among and with the appropriate military and civil agencies, authorities and commissions of or representing any of the United Nations with respect to the matters dealt with in this Agreement.

EMOLUMENTS AND EXPENSES

24. The emoluments and expenses of those members of the International Military Tribunal designated by the respective Signatories as provided in Article 15 of this Agreement and of the representatives provided for in Article 22 of this Agreement, shall be borne by the respective Signatories by whom they have been appointed.

25. The emoluments and expenses of the staffs for the International Military Tribunal and the representatives and incidental expenses, such as rent, heat, light, stationery and printing shall be borne in equal shares by the Signatories.

26. The emoluments and expenses of those occupation courts and tribunals established as provided in Article 19 of this Agreement shall be justly apportioned between the Signatories concerned and any participating Adherents as may be agreed between them.

Done at _____ this the _____
day of _____ 1945.

V. American Memorandum Presented at San Francisco, April 30, 1945

Note: The following memorandum was prepared, as the date indicates, in reference to an earlier draft than the revision submitted at San Francisco. It was, however, considered equally applicable to the latter and was delivered to the Foreign Ministers at San Francisco. Copies were also later provided to the representatives at the London Conference.

MEMORADUM OF PROPOSALS FOR THE PROS ECUTION AND PUNISHMENT OF CERTAIN WAR CRIMINALS AND OTHER OFFENDERS

30 April 1945

I. The Moscow Declaration Did Not Cover the Whole Problem of the Trial and Punishment of War Criminals.

In the statement jointly issued by President Roosevelt, Premier Stalin and Prime Minister Churchill on 1 November 1943, usually referred to as the Moscow Declaration, it was announced that those members of the Hitlerite forces who have been responsible for, or have taken a consenting part in, atrocities and war crimes in territory occupied by the Axis forces, would be sent back to the countries in which their abominable deeds were done in order that they may be judged according to the laws of those countries. It is assumed for the purposes of this memorandum that the four principal Allies will cooperate in carrying out this policy set out in the Moscow Declaration and also that the several Allies will cooperate fully in arranging for the trial and punishment by the United Nations concerned (or before an Allied military tribunal) of those Hitlerite nationals who have committed war offenses anywhere against the civilians or soldiers of any United Nation.

No policy, however, was fixed in the Moscow Declaration covering

- a. the punishment of the major war criminals whose offenses have no particular geographical localization, beyond the announcement that they would be punished by joint decision of the Governments of the Allies; or
- b. the methods of punishment of those members of the principal Nazi organizations, such as the Gestapo and S.S., who voluntarily

engaged in carrying out the ruthless policies of the Nazi regime but who cannot readily be proved to have participated personally in the execution of specific atrocities.

II. Summary of Proposals.

This memorandum proposes that the following policy be adopted by the Governments of the United States, the Soviet Union, and the United Kingdom, and the Provisional Government of France for the trial of

- a. the major Nazi leaders and their principal accomplices in the broad program of war crimes and atrocities which have characterized the Nazi regime since 1933 and
- b. the principal Nazi organizations and their members, through whom the most bestial of the Nazi cruelties have been put into effect.

Considerations Taken Into Account in Framing the Proposals

The proposals now advanced give recognition to the following facts:

- a. that the criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany and within the areas occupied by German military forces, in connection with which the crimes and atrocities referred to were committed;
- b. that these crimes and atrocities were perpetrated pursuant to a premeditated criminal plan;
- c. that for the carrying out of the acts of oppression and terrorism which their program involved, the Nazi leaders and their associates created and utilized a numerous organization, chief among which are the S.S., and the Gestapo, and
- d. that there is necessity for establishing practical measures for bringing these criminals, their principal organizations, and their active leaders and members to justice on a basis which takes adequate account not only (1) of those offenses committed within and outside Germany, during the war or against the citizens of the United Nations, but also (2) of those atrocities, both before and after 1939, committed against members of Axis minorities.

Proposed Policy

1. The Axis leaders should be tried before Allied military tribunals composed of officers of the four principal Allies. Their guilt and punishment should be determined by *judicial* action of a military tribunal and not by political action of the Allied Governments. (See discussion below Part IV, page 33.)

2. Either in separate trials, or at the same time, the leaders of the principal Hitlerite organizations (e.g., the Gestapo and the S.S.) and

the organizations themselves should also be tried before an Allied military tribunal. This tribunal should determine both the guilt of the individual leaders and the extent of the participation of each of these organizations and its members in the great Nazi criminal enterprise, of which the crimes and atrocities which have shocked the world were an integral part or at least the natural and probable consequence. (See discussion below, Part III, Section B, page 31.)

3. The extent of the guilt of the individual members of the Hitlerite organizations, which may be found to have participated in the Nazi enterprise, should be determined and the individual members should be punished in a manner based upon the extent of their guilt. (See discussion below, Part III, Section C, page 32.)

4. An Allied executive group, composed of representatives of the four principal Allies, should be established to prepare the charges against the Hitlerite leaders and the organizations, to collect and present the evidence in support of those charges and to conduct their prosecution. (See discussion below, Part V.)

The proposals now advanced contemplate that the four principal allies will enter into an executive or military agreement embodying the foregoing policies, to which the other United Nations will be invited to adhere after the agreement has been negotiated and signed. Prior participation by the other United Nations in the negotiation of the agreement is probably not appropriate because the agreement will be largely a matter affecting the four nations engaged in the occupation of Germany and because of the necessity for speed in reaching agreement.

III. The Trial and Punishment of the Hitlerite Leaders and the Major Hitlerite Organization Should be Based upon Their Voluntary Participation in a Common Criminal Enterprise of which the Axis Atrocities and War Crimes were an Integral Part and the Probable Consequence.

A. Method of Determining Guilt

After Germany's defeat or unconditional surrender, the Allies by joint action, pursuant to treaty or otherwise, could probably agree to put to death the most notorious Nazi criminal without trial. Such action, however, would be violative of concepts of justice, which the freedom loving United Nations accept and, on that account, would be distasteful and inappropriate. For reasons more fully stated in Part IV of this memorandum, it is felt that all reasonable efforts should be made to avoid such a purely political disposition of the Nazi leaders. Instead, it should be possible to determine upon a suitable judicial process more in accord with the common traditions of the principal United Nations.

It is believed that a military tribunal is the appropriate type of court for this judicial action for the following reasons:

a. The offenses of the Axis leaders and their organizations which will be the subject of judicial inquiry will be largely war crimes properly cognizable by a military tribunal.

b. The trials will take place as a part of or in connection with a military occupation of Germany and Austria.

c. The crimes to be punished are atrocities which should be dealt with by the swift justice of a military tribunal created by simple military or executive agreement. The prosecution should not be subject to the delays inherent in the formal setting up of an international treaty court.

B. Nature of Charges to be Made

For the systematic and planned policy of oppression and aggression both within Germany and against Germany's neighbors, the Nazi leaders and the whole membership of the principal Nazi organizations share responsibility. The leaders and their organizations must be made to pay the penalties which international law and the laws and customs of war exact for war crimes and atrocities contemplated by their program and perpetrated in its execution. It should be remembered that in this program members of the S.S. and the Gestapo, as volunteers pledged to absolute obedience, joined, with their leaders.

Accordingly, the Government of the United States advances for consideration a plan which in no way would interfere with the punishment of individual Hitlerites at the scene of their crimes for specific atrocities which they have committed. Neither would it interfere with separate trials of the principal Nazi leaders before Allied military tribunals if that is considered desirable. Indeed such separate trials might have substantial advantage in that they can be conducted quickly and without awaiting final disposition of the trial of the charges of the common criminal enterprise of the whole Hitler hierarchy of criminals. The plan proposed, however, would ensure the punishment of the Nazi leaders and the active members of the principal Nazi organizations for the program in which they have played the major part.

The German leaders and their associates and the organizations employed by them should be charged with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about. The allegation of the criminal enterprise should be so couched as to permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the pre-war atrocities and those committed against their own nationals, neutrals, and stateless persons, as well

as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war. There should be invoked the rule of liability, common to most penal systems and included in the general doctrine of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other. In support of this charge there should be admitted in evidence the acts of any of the conspirators done in furtherance of the conspiracy, whether or not these acts were in themselves criminal and subject to separate prosecution as such.

C. Trial of the Charges

The trial of the charges described in the preceding paragraph should be carried out in two stages:

a. Stage 1. There should be brought before an international military tribunal the highest ranking German leaders to a number fairly representative of the groups and organizations charged with complicity in the basic criminal plan. (As stated above, this need not preclude separate prior trial of particular German leaders if that is deemed desirable.) Adjudication should be sought not only of the guilt of those individuals physically before the tribunal, but also of the complicity of the members of the organizations included within the charge. The tribunal should make findings adjudicating the facts established, including the nature and purposes of the criminal plan, the identity of the groups and organizations guilty of complicity in it, and the acts committed in its execution. The tribunal should sentence those individual defendants physically before it who are convicted.

The above, which might take place in one or more trials, should complete the mission of this international tribunal.

b. Stage 2. Without prejudice to the trial before any suitable tribunal of individuals charged with specific atrocities, the members of the organizations, who are charged with complicity through such membership in the basic criminal plan but against whom there is not sufficient proof of personal participation in specific atrocities, should be brought before occupation or other appropriate tribunals.

The findings of the tribunal in the trial provided for in paragraph *a* above should be taken to constitute a general adjudication of the criminal character of the groups and organizations referred to, binding upon all the members thereof in their subsequent trials in occupation tribunals or in other tribunals established under this instrument. In these subsequent trials the only necessary proof of guilt of any particular defendant, as regards the charge of complicity, should be his membership in one of those organizations. Proof should

also be taken of the nature and extent of the individual's participation.

c. The defendant in each case should, upon conviction, suffer death or such other punishment as the tribunal may direct, depending upon the gravity of the offense and the degree of culpability of the defendant. In general, except upon proof of very substantial individual participation in specific atrocities, the less prominent defendants might well be sentenced to perform useful reparational labor, etc., rather than to capital punishment.

D. Procedures

Any military or executive agreement should include an undertaking to adopt and apply comprehensively in the trial of war criminals, to the greatest extent practicable, expeditious, fair, non-technical procedures which would (in a manner consistent with the purposes of the agreement) :

- a.* provide each accused with notice of the charges against him and an opportunity to be heard reasonably on such charges;
- b.* permit the court to admit any evidence which it considers would have probative value;
- c.* except as the court in its discretion shall deem appropriate in particular cases, exclude any defense based upon the fact that the accused acted under orders of a superior officer or pursuant to state or national policy;
- d.* exclude any defense based upon the fact that the accused is or was the head or purported head or other principal official of a state; and
- e.* confine trials strictly to an expeditious hearing of the issues raised by the charges.

IV. The Guilt and Punishment of the Hitlerite Leaders Should be Determined Judicially before an Allied Military Tribunal and not by Purely Political Action:

It may be argued that the Axis leaders should be dealt with politically rather than judicially and that, without trial, by joint action of the Allies they should be put to death upon capture. The United States is vigorously opposed to any such political disposition. Because great importance is attached to judicial action, the arguments in favor of a swift but fair trial of the Hitlerite criminals, are set out below in considerable detail:

A. The Punishment of those guilty of War Crimes and Atrocities is for Criminal Violation of International Law:

The Allied promises to bring the major Axis leaders to justice rest squarely on the ground that these leaders have been responsible for crimes, acts which violate generally accepted standards of the conduct

of individuals and nations—not only during the war but in preparing for it and starting it. The violation of these standards is regarded by the world as criminal.

B. Punishment for Crime Should Only Follow a Judicial Trial:

No principle of justice is so fundamental in most men's minds as the rule that punishment will be inflicted by judicial action. Judicial punishment is imposed only after notice to the accused of the charges against him, establishment of the facts upon which the charges rest, and an opportunity to defend against the charges with the advice of counsel. The form in which proof is presented varies from nation to nation. So does the precise extent of the opportunity to defend, the nature of the hearing, and the incidence of the burden of proof. This principle is applied in greater or less degree by all nations, and historically its recognition is the first step in the approach to the democratic standard of liberty under law.

C. Punishment of War Criminals Is Designed as a Deterrent and to Raise International Standards of Conduct:

Punishment of war criminals should be motivated primarily by its deterrent effect, by the impetus which it gives to improved standards of international conduct and, if the theory of punishment is broad enough, by the implicit condemnation of ruthlessness and unlawful force as instruments of attaining national ends. The satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied cause. A purely political disposition of the Axis leaders without trial, however disguised, may be regarded eventually, and probably immediately, as adoption of the methods of the Axis itself. It will retard progress towards a new concept of international obligations simply because those who have sought in this war to preserve democracy will have made their most spectacular dealing with the vanquished a negation of democratic principles of justice. They will have adopted methods repugnant alike to Anglo-American and Continental traditions.

D. The Method of Punishment Adopted must not Detract from the Moral Force Behind the Allied Cause:

The preservation of the moral force behind the Allied cause is important. That force, born from the exigencies of self defense, has brought freedom-loving peoples together and can keep them together. If we lose it in the matter of punishing war criminals, we sacrifice a part of something very precious. Only the most imperative reasons could conceivably justify such action.

E. The Verdict of History Upon the Fairness of the Disposition of War Criminals Has Practical Significance:

A further highly important reason for adopting a fair judicial method of bringing war criminals to justice is that such methods are more likely than any others to commend themselves to the judgment of history. What future generations think of the Allied action on war criminals may have a profound effect upon the preservation of peace in years to come. That action certainly will set the tone of the Allied occupation of Germany by showing that a government of laws and not of men has begun. A political disposition of the Axis leaders, on the other hand, would look like, and would be, a continuation of totalitarian practices. One has only to remember the confusing propaganda interpretations of the Versailles Treaty to realize what might be the disastrous results of action dictated by politics and not by fundamental principles of law and justice. If Allied actions are soundly conceived, however, there exists an opportunity to mark up an important step in the obtaining of future world security. Punishment following a judicial determination, in which a number of nations participate, to the effect that the alleged violations of international law have occurred, will certainly induce future government leaders to think before they act in similar fashion. It will serve also to bring home the truth to those Germans who remain incredulous about the infamies of the Nazi regime.

F. The Arguments Advanced Against Trials for the Axis Arch-Criminals are not Persuasive:

The arguments which may be advanced against some proper trial for the Axis leaders must come to this—First, that the trial might be one, lasting almost indefinitely, in which all sorts of irrelevant matters might be discussed, producing a fertile field for controversy and possibly leading to adverse world reactions; second, that attempts to restrict the trial to a reasonable length and to matters which are relevant might lead to a trial which is a mere travesty upon Allied ideals of judicial inquiry. The fear really is that the trial will be either (1) a prolonged “State” trial, unsatisfactory to the Allies and providing Hitler and his associates with an effective sounding board for propaganda and an easy road to martyrdom, or (2) an inadequate substitute for our traditional procedures which the world will brand as an attempted fraud.

Both these objections are mere arguments against the ability of Allied legal brains to produce a fair, expeditious, reasonable procedure to meet the novel situation which is presented. As a problem of pure procedure it obviously can be solved. If a proper procedure is devised, an Allied military tribunal can administer it with fairness, dignity and swiftness and give, in substance and not merely in form,

a trial and decision as impartial as it lies within the ability of humans to provide. There are few issues of fact which cannot be tried in a reasonable time, and, if the military judges properly control the trial, the accused should receive a fair hearing without unduly prolonged discussion of wholly irrelevant matters. The advantages of the trial method over political action are so fundamental that we should not allow the bug-a-boos of possible embarrassments to hinder us from establishing the principle. More is involved than convenience and avoiding the chance of Nazi propaganda and countercharges.

It should not shock anyone that a trial before an Allied military tribunal should have some aspects based upon common law traditions and some drawn from the Continental and Slavic systems. For example, the United States and the United Kingdom cannot insist on the full, rigid application of Anglo-American procedures, the rules of evidence, the privilege against self incrimination and similar matters. These are not inherent parts of other systems of criminal practice and there is no need for leaning over backward to give the Axis leaders the benefit of protective principles, not afforded by German law, even prior to Axis distortion of German justice. The Hitlerites need only have a fair trial. Similarly, those raised in the Russian and Continental systems of law cannot properly object to having the methods of trial influenced by common law principles to some extent. The trial should be an Allied venture, reflecting the influence of the systems of justice in force in all four of the principal Allied nations. Of course, the accused while in custody should not be subjected to duress or to any essentially unfair or unreasonable inquisition and the trial in all respects should be conducted justly and impartially.

A final objection may be raised that there can be no real trial when the real offense, for which Hitler and the other Axis leaders are being tried, is the totality of what they have done to the world since 1933. It is true that all that the Axis has done should be brought into the grounds of punishment. The offenses charged should include the preparation for war, the prewar atrocities and the launching of aggressive war in violation of Germany's treaty obligations as well as the ruthless conduct of war in violation of international law and custom.

Principal emphasis, doubtless, will be placed in the trial upon those patent violations of the customs of war which most shock the Allies (e. g., murder of prisoners of war, abuse of populations in occupied territories, deportation of Allied peoples for use as slave labor, etc.). Nevertheless, these offenses were only a part of the whole ghastly Hitlerite enterprise. These particular atrocities color the enterprise and make the whole of it so clearly criminal, that the whole enterprise should be included in the charges and revealed in the trial.

The very breadth of the offense, however, is not in itself an argument against judicial action. It is a most important reason for a trial, for it is highly desirable that there be established and declared by actual decision, after adequate hearing and determination of the facts, the principles of international law applicable to the broad, vicious Nazi enterprise. The application of this law may be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel and all that is needed is a wise application of those principles on a sufficiently comprehensive scale to meet the situation. International law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones. By including within the general area of punishable international crimes the violation of compacts, there will be world judicial condemnation of depredations so great and so violent that international security cannot exist if they should be permitted to continue unchecked. The law should be supple enough to cope with the totality of the offense and though the most solid basis for prosecution under existing law relates to the violations of actual and recognized rules of war, the full offense covers so obviously areas wider than this limited field that it is natural and proper in this day and age that we must deal with those too.

V. There is Immediate Need of an Allied Executive Prosecuting and Planning Organization to Deal with the Principal War Crimes Trials and Related Problems:

1. In the trial of the Hitlerite leaders no charges which cannot be proved should be presented and the theory of prosecution should rest upon ascertainable facts. The actual trial of cases must be planned and conducted by persons familiar with the techniques of the expeditious presentation of intricate causes. Accordingly, there should be created to take charge of preparations for the major trials, an Allied executive or planning group consisting of one representative each of the United States, the Soviet Union, the British Commonwealth and France. This group should be assisted by an adequate staff of attorneys and research personnel to compile and analyze data, prepare the charges in the principal case or cases to conform to the proof and arrange the evidence for presentation to the international military tribunal.

So far as the operations of this executive group are carried out within Germany or Austria, such operations might appropriately be subject to the administrative direction of the Control Council for Germany or for Austria as the case may be.

2. The presentation of the principal case or cases before the international tribunal should be made by persons designated by the United

States, the Soviet Union, the British Commonwealth and France, each of these countries being entitled to designate one person, who might be its member of the executive group referred to in the preceding paragraph.

3. The full time executive group might also be charged with:
 - a. the recommendation to the appropriate governmental authorities of agreements and measures supplemental to or in addition to the agreement, necessary or appropriate to accomplish its objectives, and
 - b. the maintenance of liaison among and with the appropriate military and civil agencies, authorities and commissions of or representing any of the United Nations which are or may be charged with responsibility for any matters dealt with in the agreement.
4. Expenses—Any military or executive agreement should make suitable provision for the payment of the expenses of the prosecutions and the executive group.

VI. British Memorandum of May 28, 1945

Note: On May 22, Mr. Justice Jackson, at the direction of President Truman, left for Europe to organize the gathering of evidence through American military and other channels, to confer as to progress toward an agreement for international trials, and to discuss trial preparations with American military authorities and with the French, British, and Soviet officials who would be concerned with such trials.

Discussion with French Foreign Minister Bidault en route to Paris resulted in assurances that the Provisional Government agreed in principle with the American plan and would promptly name a representative to engage in negotiation of a definitive plan and to conduct the prosecutions.

In London Lord Chancellor John Viscount Simon stated that the United Kingdom Government had become convinced of the desirability of proceeding along the general lines outlined in the American proposal. At a meeting with Attorney-General Sir David Maxwell Fyfe, Treasury Solicitor Sir Thomas Barnes, and Patrick Dean of the Foreign Office on May 28, the following memorandum of British proposals for amending the agreement as proposed by the United States at San Francisco [IV] was handed to Mr. Justice Jackson.

A call made upon Soviet Ambassador Gusev in London gave no information as to the Soviet attitude.

WAR CRIMINALS: DRAFT AGREEMENT

Dated 3rd May 1945

DRAFTING AMENDMENTS

Paragraphs 4 and 5:

Omit paragraph 4.

Substitute for paragraph 5:

"5. The United Kingdom, the United States and the Soviet Union in the Declaration issued at Moscow November 1, 1943, after providing that those responsible for atrocities, massacres and cold-blooded mass executions in occupied countries should 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, went on to provide

"that the above declaration was without prejudice to the case of major criminals, whose offences have no particular geographical localization and who will be punished by joint decision of the Governments of the Allies.

"This Agreement is entered into in order to establish the necessary measures for bringing to justice the major criminals referred to above, their principal agents and accessories, ~~and all other offenders who are not sent back for trial to the countries in which their atrocities and crimes were committed.~~"

I [Sir David Maxwell Fyfe] have omitted the last 2½ lines as many "minor" criminals will be tried at any rate by the occupying powers in Germany and not sent back.

Substitute for Paragraph 6:

"6. The parties to this Agreement agree to bring to trial, in the names of their respective peoples, the persons referred to in Article 5 for their responsibility for the following criminal acts:

- a. Violation of the customs and rules of warfare.
- b. Pursuing a systematic policy for the purpose of dominating Europe by a war of aggression and in the carrying out of that policy.
 - (1) Initiating and making attacks on other countries in violation of International Law, treaties or assurances.
 - (2) Resorting to war as an instrument of national policy."

Paragraph 9: "held" for "deemed".

Paragraph 12:

- (a) Omit "Such notice may be actual or constructive".
 - (b) Omit "physically present before the tribunal".
- Refer in (b) to right to call evidence.

Add to Article 12:

e. Participating in the formulation or execution of a common plan or enterprise, including a plan or enterprise aimed at the domination of another country, which involves the commission of any of the foregoing criminal acts.

Paragraph 14:

Make clear what is meant by "proffers of proof".

Paragraph 15 and later paragraphs:

"Inter-Allied" for "International".

Paragraph 16:

Clear up the meaning of majority when the Court consists of four.

Paragraph 17:

Refer to other enemy countries.
Leave out "masters and other".

Paragraph 20:

Is the Control Council the right body?

VII. Aide-Mmémotre from the United Kingdom, June 3, 1945

AIDE-MÉMOIRE

His Majesty's Embassy are instructed to inform the State Department that His Majesty's Government have now accepted in principle the United States draft as a basis for discussion by the representatives appointed by the Allied Governments to prepare for the prosecution of war criminals.

2. His Majesty's Government suggest that in the circumstances the United States Government may now care to follow up the approach which they made to the Three Powers at San Francisco by representing to His Majesty's Government, the Soviet Government and the French Government that it is urgently necessary to reach agreement on the main principle at least of the United States draft agreement, by inviting the two latter Powers to follow the example of the United States Government and of His Majesty's Government by appointing representatives for the prosecution of these criminals. His Majesty's Government hope that the United States Government might be willing to state that for various reasons and in view of the impending return to London of Judge Jackson, London appears to be the most suitable place for further discussions, both on the draft agreement and also on the organization of the proposed prosecuting authority, the preparation of charges, and the procedure for trials, and that they understand that His Majesty's Government would be prepared to issue invitations to the Three Powers concerned accordingly. The United States Government might wish to add that in view of the importance of working out the most satisfactory procedure possible in order that the trials should serve their full purpose, it would be desirable that these discussions should be conducted by the four prosecuting counsel. (This would incidentally give point to the invitation of the French and Soviet Governments to appoint their representatives without further delay).

BRITISH EMBASSY,
WASHINGTON, D. C.,
June 3, 1945.

VIII. Report to the President by Mr. Justice Jackson, June 6, 1945

Note: Upon his return from Europe, Mr. Justice Jackson made a report to the President. It was released to the press by the White House with a statement of the President's approval and was widely published throughout Europe as well as in the United States. This report was accepted by other governments as an official statement of the position of the United States and as such was placed before all of the delegations to the London Conference. It follows:

June 6, 1945.

THE PRESIDENT,
The White House,
Washington, D. C.

MY DEAR MR. PRESIDENT:

I have the honor to report accomplishments during the month since you named me as Chief of Counsel for the United States in prosecuting the principal Axis War Criminals. In brief, I have selected staffs from the several services, departments and agencies concerned; worked out a plan for preparation, briefing, and trial of the cases; allocated the work among the several agencies; instructed those engaged in collecting or processing evidence; visited the European theater to expedite the examination of captured documents, and the interrogation of witnesses and prisoners; coordinated our preparation of the main case with preparation by Judge Advocates of many cases not included in my responsibilities; and arranged cooperation and mutual assistance with the United Nations War Crimes Commission and with Counsel appointed to represent the United Kingdom in the joint prosecution.

I.

The responsibilities you have conferred on me extend only to "the case of major criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the governments of the Allies", as provided in the Moscow Declaration of November 1, 1943, by President Roosevelt, Prime Minister Churchill and Premier Stalin. It does not include localized cases of any kind. Accordingly, in visiting the European theater, I attempted to establish standards to segregate from our case against the principal offenders,

cases against many other offenders and to expedite their trial. These cases fall into three principal classes:

1. The first class comprises offenses against military personnel of the United States—such, for example, as the killing of American airmen who crash-landed, and other Americans who became prisoners of war. In order to insure effective military operation, the field forces from time immemorial have dealt with such offenses on the spot. Authorization of this prompt procedure, however, had been withdrawn because of the fear of stimulating retaliation through execution of captured Americans on trumped-up charges. The surrender of Germany and liberation of our prisoners has ended that danger. The morale and safety of our own troops and effective government of the control area seemed to require prompt resumption of summary dealing with this type of case. Such proceedings are likely to disclose evidence helpful to the case against the major criminals and will not prejudice it in view of the measures I have suggested to preserve evidence and to prevent premature execution of those who are potential defendants or witnesses in the major case.

I flew to Paris and Frankfurt and conferred with Generals Eisenhower, Smith, Clay, and Betts, among others, and arranged to have a representative on hand to clear questions of conflict in any particular case. We also arranged an exchange of evidence between my staff and the Theater Judge Advocate's staff. The officials of other countries were most anxious to help. For example, the French brought to General Donovan and me in Paris evidence that civilians in Germany had beaten to death with wrenches three American airmen. They had obtained from the German Burgomeister identification of the killers, had taken them into custody, and offered to deliver them to our forces. Cases such as this are not infrequent. Under the arrangements perfected, the military authorities are enabled to move in cases of this class without delay. Some are already under way; some by now have been tried and verdicts rendered. Some concentration camp cases are also soon to go on trial.

2. A second class of offenders, the prosecution of which will not interfere with the major case, consists of those who, under the Moscow Declaration, are to be sent back to the scene of their crimes for trial by local authorities. These comprise localized offenses or atrocities against persons or property, usually of civilians of countries formerly occupied by Germany. The part of the United States in these cases consists of the identification of offenders and the surrender on demand of those who are within our control.

The United Nations War Crimes Commission is especially concerned with cases of this kind. It represents many of the United Nations, with the exception of Russia. It has been usefully engaged as a body

with which the aggrieved of all the United Nations have recorded their accusations and evidence. Lord Wright, representing Australia, is the Chairman of this Commission, and Lt. Col. Joseph V. Hodgson is the United States representative.

In London, I conferred with Lord Wright and Colonel Hodgson in an effort to coordinate our work with that of the Commission wherever there might be danger of conflict or duplication. There was no difficulty in arriving at an understanding for mutual exchange of information. We undertook to respond to requests for any evidence in our possession against those listed with the Commission as criminals and to cooperate with each of the United Nations in efforts to bring this class of offenders to justice.

Requests for the surrender of persons held by American forces may present diplomatic or political problems which are not my responsibility. But so far as my work is concerned, I advised the Commission, as well as the appropriate American authorities, that there is no objection to the surrender of any person except on grounds that we want him as a defendant or as a witness in the major case.

3. In a third class of cases, each country, of course, is free to prosecute treason charges in its own tribunals and under its own laws against its own traitorous nationals,—Quislings, Lavals, “Lord Haw-Haws”, and the like.

The consequence of these arrangements is that preparations for the prosecution of major war criminals will not impede or delay prosecution of other offenders. In these latter cases, however, the number of known offenses is likely to exceed greatly the number of prosecutions, because witnesses are rarely able satisfactorily to identify particular soldiers in uniform whose acts they have witnessed. This difficulty of adequately identifying individual perpetrators of atrocities and crimes makes it the more important that we proceed against the top officials and organizations responsible for originating the criminal policies, for only by so doing can there be just retribution for many of the most brutal acts.

II.

Over a month ago the United States proposed to the United Kingdom, Soviet Russia and France a specific plan, in writing, that these four powers join in a protocol establishing an International Military Tribunal, defining the jurisdiction and powers of the tribunal, naming the categories of acts declared to be crimes, and describing those individuals and organizations to be placed on trial. Negotiation of such an agreement between the four powers is not yet completed.

In view of the immensity of our task, it did not seem wise to await consummation of international arrangements before proceeding with

preparation of the American case. Accordingly, I went to Paris, to American Army Headquarters at Frankfort and Wiesbaden, and to London, for the purpose of assembling, organizing, and instructing personnel from the existing services and agencies and getting the different organizations coordinated and at work on the evidence. I uniformly met with eager cooperation.

The custody and treatment of war criminals and suspects appeared to require immediate attention. I asked the War Department to deny those prisoners who are suspected war criminals the privileges which would appertain to their rank if they were merely prisoners of war; to assemble them at convenient and secure locations for interrogation by our staff; to deny them access to the press; and to hold them in the close confinement ordinarily given suspected criminals. The War Department has been subjected to some criticism from the press for these measures, for which it is fair that I should acknowledge responsibility. The most elementary considerations for insuring a fair trial and for the success of our case suggest the imprudence of permitting these prisoners to be interviewed indiscriminately or to use the facilities of the press to convey information to each other and to criminals yet uncaptured. Our choice is between treating them as honorable prisoners of war, with the privileges of their ranks, or to classify them as war criminals, in which case they should be treated as such. I have assurances from the War Department that those likely to be accused as war criminals will be kept in close confinement and stern control.

Since a considerable part of our evidence has been assembled in London, I went there on May 28th with General Donovan to arrange for its examination, and to confer with the United Nations War Crimes Commission and with officials of the British Government responsible for the prosecution of war criminals. We had extended conferences with the newly appointed Attorney-General, the Lord Chancellor, the Foreign Secretary, the Treasury Solicitor, and others. On May 29th, Prime Minister Churchill announced in the House of Commons that Attorney-General Sir David Maxwell Fyfe had been appointed to represent the United Kingdom in the prosecution. Following this announcement, members of my staff and I held extended conferences with the Attorney-General and his staff. The sum of these conferences is that the British are taking steps parallel with our own to clear the military and localized cases for immediate trial, and to effect a complete interchange of evidence and a coordination of planning and preparation of the case by the British and American representatives. Despite the fact that the prosecution of the major war criminals involves problems of no mean dimensions, I am able to report that no substantial differences exist between the United Kingdom representatives and ourselves, and that minor differences

have adjusted easily as one or the other of us advanced the better reasons for his view.

The Provisional Government of the French Republic has advised that it accepts in principle the American proposals for trials before an International Military Tribunal. It is expected to designate its representative shortly. The government of the Union of Soviet Socialist Republics, while not yet committed, has been kept informed of our steps and there is no reason to doubt that it will unite in the prosecution. We propose to make provision for others of the United Nations to become adherents to the agreement.

III.

The time, I think, has come when it is appropriate to outline the basic features of the plan of prosecution on which we are tentatively proceeding in preparing the case of the United States.

1. The American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry, preferably in association with others, but alone if necessary, into the culpability of those whom there is probable cause to accuse of atrocities and other crimes. We have many such men in our possession. What shall we do with them? We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But indiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.

2. These hearings, however, must not be regarded in the same light as a trial under our system, where defense is a matter of constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons. But the procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials.

Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit

of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law".

With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility. There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of rank or the latitude of his orders. And of course, the defense of superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or the S.S. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all.

3. Whom will we accuse and put to their defense? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals. We also propose to establish the criminal character of several voluntary organizations which have played a cruel and controlling part in subjugating first the German people and then their neighbors. It is not, of course, suggested that a person should be judged a criminal merely because he voted for certain candidates or maintained political affiliations in the sense that we in America support political parties. The organizations which we will accuse have no resemblance to our political parties. Organizations such as the Gestapo and the S.S. were direct action units, and were recruited from volunteers accepted only because of aptitude for, and fanatical devotion to, their violent purposes.

In examining the accused organizations in the trial, it is our proposal to demonstrate their declared and covert objectives, methods of recruitment, structure, lines of responsibility, and methods of effectuating their programs. In this trial, important representative members will be allowed to defend their organizations as well as themselves. The best practicable notice will be given, that named or-

ganizations stand accused and that any member is privileged to appear and join in their defense. If in the main trial an organization is found to be criminal, the second stage will be to identify and try before regular military tribunals individual members not already personally convicted in the principal case. Findings in the main trial that an organization is criminal in nature will be conclusive in any subsequent proceedings against individual members. The individual member will thereafter be allowed to plead only personal defenses or extenuating circumstances, such as that he joined under duress, and as to these defenses he should have the burden of proof. There is nothing novel in the idea that one may lose a part of or all his defense if he fails to assert it in an appointed forum at an earlier time. In United States war-time legislation, this principle has been utilized and sustained as consistent with our concept of due process of law.

4. Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world. We must not forget that when the Nazi plans were boldly proclaimed they were so extravagant that the world refused to take them seriously. Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.

5. What specifically are the crimes with which these individuals and organizations should be charged, and what marks their conduct as criminal?

There is, of course, real danger that trials of this character will become enmeshed in voluminous particulars of wrongs committed by individual Germans throughout the course of the war, and in the multitude of doctrinal disputes which are part of a lawyer's paraphernalia. We can save ourselves from those pitfalls if our test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power.

Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted. I think also that through

these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization. Before stating these offenses in legal terms and concepts, let me recall what it was that affronted the sense of justice of our people.

Early in the Nazi regime, people of this country came to look upon the Nazi Government as not constituting a legitimate state pursuing the legitimate objectives of a member of the international community. They came to view the Nazis as a band of brigands, set on subverting within Germany every vestige of a rule of law which would entitle an aggregation of people to be looked upon collectively as a member of the family of nations. Our people were outraged by the oppressions, the cruelest forms of torture, the large scale murder, and the wholesale confiscation of property which initiated the Nazi regime within Germany. They witnessed persecution of the greatest enormity on religious, political and racial grounds, the breakdown of trade unions, and the liquidation of all religious and moral influences. This was not the legitimate activity of a state within its own boundaries, but was preparatory to the launching of an international course of aggression and was with the evil intention, openly expressed by the Nazis, of capturing the form of the German state as an instrumentality for spreading their rule to other countries. Our people felt that these were the deepest offenses against that International Law described in the Fourth Hague Convention of 1907 as including the "laws of humanity and the dictates of the public conscience".

Once these international brigands, the top leaders of the Nazi party, the S.S., and the Gestapo, had firmly established themselves within Germany by terrorism and crime, they immediately set out on a course of international pillage. They bribed, debased, and incited to treason the citizens and subjects of other nations for the purpose of establishing their fifth columns of corruption and sabotage within those nations. They ignored the commonest obligations of one state respecting the internal affairs of another. They lightly made and promptly broke international engagements as a part of their settled policy to deceive, corrupt, and overwhelm. They made, and made only to violate, pledges respecting the demilitarized Rhineland, and Czechoslovakia, and Poland, and Russia. They did not hesitate to instigate the Japanese to treacherous attack on the United States. Our people saw in this succession of events the destruction of the minimum elements of trust which can hold the community of nations together in peace and progress. Then, in consummation of their plan, the Nazis swooped down upon the nations they had deceived and ruthlessly conquered them. They flagrantly violated the obligations which states, including their own, have undertaken by convention or tradition as a part of the rules of land warfare, and of the law of the sea. They wantonly de-

stroyed cities like Rotterdam for no military purpose. They wiped out whole populations, as at Lidice, where no military purposes were to be served. They confiscated property of the Poles and gave it to party members. They transported in labor battalions great sectors of the civilian populations of the conquered countries. They refused the ordinary protections of law to the populations which they enslaved. The feeling of outrage grew in this country, and it became more and more felt that these were crimes committed against us and against the whole society of civilized nations by a band of brigands who had seized the instrumentality of a state.

I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality. We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.

In arranging these trials we must also bear in mind the aspirations with which our people have faced the sacrifices of war. After we entered the war, and as we expended our men and our wealth to stamp out these wrongs, it was the universal feeling of our people that out of this war should come unmistakable rules and workable machinery from which any who might contemplate another era of brigandage would know that they would be held personally responsible and would be personally punished. Our people have been waiting for these trials in the spirit of Woodrow Wilson, who hoped to "give to international law the kind of vitality which it can only have if it is a real expression of our moral judgment."

Against this background it may be useful to restate in more technical lawyer's terms the legal charges against the top Nazi leaders and those voluntary associations such as the S.S. and Gestapo which clustered about them and were ever the prime instrumentalities, first, in capturing the German state, and then, in directing the German state to its spoliations against the rest of the world.

(a) Atrocities and offenses against persons or property constituting violations of International Law, including the laws, rules, and customs of land and naval warfare. The rules of warfare are well established and generally accepted by the nations. They make offenses of such conduct as killing of the wounded, refusal of quarter, ill treatment of prisoners of war, firing on undefended localities, poisoning of wells and streams, pillage and wanton destruction, and ill treatment of inhabitants in occupied territory.

(b) Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Con-

vention provided that inhabitants and belligerents shall remain under the protection and rule of "the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

(c) Invasions of other countries and initiation of wars of aggression in violation of International Law or treaties.

The persons to be reached by these charges will be determined by the rule of liability, common to all legal systems, that all who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and responsible for the acts of each other. All are liable who have incited, ordered, procured, or counselled the commission of such acts, or who have taken what the Moscow Declaration describes as "a consenting part" therein.

IV.

The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.

Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught. But International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. Summarized by a standard authority, its attitude was that "both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights." This, however, was a departure from the doctrine taught by Grotius, the father of International Law, that there is a distinction between the just and the unjust war—the war of defense and the war of aggression.

International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon

every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct. After the shock to civilization of the last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place. By the time the Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal.

The reestablishment of the principle of unjustifiable war is traceable in many steps. One of the most significant is the Briand-Kellogg Pact of 1928, by which Germany, Italy and Japan, in common with ourselves and practically all the nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means, and condemned recourse to war for the solution of international controversies. Unless this Pact altered the legal status of wars of aggression, it has no meaning at all and comes close to being an act of deception. In 1932, Mr. Stimson, as Secretary of State, gave voice to the American concept of its effect. He said, "War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. . . . By that very act, we have made obsolete many legal precedents and have given the legal profession the task of re-examining many of its codes and treaties."

This Pact constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime. Without attempting an exhaustive catalogue, we may mention the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, signed by the representatives of forty-eight governments, which declared that "a war of aggression consti-

tutes . . . an international crime". The Eighth Assembly of the League of Nations in 1927, on unanimous resolution of the representatives of forty-eight member nations, including Germany, declared that a war of aggression constitutes an international crime. At the Sixth Pan-American Conference of 1928, the twenty-one American Republics unanimously adopted a resolution stating that "war of aggression constitutes an international crime against the human species."

The United States is vitally interested in recognizing the principle that treaties renouncing war have juridical as well as political meaning. We relied upon the Briand-Kellogg Pact and made it the cornerstone of our national policy. We neglected our armaments and our war machine in reliance upon it. All violations of it, wherever started, menace our peace as we now have good reason to know. An attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community, which may properly vindicate the integrity of its fundamental compacts by punishing aggressors. We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. Thus may the forces of the law be mobilized on the side of peace.

Any legal position asserted on behalf of the United States will have considerable significance in the future evolution of International Law. In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.

V.

I have left until last the first question which you and the American people are asking—when can this trial start and how long will it take. I should be glad to answer if the answer were within my control. But it would be foolhardy to name dates which depend upon the action of other governments and of many agencies. Inability to fix definite dates, however, would not excuse failure to state my attitude toward the time and duration of trial.

I know that the public has a deep sense of urgency about these trials.

Because I, too, feel a sense of urgency, I have proceeded with the preparations of the American case before completion of the diplomatic exchanges concerning the Tribunal to hear it and the agreement under which we are to work. We must, however, recognize the existence of serious difficulties to be overcome in preparation of the case. It is no criticism to say that until the surrender of Germany the primary objective of the military intelligence services was naturally to gather military information rather than to prepare a legal case for trial. We must now sift and compress within a workable scope voluminous evidence relating to a multitude of crimes committed in several countries and participated in by thousands of actors over a decade of time. The preparation must cover military, naval, diplomatic, political, and commercial aggressions. The evidence is scattered among various agencies and in the hands of several armies. The captured documentary evidence—literally tons of orders, records, and reports—is largely in foreign languages. Every document and the trial itself must be rendered into several languages. An immense amount of work is necessary to bring this evidence together physically, to select what is useful, to integrate it into a case, to overlook no relevant detail, and at the same time and at all costs to avoid becoming lost in a wilderness of single instances. Some sacrifice of perfection to speed can wisely be made and, of course, urgency overrides every personal convenience and comfort for all of us who are engaged in this work.

Beyond this I will not go in prophecy. The task of making this record complete and accurate, while memories are fresh, while witnesses are living, and while a tribunal is available, is too important to the future opinion of the world to be undertaken before the case can be sufficiently prepared to make a creditable presentation. Intelligent, informed, and sober opinion will not be satisfied with less.

The trial must not be protracted in duration by anything that is obstructive or dilatory, but we must see that it is fair and deliberative and not discredited in times to come by any mob spirit. Those who have regard for the good name of the United States as a symbol of justice under law would not have me proceed otherwise.

May I add that your personal encouragement and support have been a source of strength and inspiration to every member of my staff, as well as to me, as we go forward with a task so immense that it can never be done completely or perfectly, but which we hope to do acceptably.

Respectfully yours,

ROBERT H. JACKSON

IX. Revision of American Draft of Proposed Agreement, June 14, 1945

Note: On June 11, 1945, the British Ambassador in Washington presented to the Secretary of State an *aide-mémoire* inviting the United States to send representatives to London for discussions of the prosecution of war criminals beginning on or about June 25. Similar invitations were addressed to the Soviet and French Governments. These invitations were accepted first by the United States and later by the Soviet and French Governments.

Meanwhile, the legal staff assembled by Mr. Justice Jackson studied the draft of the proposal and, without changing it in principle, suggested various revisions. On June 14, 1945, a revised draft was transmitted to the Embassies of the United Kingdom, the Soviet Union, and the Provisional Government of France at Washington for the information and consideration of their Governments before the approaching London Conference. It was explained that the draft did not contain changes suggested by any of those Governments but that their omission did not mean that many of them were not acceptable to the United States.

The following draft is the one which was so submitted and which was taken up for analysis and criticism by the London Conference when it convened on June 26, 1945.

EXECUTIVE AGREEMENT RELATING TO THE PROSECUTION OF EUROPEAN AXIS WAR CRIMINALS

1. WHEREAS: (1) The Declaration issued at Moscow on November 1, 1943 stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes "will 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 that will be created therein"; and

(2) this Declaration was stated to be "without prejudice to the case of major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies";

Now THEREFORE joint action is necessary to provide for the prompt prosecution and trial of the major criminals of the European Axis Powers, including the organizations, responsible for or taking a consenting part in the commission of crimes and in the execution of criminal plans.

2. To provide the necessary practical measures for the achievement of these ends, this Executive Agreement is entered into by the Governments of the Union of Soviet Socialist Republics, the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, acting by their respective duly authorized representatives.

3. All members of the United Nations shall be invited by the Government of the United Kingdom, acting on behalf of the other signatories hereto, to adhere to this Agreement. Such adherence shall in each case be notified to the Government of the United Kingdom which shall promptly inform the other parties to this Agreement.

4. For convenience, (a) the four signatories will sometimes be referred to as "the Signatories," (b) the members of the United Nations adhering hereto as provided in the preceding Article will sometimes be referred to as "the Adherents," and (c) the Signatories and all Adherents will sometimes be collectively referred to as "the parties to this Agreement".

INTERNATIONAL MILITARY TRIBUNALS

5. There shall be set up by the Control Council for Germany one or more international military tribunals (hereinafter referred to as "International Military Tribunal") which shall have jurisdiction to hear and determine any charges presented pursuant to Article 10. Each such International Military Tribunal shall consist of four members, each with an alternate, to be appointed as follows: One member and one alternate each by the representatives upon the Control Council for Germany of the Soviet Union, the United States, the United Kingdom and France. The alternate, so far as practicable, shall be present at the sessions of the tribunal. The presiding officer of each International Military Tribunal shall be selected by the members of the tribunal, and if they are unable to agree, he shall be selected by lot.

6. In the event of the death or incapacity of any member of an International Military Tribunal, his alternate shall sit in his stead without interruption of the proceedings. All actions and decisions shall be taken by majority vote.

7. An International Military Tribunal may sit in any zone in Germany, Austria or Italy or in any other country with the consent of such country. It shall have the power to summon witnesses including defendants and to require their attendance and testimony, to require the production of documents, to administer oaths, to appoint special

masters and other officers, to hold hearings and generally to exercise in a manner not inconsistent with the provisions of this Agreement plenary authority with respect to the trial of charges brought pursuant to this Agreement.

8. An International Military Tribunal shall have the power to establish its own rules of procedure, which shall be not inconsistent with the provisions of this Agreement.

9. This Agreement shall not in any way prejudice the creation of other tribunals by the parties to this Agreement or any of them for the trial of persons who are not prosecuted before an International Military Tribunal established hereunder.

PREPARATION OF CHARGES AND PROSECUTION

10. The parties to this agreement agree to bring to trial before an International Military Tribunal, in the names of their respective peoples, the major criminals, including organizations, referred to in Article 1. To this end, the Soviet Union, the United States, the United Kingdom and France shall each designate at the earliest possible time a representative to act as its chief of counsel. Such chiefs of counsel, acting by majority vote, shall determine the persons and organizations to be brought to trial before an International Military Tribunal, and they shall prepare the charges and institute and conduct the prosecution.

11. The chiefs of counsel shall also be charged with:

- (a) recommending to appropriate governmental authorities agreements and measures supplemental to or in addition to this agreement, necessary or appropriate to accomplish the objectives thereof, and
- (b) the maintenance of liaison among and with the appropriate military and civil agencies, authorities and commissions of or representing any of the United Nations with respect to the matters dealt with in this Agreement.

DECLARATION OF LEGAL PRINCIPLES

12. In any trial before an International Military Tribunal, the tribunal shall be bound by this declaration of the parties to this Agreement that the following acts are criminal:

- a. Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare.
- b. Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1 January 1933 in violation of any applicable provision of the domestic law of the country in which committed.

- c.* Invasion of another country by force or threat of force, or the initiation of war, in violation of international law.
- d.* Launching a war of aggression.

“International law” shall be taken to include treaties between nations and the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

13. In any trial before an International Military Tribunal, the tribunal shall apply the general rule of liability that those who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and responsible for the acts of each other.

14. In any trial before an International Military Tribunal any defense based upon the fact that the accused is or was the head or purported head or other principal official of a state is legally inadmissible and will not be entertained.

15. In any trial before an International Military Tribunal the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defense per se, but may be considered either in defense or in mitigation of punishment if the tribunal determines that justice so requires.

FAIR TRIAL FOR DEFENDANTS

16. In order to insure fair trial for defendants charged with crime pursuant to this Agreement, it is declared that the following procedure is required:

a. Reasonable notice shall be given to the defendants of the charges against them and of the opportunity to defend. Such notice may be actual or constructive. An International Military Tribunal shall determine what constitutes reasonable notice in any given instance.

b. The defendants physically present before an International Military Tribunal (*a*) will be furnished with copies translated into their own language, of any indictment, statement of charges or other document of arraignment upon which they are being tried, (*b*) will be given fair opportunity to be heard in their defense and to have the assistance of counsel. The tribunal shall determine to what extent and for what reasons proceedings against defendants may be taken without their presence.

c. Organizations, official or unofficial, may be charged before an International Military Tribunal with criminal acts or with complicity therein by producing before the tribunal and putting on trial such of their number as the tribunal may determine to be fairly representative of the group or organization in question. Upon conviction of an

organization hereunder, the tribunal shall make written findings and enter written judgment on the charges against such organization and the representative members on trial.

EVIDENCE AND PROCEDURE

17. An International Military Tribunal shall adopt and apply to the greatest extent possible expeditious and nontechnical procedures.

18. An International Military Tribunal shall (a) admit any evidence which it deems to have probative value; (b) confine trials strictly to an expeditious hearing of the issues raised by the charges; (c) disallow action by defendants which will cause unreasonable delay or the introduction of irrelevant issues or evidence; and (d) employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make proffers of proof; taking judicial notice of facts of common knowledge; and utilizing reasonable presumptions.

PUNISHMENT

19. Defendants brought to trial before an International Military Tribunal as provided in this Agreement shall, upon conviction, suffer death or such other punishment as shall be determined by the tribunal to be just and approved by the Control Council acting by majority vote. The Control Council, by such vote, may approve, reduce or otherwise alter the sentences determined by the tribunal, but may not increase the severity thereof.

20. The sentences, when and as approved by the Control Council, shall be carried into execution in accordance with the written orders of the Control Council.

PROSECUTION OF MEMBERS OF CRIMINAL ORGANIZATIONS

21. Upon conviction of an organization before an International Military Tribunal, persons charged with criminal liability by reason of membership therein may be prosecuted in occupation courts or other military tribunals established by the parties or any of them. In the trial of such prosecutions the legal principles declared in Articles 12, 13, 14, and 15 shall be binding upon the court or tribunal and the findings and judgment of an International Military Tribunal shall be conclusive with respect to the criminal purposes and activities of the organization. Upon proof of membership in such an organization, the burden shall be upon the defendant to establish any circumstances relating to his membership or participation therein which are relevant either in defense or in mitigation.

22. The chiefs of counsel designated pursuant to Article 10 shall prepare and recommend to the Control Council plans for the prosecution and trial of persons charged pursuant to Article 21 with liability by reason of membership in organizations found criminal by an International Military Tribunal.

EMOLUMENTS AND EXPENSES

23. The emoluments and expenses of the members of an International Military Tribunal and their alternates designated as provided in Article 5 of this Agreement and of the chiefs of counsel designated as provided in Article 10 of this Agreement, shall be borne by the respective Signatories by whom they have been designated.

24. The emoluments and expenses of the staffs for the International Military Tribunal and the chiefs of counsel and incidental expenses, such as rent, heat, light, stationery and printing shall be borne in equal share by the Signatories.

25. The emoluments and expenses of those occupation courts or other military tribunals which may be established for the trial of prosecutions instituted in accordance with Article 21 of this Agreement shall be justly apportioned between the Signatories concerned and any participating Adherents as may be agreed between them.

RETURN OF OFFENDERS TO THE SCENE OF THEIR CRIMES

26. The Signatories agree that the Control Council for Germany shall establish policies and procedures governing (a) the return of persons in Germany charged with criminal offenses to the scene of their crimes in accordance with the Moscow Declaration and (b) the surrender of persons within Germany in the custody of any of the Signatories who are demanded for prosecution by any party to this Agreement.

X. Aide-Mémoire from the Soviet Government June 14, 1945

Note: On June 14, 1945, Nikolai V. Novikov, Minister Counselor of the Soviet Embassy at Washington, called on Mr. Justice Jackson and delivered an *aide-mémoire* in the Russian language along with the following translation. Its references are to the draft submitted to the Foreign Ministers at San Francisco [IV] and not to the later draft submitted to the embassies.

AIDE-MÉMOIRE

[Translation]

The Soviet Government considering it extremely important that the punishment of war criminals be realised as soon as possible agrees with the proposal of the Government of the United States about the necessity of an urgent establishment of an international tribunal for trial of principal war criminals—leaders of the Hitlerite Government, the Fascist German army and their agents and accomplices and expresses its readiness to sign without delay an appropriate agreement.

As regards the draft of the very agreement submitted by the Government of the United States the Soviet Government agrees with the outline in its principles and considers it possible to accept it as a basis. The Soviet Government considers it necessary, however, to make the following amendments and supplements to this draft:

1. The introductory part of the agreement (article 1) to be worded as follows: "In accordance with the Moscow Declaration of October 30, 1943 'About the responsibility of the Hitlerites for the atrocities committed' and other statements of the United Nations on the question of punishment of war criminals, the Governments of the USSR, the United States, the United Kingdom of Great Britain and Northern Ireland and the Provisional Government of France, acting in the interests of all United Nations, have concluded the following agreement:"
2. In article 4 instead of the words "committed by the Axis powers" to say: "committed by the European Axis powers" and further in accordance with the text.

3. To begin point one of article five with the words: "those German officers and soldiers and members of the Nazi party" and further in accordance with the text.
The last paragraph of article five to begin with the words: "The present agreement is being concluded so as to establish an order for prosecution", and further in accordance with the text.
4. In the titles to the articles 6, 8 and 9 to substitute the word "declaration" for "provision" and change their wordings accordingly.
5. To supplement the enumeration of criminal actions (article six of the draft) by making mention of annihilation and other atrocities in respect to prisoners of war and the peaceful population, of plunder and forceful displacement of the population.
6. Article seven to be worded as follows: "In virtue of the present agreement accusation can be brought forward and the guilty be prosecuted also for committing other crimes not mentioned in article 6."
7. Article 11 to be worded as follows: "The fact that the accused acted under orders of his superior or his government will not be considered as justifying the guilt circumstance."
8. Points "C" and "D" of article 12 to be excluded as, in accordance with the Crimea decisions, it is supposed that the Allied Control Council will have the power of dissolution and prohibition, in administrative order, as mentioned in points "C" and "D" of article 12 fascist organisations. This, of course, does not exclude the right of the international tribunal or occupational tribunals to prosecute any member of an organization dissolved in such a way. Accordingly, all provisions pertaining to these organizations should be excluded in subsequent articles.
9. Point "C" of article 14 to be worded as follows: "Do not allow on the part of the accused any intervention, which can cause unjustified delay, or containing propaganda against the United Nations."
10. Division "Tribunals" to be supplemented by a new article of the following contents: "Governments signatories of this agreement pledge to provide the turning over to the jurisdiction of the international tribunal of any person subject to trial by this tribunal."
11. The last sentence of article 20 to be worded in the following way: "The Control Commission can approve the verdict or overrule it and direct the case for new consideration, or reduce the measure of punishment, or introduce other changes in the verdict of the tribunal, but it cannot increase the measure of punishment."
12. In article 22 to point out that the appointed four representatives form a committee of inquiry at the international tribunal for which purpose after the words "a representative" to add: "who form the

committee of inquiry at the international tribunal". In the second sentence of this article the words "and acting as a group", should be substituted by the words: "and acting as a committee of inquiry".

13. To supplement article 23 by point "C" of the following contents: "The committee of inquiry uses as proof of guilt materials collected and prepared by the commissions of the United Nations and national commissions on investigation of crimes committed by war criminals subject to trial by the international tribunal."
14. All the expenses on the maintenance of the international tribunal and committee of inquiry to come from the funds which will be allotted for the maintenance of the Allied Control Council in Germany. In accordance with this the wording of articles 24 and 25 should be changed.
15. Article 26 to be excluded. As the occupational courts and tribunals are situated with the occupation troops their maintenance expenses will be included in the general expenses for the maintenance of occupation troops.
16. The draft agreement to be supplemented by a new point providing that the agreement comes into force on the day it is signed.
17. At the end of article 15 and at the end of article 22 to point out accordingly that the members of the international tribunal and the committee of inquiry preside alternately at the meetings.

XI. Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945

Note: Mr. Justice Jackson's trial staff at once began work on preparation for a trial of the leading Nazi war criminals. A first step was the formulation of a planning memorandum to indicate the application of the provisions of the United States proposal to the various practical problems of an actual trial. The following memorandum is included because it was distributed to all delegations at the beginning of the London Conference as an aid to their understanding of the meaning of the proposed agreement.

PLANNING MEMORANDUM

I. ASSUMPTIONS

1. For planning purposes only it will be assumed:

a. Certain of the United Nations may agree to prosecute the leaders of the European Axis powers and their principal agents and accessories along the assumed general lines set forth below.

(Caution: This is not yet an agreed plan. The circulation of this paper by the immediate members of the Chief of Counsel's staff will be limited to those accredited individuals whose work makes access to the paper necessary.)

b. The defendants will comprise (1) individuals to be selected such as Hitler, Goering, Himmler, and others; (2) organizations such as the S.S. and Gestapo, who are so implicated in the common enterprise and the overt acts to be charged, that they are deemed to share in the criminal liability therefor.

c. The defendant organizations may be official or unofficial. They may be tried on a class representation basis; that is to say, any such organization may be charged with criminal acts or with complicity therein by producing before the tribunal and putting on trial such of their number as the tribunal may determine to be fairly representative of the organization in question. The selected representatives may include some or all the individual defendants referred to in *b* above.

d. The charges will include the following:

(1) That at some time prior to 1 September 1939 the defendants entered into a common plan or enterprise aimed at the establishment

of complete German domination of Europe and eventually the world, which plan or enterprise included or intended, or was reasonably calculated to involve the use of unlawful means for its accomplishment, including the atrocities and other crimes alleged in sub-paragraphs (2), (3), and (4) below.

(2) That on or about 1 September 1939, and at various times thereafter, the defendants launched illegal wars of aggression.

(3) That in the course of conducting such wars the defendants violated international law, the laws, rules, and customs of war, or the law of the sea.

(4) That before and after the launching of such illegal wars of aggression, and during their continuance, the defendants instigated, committed or took a consenting part in atrocities and other crimes which were in violation of international law or treaties, or the laws of Germany or one or more of its allies, co-belligerents, or satellites.

(5) That the atrocities and other crimes set forth in subparagraphs (2), (3), and (4) above were committed pursuant to, or in the course of and as the chosen means for executing a common criminal plan or enterprise among the defendants.

II. SCOPE OF PROOF

2. Proof will be necessary to establish :

- a. The nature and purpose of the criminal plan or enterprise.
- b. That the criminal plan or enterprise included, or intended, or could reasonably have been expected to involve, the specific crimes charged.
- c. The facts and circumstances which made the wars launched by the defendants illegal wars of aggression.
- d. The unlawful means and methods employed by the defendants in the course of and as the means for conducting such wars.
- e. The atrocities and other crimes referred to in paragraph d (4) above.
- f. With regard to the defendants :
 - (1) Their identity.
 - (2) Their participation in the criminal plan or enterprise.
 - (3) Their responsibility for the specific atrocities and other crimes charged.

3. Proof will also be desired of the acts and conduct of the defendants which may not have been criminal *per se* but which were used in preparation, furtherance and execution of the criminal plan, including but not limited to :

- a. The defendants' internal and external policies.

- b. Their ideological, organizational, and material preparations for the commission of the atrocities and other crimes charged against them.
- c. The pre-war (pre - 1 September 1939) atrocities and other crimes, and those committed by the defendants against their fellow-nationals, neutrals, stateless persons, and nationals of the United Nations.

III. ADMISSIBILITY OF EVIDENCE

4. It is assumed that any tribunal before which the above charges are tried will:

a. Adopt and apply to the greatest extent possible expeditious and non-technical procedures; b. admit any evidence which has probative value, and reduce to the minimum compatible with essential justice requirements governing competency; and c. employ with all possible liberality such established procedures as taking judicial notice of facts of common knowledge and utilizing reasonable presumptions.

5. In the preparation of the case, the best evidence *readily* available will be used. Time is of the essence, and a good case ready for trial at an early date will be far preferable to a perfect case unduly delayed.

IV. OUTLINES OF PROOF

6. Proof of the criminal plan or enterprise will include but not be limited to:

a. Internal Measures Taken by Defendants:

- (1) Establishment of rigid internal control by the defendants over government and all its agencies, religion, administration of justice, education, news dissemination, finance, commerce and industry.
- (2) Destruction of all potential resistance to the defendants' plans by terrorizing, confining, and destroying opposition elements (democrats, trade unionists, Catholics, Protestants, Jehovah's Witnesses, pacifists, anti-nationalists, etc.).
- (3) Dividing the German citizenry on a racial basis and discriminating against those whom defendants adjudged not to be of German blood.
- (4) Dividing the German citizenry into those having legal rights (Aryans) and those without (Jews).
- (5) Utilization of means and methods such as those referred to in (2), (3), and (4) above for purpose of perfecting organizations like the S.S. and Gestapo and training their personnel in (a) using like tactics in the occupation and control of subjugated areas, and (b) administering like treatment to their "inferior" native populations.
- (6) Unlawful expropriations, spoliations, and forced sales for the per-

sonal enrichment of the defendants and for the purpose of establishing and maintaining internal control in their hands as set forth in (1) above.

- (7) Nature, establishment, enforcement and significance of the "Fuehrer Principle".
- (8) Integration of all the foregoing and its utilization for the purpose of preparing Germany organizationally, materially, psychologically and otherwise to launch and conduct illegal wars of aggression and to wage such wars by unlawful means.
- (9) Accomplishment of the foregoing by violations of the laws of Germany.
- (10) Advance planning for the atrocities and other crimes to be committed by the defendants during occupation of subjugated areas.

b. External Measures Taken by Defendants Against Other Nations With Whom Germany Was at Peace:

- (1) Employment of divisive tactics openly and surreptitiously in such countries, such as promoting ethnic, religious, and political disputes and differences, for the purposes of opening the door to the defendants' influence on local policy and of weakening or destroying resistance to the defendants' intended military and political encroachments.
- (2) Establishment and utilization of German and native fifth columns in such countries for the above purposes.
- (3) Employment of bribery, corruption, and false and subversive propaganda in such countries in order to accomplish the foregoing.
- (4) Employment of a policy of entering into treaties without intent to observe them and of thereafter violating them in furtherance of the defendants' plans.
- (5) Infiltration of spies and saboteurs into such countries for use in connection with the defendants' threats of invasions, invasions, and aggressive wars.
- (6) Carrying out the foregoing in violation of international law and the laws of the countries concerned.
- (7) Increasing the defendants' war potential and reducing the defensive capacity of other nations by creating monopolistic and other unlawful schemes and devices in furtherance of the defendants' plans.

7. Proof that the defendants launched illegal wars of aggression will include but not be limited to the following:

- a. Violation of treaties and conventions to which the German State was a party.
- b. Violation of any applicable international law.
- c. Relating the above violations to the plan or enterprises referred to in par. 1 *d* (1) above.

8. Proof that in the course of conducting their illegal wars the defendants violated international law, the laws, rules, and customs of war, or the law of the sea, will cover the proof of the commission of crimes usually and traditionally considered war crimes. This proof will establish, from the nature, frequency, and common characteristics of the crimes referred to, and from the circumstances of their occurrence, that they were the result of an overall policy which directed or envisaged their commission. Proof of individual and organizational responsibility will be coordinated with the pertinent results of any other projects.

9. Proof of the defendants' atrocities and other crimes referred to in par. 1 *d* (4) above will include but not be limited to the following :

- a. Genocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding ; (2) sterilization and castration ; (3) depriving them of clothing, shelter, fuel, sanitation, medical care ; (4) deporting them for forced labor ; (5) working them in inhumane conditions.
- b. Unlawful expropriations, spoliations and forced sales in occupied areas.
- c. Unlawful destruction of property.
- d. Seizure of control of other nations by threats of violence, invasion, and other unlawful means.

V. SOURCE MATERIALS

10. *Documentary:*

- a. Writings and speeches of defendants and their associates.
- b. Organizational literature.
- c. Magazines, newspapers, and other literature under defendants' control.
- d. Laws, decrees, ordinances, and regulations.
- e. Manuals ; military, diplomatic, and other official orders, reports, plans, etc. ; and pertinent official documents of any nature.
- f. Correspondence.
- g. Diplomatic and political treaties and agreements, public and secret.
- h. Financial, commercial, and trade agreements and data.
- i. Biographical records.

11. *Photographic:*

- a. Still.
- b. Motion pictures.

12. *Oral Testimony:*

- a. Film and other recordings.
- b. Witnesses.

XII. Summary Record of Two Informal Gatherings of British and American Delegations June 21 and 24, 1945

On Thursday, June 21, 1945, at the invitation of the British, an informal gathering of the United States and British representatives was held.

Sir Basil Newton, of the British Foreign Office, advised that the Provisional Government of France had accepted the conference invitation for June 25 and would send Henri Donnedieu de Vabres as their Representative¹ and that, although the Soviet Government had come to no decision, it was hoped that they would attend and that their delegate would depart from Moscow on June 23.

Sir David Maxwell Fyfe, Attorney-General of the United Kingdom, suggested as the basis for discussion a list of defendants consisting of Goering, Hess, Ribbentrop, Ley, Rosenberg, Hans Frank, Frick, Keitel, Streicher, and Kaltenbrunner. It was agreed that this list should be considered and that the United States would propose additional names later. The United States, it was stated, had not reached a consideration of cases against individual defendants but had engaged in obtaining general proof necessary against all leading Nazis with the expectation of selecting defendants in the light of evidence so obtained.

There was general discussion of the best methods of proof in view of the difficulty and novelty of the case and of the possible sources of evidence to be explored.

The policies to be followed by the respective countries in the return of prisoners requested by the governments of occupied territories for trial at the scene of their crimes were discussed at some length.

Sir David Maxwell Fyfe stated that the British hoped that international trials would commence at the beginning of September. He referred to the pending elections and said that he had no doubt that, in the event a Labor government were chosen, it would adhere to the plans made by its predecessors at this Conference. He suggested Munich, in the United States Zone of Germany, as an appropriate place for trial, partly for its psychological value as the birthplace of the Nazi party. Mr. Justice Jackson suggested that the choice de-

¹ France was represented at the London Conference by Judge Robert Falco.

pended chiefly on facilities that could be made available and undertook to investigate the suitability of Munich. All agreed that the trial should be held on the Continent, probably in Germany, and all agreed that, if in Germany, it should be held either in the British or in the American zone of occupation.

A similar gathering took place on Sunday, June 24, at which Sir Basil Newton advised the meeting that the British Ambassador in Moscow had reported that Soviet delegates would attend the Conference but that they had requested that the meeting be deferred from June 25 to June 26. It was agreed that the British Embassy at Moscow should be notified that the British and American Delegations acceded to the Soviet request.

Sir Basil further informed the session that the French had decided to send as their Representative Judge Robert Falco of the Cour de Cassation, to be assisted by Professor André Gros, French member of the United Nations War Crimes Commission.

There was an informal discussion of the amendments that had been proposed by the British to the American draft and of the points raised in the *aide-mémoire* handed to Mr. Justice Jackson by the Counselor of the Soviet Embassy at Washington [X]. Pending arrival of the other delegations, it was agreed that a committee would attempt to reconcile such differences as there were between the British and the American viewpoints in a joint draft of a protocol but that no commitment should be made by either Delegation on any point that was to come before the Conference.

A joint draft of a protocol was thereafter prepared by a committee, which showed how satisfactory reconciliation could be accomplished on all differences between the British and American viewpoints. This draft was not circulated, however, and was not the subject of discussion in the four-power conferences, and, as it was largely repetition and only in the nature of a working paper of the two Delegations, it has not been set forth.

XIII. Minutes of Conference Session of June 26, 1945

The Conference was called to order by the Attorney-General, Sir David Maxwell Fyfe, who welcomed the Representatives on behalf of the host, the United Kingdom.¹ He stated the purpose of the Conference in general terms and reviewed the proceedings which had led up to it. He suggested that, in as much as the United States had proposed a definite agreement, the Conference call upon Mr. Justice Jackson to explain in detail the United States proposal.

Mr. Justice Jackson pointed out that there were two drafts of the United States proposal outstanding. The first had been handed to the Foreign Ministers at San Francisco [IV]. Later studies had resulted in some changes and a later draft had been forwarded to all conferees through their respective embassies [IX]. He suggested that the latter proposal be made the basis of the discussions.

General Nikitchenko suggested that, instead of embodying the entire subject in one instrument, there should be a separate and short executive agreement between the powers which would adopt an annexed statute to govern the conduct of the trials. The latter, he thought, should specify the rules of procedure in great detail. He thought it should provide for the organization of the Tribunal, by whom it should be named, its powers, and the cases it was to hear—which should be only major cases—and should specify that other criminals be handed over to the appropriate national authorities for trial by them; it should stipulate where the trials should take place, the language in which the proceedings should be conducted, and the procedure of the trial; it should leave to the court itself the working out of internal procedures.

The Attorney-General, after the morning's general discussion, called upon Mr. Justice Jackson at the afternoon session to explain the American proposal, and the proceedings were as follows:

MR. JUSTICE JACKSON. We start with the recital of the declaration of Moscow, which is really the beginning of the plan to conduct these trials, and the recital follows the language of the declaration. It is the purpose to indicate the division between the class of cases we are concerned with and the class with which we are not concerned. The recitals are intended to make plain what the background of this agree-

¹ For complete list of members of delegations, see p. 441.

ment is. That is why we put in those recitals. I do not know whether any questions occur on that or not. [No questions.]

Then we recite that it is necessary in order to carry out those commitments that there be joint action and that all Members of the United Nations shall be invited to sign and adhere to this agreement; that adherents shall be notified to the governments through the United Kingdom; and that the four signatories will be referred to as "signatories", and the other United Nations who may adhere to it are "adherents", and all are referred to later as "parties to the agreement". I do not know whether any questions occur on those or not.

GENERAL NIKITCHENKO. I am not quite clear on the point of including the organizations. Are they juridical bodies? How is it envisaged?

MR. JUSTICE JACKSON. I would envisage that, in case of such an organization as the S.S., the purpose of this proceeding would be to try the general purposes, plan, the methods, etc., of that organization to determine whether it constitutes such a criminal organization that we should attribute to each member responsibility for acts of the others and responsibility for the acts of the whole. The organizations that we think should be included would be only voluntary organizations, of course, where the membership was in itself significant of an adherence to the purposes of the organization and where the organization was sufficiently closely knit so that responsibility of the member would be a reasonable conclusion. We did not think that it would ordinarily reach, for example, to the army or to the Nazi party. But such organizations as the S.S., the Gestapo—perhaps some groups that are not technically organizations—would be included. But that is not attempted to be solved here. We simply attempt to decide that organizations ought to be brought within the purview of this trial.

GENERAL NIKITCHENKO. We do not propose to go into details of definition here and now but would like to draw attention to the Crimea declaration agreed to at Yalta, under which the Nazi organizations were declared to be illegal and criminal and therefore should be utterly destroyed; and it would therefore be necessary to see that this agreement, or the line taken here, follows the decision of the Three Powers in the Crimean agreement. However, that could be decided later.

MR. JUSTICE JACKSON. It is intended that there be no inconsistency. The inclusion of these organizations is not intended to be a recognition of legality of their existence in the future, and we did not think in proposing the trial that it would be any obstacle in the dissolution of them for the future. We are thinking of their past acts.

We now come to the article dealing with the military tribunals, which we think of as entirely separate from the prosecuting staff. [Here the Justice read from paragraph 5 of the draft proposal, IX.]

We have in mind that one or more should be provided for at this time to have jurisdiction to hear any of the charges. We provide that each shall consist of four members, each with an alternate, one from each government here represented; that the presiding officer shall be selected by the members of the Tribunal or, if there is no agreement, by lot. The idea as to an alternate is that he should sit if the representative should become ill, die, or become incapacitated. The alternate would be present during the entire proceedings and be prepared to step into the place of the principal judge in event of necessity. The decision should be by majority vote. There are infinite possibilities of varying this arrangement, but this is as practical an arrangement as we could think of, and we therefore proposed it in that form.

GENERAL NIKITCHENKO. In the original American draft the proposal regarding the position of presiding officer was that it should be held by rotation; now we see by the second draft that the chairman shall be elected or chosen by lot. The Soviet Representative would be glad to know why this alternative system was preferred in the second draft and how far it is suitable as compared with the first original proposal.

MR. JUSTICE JACKSON. We have never had the general practice in our country of rotating the presiding officer except in some courts, and in some of our commissions they rotate by the year. The presiding officer, of course, has no more power than the other members of the Tribunal, but there would be a greater consistency in the proceedings if one man presided. I do not know, if there were rotation, whether it would be by the day or week, or just how it could be arranged. We read the Soviet suggestion on rotation of the presiding officer, but I did not recall that we had ever proposed rotation, and I am inclined to think you are in error about that. Rotation was never proposed, to my knowledge, and it is rather foreign to our ideas.

COLONEL BERNAYS. The first draft taken from San Francisco had no suggestion of rotation.

MR. JUSTICE JACKSON. Your suggestion of rotation was first brought to our attention in an *aide-mémoire* delivered to me in Washington [X].

GENERAL NIKITCHENKO. In the question of rotation of the chairmanship, of course it would not be a question of having a different one every day. The Soviet Delegation had in mind that there are, after all, four judges envisaged for the International Tribunal, and, assuming that the opinions of the four judges were evenly divided, it would be necessary for the chairman to give his vote. The actual view of the Soviet Delegation on the way in which rotating chairmanship should be organized is that in every individual case coming before the court from the beginning there would be a single chair-

man in office; then when the next case came up the chairmanship would revert to another of the judges, who would hold office until that case were completed, and so on. That is particularly important if the Tribunal sits in different countries. For instance, if the Tribunal were sitting in France, it would be desirable to have a Frenchman as chairman.

Do the authors of this proposal suggest that, where it states that the whole membership of the United Nations shall be invited by the United Kingdom to appear as adherents [paragraph 3], adherence to the agreement confers any obligations to take part in the work of the court, especially if it happens to be sitting in one of those countries?

MR. JUSTICE JACKSON. It was not intended by the language to impose any obligations or to confer any rights except such privileges as might be granted in particular circumstances. There might be a situation where it would be advisable and we would agree that some nation should come forward with some evidence, for example. The problem of dealing with their cases we thought was pretty much solved by the provision for sending back for local trials the local offenders. If we are going to get this task done in any reasonable length of time, it is necessary to limit the number of people who will participate, and therefore we have taken the view that the four countries who have the chief responsibility are our own and that, while we would like the participation of the others, it would not be practical to open the matter to all others as a matter of right. That was the view we entertained in drawing these documents.

SIR DAVID MAXWELL FYFE. We have one point on number 5 which has been already mentioned, Mr. Justice Jackson, that we should prefer that the Tribunal should be set up by the Governments in consultation with the Control Council, because it would make it easier for us to get the best members for the Tribunal if they were appointed by the Government and then the Government would consult with the Control Council and see if they approve.

MR. JUSTICE JACKSON. "An International Military Tribunal may sit in any zone in Germany, Austria or Italy. . . ." [Here the Justice read paragraph 7.] Any questions on number seven? [No questions.]

[The Attorney-General was excused and Mr. Roberts acted thereafter as his alternate as chairman of the Conference and of the British group.]

GENERAL NIKITCHENKO. That point is quite clear with possibly some amendments which could be inserted *in toto* in the statute of the International Military Tribunal.

MR. JUSTICE JACKSON. In paragraph 8 we provided that "An International Military Tribunal shall have the power to establish its own rules of procedure, which shall be not inconsistent with the provisions

of this Agreement." We have thought in our subsequent studies that the agreement should also authorize the prosecuting staff to propose rules to the Tribunal so that there would be direct authority for proposing them. I may say that the system of adopting its own rules of procedure is customarily used in our country with commissions and even with courts. I think we delegate to the court more rule-making power than you do with the Continental system. We leave it to judges to make rules for their own courts, and sometimes we even delegate the power to make rules to govern the entire litigation procedure. Perhaps that is why we have favored a large delegation of power to the Tribunal itself instead of attempting to codify details of procedure. We were also a little afraid, since this is an unprecedented case, that we were not wise enough to adopt in advance rules that were all-inclusive to meet all situations. I would like to see a liberal rule-making power left in the court to meet all unforeseen situations as are apt to arise. We have not been through this kind of trial before, and it therefore is not so simple as drafting a statute to govern an everyday litigation.

GENERAL NIKITCHENKO. It is, of course, impossible to foresee all the details that should be included in a statute of this kind and I agree that the court which is to be set up must have the power to elaborate detailed instructions that will be necessary; but we are afraid the actual wording of this paragraph number 8, as it is, rather implies that if we do not here and now define basic principles for government of the International Tribunal, it will be left then to the Tribunal itself when set up to do that work, and it would delay the work of the prosecutors.

MR. ROBERTS. May I say that it is our view, too. We would like to draft some rules by agreement although we quite understand that the Tribunal will have the power to modify or extend those rules, but we share the Russian fear that this paragraph as it is might lead to duplication and delay.

GENERAL NIKITCHENKO. This is a change we can discuss in a memorandum, but we could leave the text as it stands now in the statute and arrange that when necessary. The Tribunal may later elaborate or extend.

MR. JUSTICE JACKSON. I assume you mean that a memorandum will be prepared by the Soviet which will indicate the type of rules which you think should be incorporated. We do not object to adding any rules we feel should be incorporated as we go along.

The next paragraph of the draft is simply designed to make clear that each country retains the right to set up its own tribunal for any accused that are not reached by this.

GENERAL NIKITCHENKO. I quite agree.

MR. JUSTICE JACKSON. We take up next the subject of charges and

prosecution. I repeat that all of this is framed in the light of the little procedural law we know, which is our own system, and we put it forward against that background, of course. [Here the Justice read from paragraph 10.] "The parties to this Agreement agree to bring to trial before an International Military Tribunal, in the names of their respective peoples, the major criminals, including organizations, referred to in Article 1."

The next paragraphs are amplifications to some extent recommending additional measures and maintenance of relations with any groups that are interested in the prosecutions, including any of the United Nations which are not included in the prosecution. While this is a very sketchy provision about the prosecution, it was understood by us when we were preparing it as embodying our usual method of prosecution by which the prosecution proceeds entirely without consultation with the court and without the court's knowledge or participation in any way. Our system contemplates a complete separation of the function of hearing charges from the function of prosecution. It is a separation of functions which is a very deep-seated part of our legal philosophy, and it is against that background that it is put forward.

GENERAL NIKITCHENKO. It would be desirable if we could be given a more detailed explanation of prosecution in the United States, the actual raising or preparing of a charge as applied to the tasks which lie before the International Tribunal here.

MR. JUSTICE JACKSON. I can give you a little more clearly what I would envisage in the light of our system. Our first task as prosecutors, as we see it, is to get the evidence in the case. We would not wait for any court to be set up to do that because we think of that as a prosecutor's function, and therefore we have already started work on it and have many people trying to examine captured orders and reports. We have interrogated prisoners of war, interrogated civilian prisoners taken since the surrender, interrogated witnesses, and gathered all of the evidence we can get in proof of the charges. Then we envisage the preparation of an indictment or bill of accusation—you can call it by various names—in which we would select persons indicated by the evidence to be guilty, they would be charged with crimes, and that indictment would then be presented to the court. That would be the first time there would be any contact between the prosecutors and the court in our system—when the charges are presented. That brings the case into court—when you have an indictment. The Court would then have nothing before it except the indictment but it would fix the time of trial and might assign counsel. On the trial date we would produce in court all of our evidence. The court would not have the evidence merely as a result of its being

gathered by the prosecutors but it would have received it in open session. Documentary proof, as we call it, would be offered and some facts would be established by "judicial notice", which means it would not be necessary to prove them. Oral testimony would be received. The decision would then be made, based on the evidence that was produced before the court by the prosecutors. The court would take no responsibility for the production of any part of the proof. It would have no part in the prosecution. It would simply have one function, to receive and weigh evidence and determine the question of guilt. That in a crude way is a statement of our procedure.

PROFESSOR TRAININ. The basic problem is whether the International Military Tribunal requires an auxiliary body, and I understand from the document which has been submitted and from the explanation of the United States Representative that both the Soviet and American Representatives hold the same view, that some body for the purpose of investigation is necessary; so both delegations make the same reply to that question.

There is agreement apparently on the second point, that the commission of inquiry works independently and draws up the indictment. In that way, one is called "commission of inquiry" on the Russian side and "prosecutor" on the American. Both delegations agree on the function of drawing up the indictment. Then there is the third task of bringing in the indictment before the Tribunal. On that point there seemed to be slight difference because the American proposal suggests there is no need to provide any additional material. The court can decide only the actual form of indictment. That, of course, is a point which can be discussed later. Since the United States proposal foresees the necessity for the prosecuting body to conduct investigation and draw up the indictment, both delegations are sufficiently close to one another.

MR. JUSTICE JACKSON. I am afraid that we are not quite as close as Professor Trainin states, but I hope we may be. We think the indictment might properly refer to some facts of which the court might take judicial notice, but our system contemplates bringing into the court after the indictment all of the proof. The indictment itself merely shows that one is accused and informs him of the charges against him, but the indictment itself is not much more than a notice of trial and of the charges and does not stand as evidence. Therefore, the prosecuting officers would conduct the trial at which all the proof would be brought out. I do not know whether the difference between us is, or just how much of the difference is, a matter of words and how much a matter of substance. I think both will have to develop our ideas as we go along.

I should like to ask how the French would handle this prosecution.

JUDGE FALCO. I do not insist upon the adoption of the French system because we are working on a new thing in this International Tribunal. I want to explain the French system to see whether there are better ideas to be used in the new International Tribunal. The prosecution is made in France by a magistrate (*judge d'instruction*), and after that the prosecuting officer looks over the case and sums up the charges to present to the judges. The prosecuting officer is put in charge of the case, and the witnesses are interrogated. The court is outside of the prosecution and must not interfere with the prosecutor, so that there is a great similarity with the American system as it has been exposed by Mr. Justice Jackson. The French could not see any advantage in mixing the thing and having the court participating in the prosecution. We think it would be simpler to leave the prosecution in full charge of the prosecutors, and that leaves the court sitting and judging apart from the prosecution. The situation between the court and the prosecuting officer is such that not all procedure which has been had before the court hearing is taken into consideration by the court. The court takes the case as a new thing and does not look into the procedure which has been made before.

PROFESSOR TRAININ. The Soviet system shows independence of function between the prosecuting body and the court itself. The court could not be satisfied merely with written depositions. It must also have oral proceedings. We have agreed on the basic principle that there must be a preparatory or auxiliary body, but it seems the difference arises as to the functions of that latter body. According to the United States proposal, if we have understood it, the first step is for the prosecuting body, which would be the commission of inquiry in the Soviet system, to gather together all the evidence and sum it up into a form of indictment, and the second step is hearings before the Tribunal; but, if that indictment is merely a form of statement of the case against the criminal, it would not be sufficient. If necessary, additional evidence or material would be called for. The alternative which seems to be contemplated in the United States draft seems to be a rather complicated process and would hold up the Tribunal if there were two independent procedures established. The court should have power independently to value the indictment and call for any other material desired. The point is that it is necessary for this preparatory or auxiliary body to continue and complete the evidence in the form of an indictment so that the process should be whole and complete and the court, when the indictment is brought before it, will be in a position to adopt a formal decision without any further delay. The evidence would be handed in with the indictment.

MR. JUSTICE JACKSON. It might be well to clear up a misunderstanding. Our indictment is merely a charge. It merely accuses and names

the crime of which it accuses, tells briefly where it was committed and when, and does not give evidence. For instance, if you are indicting a man for murder, your indictment charges that on a certain date at a certain place he did commit murder by shooting such a person, causing his death, against the law and the peace and dignity of the state, and he is therefore accused. You do not set forth the evidence in the indictment. You merely start the case in motion, and then the trial is for producing the evidence; I think that is where our basic difference has been—over the nature of the indictment. [Here the Justice addressed the British Delegation.] I assume your form of indictment, which we largely copied, is very similar.

MR. ROBERTS. Much the same. In the charges the accused is given sufficient particulars for him to know with what he is charged so that he can prepare his defense. We, I think, on this side of the table entirely agree with the procedure which the French outlined and which they say they are prepared to recommend to their Government.

JUDGE FALCO. In a French bill of accusation it would be a little more complicated than what Justice Jackson said but more or less on the same line. It would be a little longer, beginning with indication of the facts and followed by indication of the proof and evidence which have been gotten by the prosecuting officer and indication of the law which applies. We would not suggest that it be adopted by the International Tribunal, which is an entirely new creation, but as indicated in French law the court can always call for new witnesses or new evidences so that we might also think along those lines.

GENERAL NIKITCHENKO. I think the system of prosecution as it is practiced in the Soviet Union does not at all differ from that practiced in France as explained at this table. The prosecutors are independent in their investigation and drawing of the charge of indictment. They submit that document to the Prosecutor General, who can ask for additional material and who has to confirm and authorize the indictment before it is submitted to the court. There are prepared, of course, details of the evidence that is advanced in support of that charge, and the document concludes with the indictment as in France. So there is really no difference between the Soviet procedure and the French. There does seem to be a difference between their system and that of the United States and the United Kingdom, where the material does not go to the court, but only a formal indictment. If it is now suggested that the French proposal is really the equivalent or fits in with the United States and United Kingdom systems, it seems to be a misunderstanding, because the resemblance is really between the French and Soviet systems. There is no suggestion on the part of the Soviet Delegation to apply the whole Soviet system to the trial of war criminals. We should aim to simplify procedure and to facilitate the work of the courts. Therefore, there should be the two stages of, first, preliminary

collection of material—on that point there does not seem any difference of opinion—and then, the second point, a special body which is to accomplish that task. The difference apparently is on the point as to whether the material is to be submitted to the court or whether it is to be kept by the prosecuting officers. In the view of the Soviet Delegation, if the court is to be assisted, that material should be referred to it and reference should be made in the indictment as to the reasons for the charges advanced, giving the evidence that has been collected and leaving it with the court as completely presented. The court should not be confined merely to preliminary investigation, but, as additional evidence is required, it should be in the power of the court to ask for it. The court, of course, continues to be completely independent.

MR. JUSTICE JACKSON. I think I have failed to make clear that in our practice the evidence is passed to the court but is passed at a stage subsequent to the indictment. The indictment merely results in notifying the defendant of the charge, the time and place of trial, and that sort of thing. All the evidence is passed to the court and enters into its archives, passing out of the hands of the prosecution. The decision of the court is based on the complete evidence. The difference is, as I gather, that you would, so to speak, attach your evidence to the indictment, while we would follow the indictment by production of the proof in open court at the trial. There is, therefore, in our system more importance to the trial and less importance to the indictment, the indictment being merely accusation. The court hears all the evidence, and in most cases our courts must hear the evidence of each witness. The defendant has the right to be confronted by every witness against him, and all testimony is heard in open court. Our system results, perhaps, in a longer trial but a shorter indictment.

GENERAL NIKITCHENKO. In the Soviet system the indictment itself is not regarded as evidence. It is merely the document containing particulars of the offense and the evidence on which it is chargeable.

MR. JUSTICE JACKSON. I would like to make clear in suggesting this arrangement that we have not proposed that our system of ordinary or jury trial be adopted. In fact, we would not think it would be at all feasible to try these cases according to the unmodified American system. What we are trying to do is to depart from ours and find a system which, while it follows the general philosophy of our system, is one on which we can hope to try these cases in a reasonable length of time and without undue difficulties.

JUDGE FALCO. I suggest that we iron out the difficulties of criminal law and see what we want, extracting from our different laws the best factors. Also, we agree that we would like to put before the court a complete investigation, and we do not want to waste time because it would take much time and create a bad impression on the Allied and

German people. I submit that the first question is to make a complete investigation. I believe the Soviet views, which are very near the French one—it would be the act of transmitting to the court the charges and the evidence going with it, and it should be for examination by the prosecuting officer. Whatever the forms we will adopt of that, certainly the French Delegation has no preference. We should go to work with the idea that a system of international prosecution must be reached, and we must not risk the court's not being satisfied. That is the most important question.

GENERAL DONOVAN. Is it your suggestion that the proposal made by Justice Jackson should be modified to submit to the court not only the indictment but evidentiary material in support of it as prepared by all counsel?

JUDGE FALCO. I agree.

MR. ROBERTS. It is your suggestion that that should be done before the trial and that before the trial the court should have the power to reject or send back.

JUDGE FALCO. Are we to have only one prosecutor?

GENERAL DONOVAN. You want the prosecutors to act jointly?

JUDGE FALCO. I agree that they act jointly so that there is no risk of the court not being satisfied. To illustrate the Soviet position, the prosecution would be reviewed by the four prosecuting officers and not by the court.

MR. JUSTICE JACKSON. I wonder if we are far enough advanced in understanding each other so that we can proceed to the legal principles that underlie the trial.

GENERAL NIKITCHENKO. Views expressed seem to be approaching one another; so I think we could proceed. According to the French proposal, these four prosecuting officers would actually be working as an investigating commission.

MR. ROBERTS. Which is really what we are doing now.

MR. JUSTICE JACKSON. Certainly.

GENERAL NIKITCHENKO. Especially since no lengthy preparation would be necessary as evidence is already gathered.

GENERAL DONOVAN. Submission of the indictment should not be accompanied by submission of the evidentiary material, but the evidence would come in only at the trial itself.

MR. ROBERTS. I agree.

JUDGE FALCO. The evidence and material itself would go before the court at trial. This would be a summary of the facts.

GENERAL NIKITCHENKO. The Soviet Delegation takes the view that the indictment should be accompanied by the evidence, the evidentiary material. I point out that the United States proposal rather assumes lengthy investigation is involved, whereas the evidence and material

is all available. Therefore, I do not see why there should be a separation between those two. After all, it is just a summary of the facts of the case and statement of the charge.

GENERAL DONOVAN. Perhaps I see the difficulty. I wonder if they think we propose that the indictment and the material could be separated by a great lapse of time. That is not what we propose. The indictment would be submitted to the court on a given day and perhaps on that very day the evidence would be taken by the court under oath, but separately.

GENERAL NIKITCHENKO. But before the trial begins.

GENERAL DONOVAN. We submit the indictment to the court and notify the defendants so that they can prepare for trial. The day for the trial is set and then all evidence on which the indictment is based, the evidence which will prove that charge, is submitted under oath, together with such documents as the court will receive.

MR. ROBERTS. That is what we on this side of the table visualize. The court is to try the case at the time set, not to try it before, but try it in court on the evidence which is presented.

GENERAL DONOVAN. And the evidence is submitted in the presence of the defendant and his counsel, to the admission of which the objection of the defense might be sustained, so that the court must sit as a referee.

GENERAL NIKITCHENKO. The details of this we could deal with later. The point at present would be for us to see whether there is any difference of opinion on the principles involved.

MR. JUSTICE JACKSON. I agree. Shall we take up the legal principles?

Number 12 has given us a great deal of difficulty, and we have re-drafted and amended it a good many times. This was caused, I suppose, by the difficulty of stating an entire body of criminal law for international trial purposes in a single paragraph. It is a very important paragraph and deserves careful study, word by word, because every word will come back to plague us before we get through with the trial. What we have attempted to do is to reach the heart of these offenses. We think it would be very unfortunate if we were to go into this trial with an argument as to whether the acts were criminal, and it should not be left to the court to sift out from the various authorities what the law is. Following that thought, we provided that, "Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare."

We have been doing a great deal of studying on that, and I fancy everyone at the table will have some suggestions to make as to changes.

GENERAL NIKITCHENKO. I do not think there is any need to go into

any discussion on this at the present moment but agree that an article of this nature is essential in the establishment of an international military tribunal in order to decide who will be tried. Obviously it will need thorough investigation, and there is no point in starting on that now.

MR. JUSTICE JACKSON. Numbers 13 and 14 are continuations of somewhat the same subject. [Here the Justice read paragraphs 13 and 14, *ante*, p. 58.]

GENERAL NIKITCHENKO. The Soviet delegates have no doubt whatsoever about including articles substantially of this character in the draft statute of the International Tribunal. It may, of course, be necessary to make amendment in the wording, et cetera, and the conditions under which it will proceed to pass judgment on leaders and organizations which we think ought to be regarded as equally responsible.

MR. JUSTICE JACKSON. There must also be provisions to assure that these trials will be fair trials, that defendants will have reasonable notice and opportunity to defend, and that those who are physically present before the Tribunal will be furnished with copies of the indictment, and given an opportunity to be heard in their defense, have counsel, et cetera.

GENERAL NIKITCHENKO. That is all perfectly clear.

MR. JUSTICE JACKSON. Then we come to the question of organizations, by which we intend to reach a great many people, in fact, with a very few people before the court. [Here the Justice read from paragraph 16, *ante*, p. 58.] This goes back to the proposition presented at Yalta of reaching the members of these organizations through the organizations. Unless we do that, the number of trials that would be necessary would be prohibitive. We think it can be done with proper safeguards so that it will be an instrument of justice and not injustice. We recognize it as a method which has to be guarded. If not, it would be a very unjust procedure, and therefore we have tried to provide for getting it done, but getting it done consistently with our ideas of what constitutes a fair trial.

GENERAL NIKITCHENKO. On that point we have exchanged views.

MR. ROBERTS. It was covered at the beginning of this afternoon, was it?

MR. JUSTICE JACKSON. Now, numbers 17 and 18. We think we can improve these in draftsmanship, but the idea may have more significance to British and American lawyers than it does to Continental lawyers. We do not want technical rules of evidence designed for jury trials to be used in this case to cut down what is really and fairly of probative value, and so we propose to lay down as a part of the statute that utmost liberality shall be used. Most of those things are

really addressed to the judges, and perhaps the question doesn't trouble you who follow the Continental system as much as it does us.

GENERAL NIKITCHENKO. That is quite understood. We think it is perhaps very advisable to remind the judges that there may be a possibility of attempts by the Fascists to use the courts as a sounding board for accusing the Allies of imperial designs.

MR. JUSTICE JACKSON. We had thought they may attempt to break up the trial through some of their techniques of behavior and thought that another section should provide very strict control, even to the extent that they should be denied the privilege of defense if their conduct is consistently in violation of orders of the court. The question of propaganda may be a somewhat difficult one. I think the scope of our charges will have to be considered in the light of what we expect to be answered. We certainly do not want to permit this to be turned into a trial of anyone except those accused, and we shall have to look to our accusations and cut our indictment to what we expect to try. We shall have to hear them within the issues. It is one of the important things about defining carefully the acts which constitute crimes. So far as we are concerned, we have never thought there was any basis in this case for trying the remote causes for this war. Our definition of crime does not involve causes; it involves only actual aggressive war—the attack. It is one thing to attack for remote reasons. It is another thing to have a war of self-defense, which I suppose we all concede is permissible and not a crime. We shall have to consider these articles carefully as definitions of crime. We have no thought here, in charging them with launching an illegal war, to have a general trial of German grievances.

GENERAL NIKITCHENKO. Don't you think it reasonable that provisions must be made to stop all attempts to use the trial for propaganda?

MR. ROBERTS. Irrelevant propaganda.

MR. JUSTICE JACKSON. I think some admonition could be embodied. I think the draftsmanship needs to be skilful in order to avoid the implication that the nations conducting this trial are afraid of something.

Number 19, on punishment, I think is fairly obvious. The only question was whether the extent to which the Control Council should have authority to control the sentence should be a continuing authority to reduce but no authority to increase.

MR. ROBERTS. Before we pass from 19, I think we on our side of the table are not in favor of the Control Council having the power of approval because, I suppose, if they have the power of approval, they have the power of disapproval, which means they could set the decision of the Tribunal aside. We personally would not like that.

MR. JUSTICE JACKSON. It was not intended to permit disapproval of a finding of guilt or innocence, but only modification of the sentence.

JUDGE FALCO. Can we really decide on this before knowing what the relations will be between the Allied Council and the International Military Tribunal?

GENERAL NIKITCHENKO. After all, we are not taking any decision now. We are merely discussing and clearing up various points in this draft. It will be done later when we shall decide what exact principle should be embodied.

MR. JUSTICE JACKSON. Number 20 leaves sentences to be directed under the Control Council. Number 21 has already been discussed. Number 22, I think, is obvious. Numbers 23, 24, and 25 deal with financial matters that are not very important to these defendants.

It was agreed that representatives of each nation other than the United States would prepare memoranda of objections and suggestions, and the Conference adjourned to meet Friday, June 29, 1945, at 10 a.m.

XIV. Amendments Proposed by the United Kingdom, June 28, 1945

PROPOSED AMENDMENTS BY THE UNITED KINGDOM DELEGATION TO THE UNITED STATES DRAFT PROTOCOL

1. *Article 5*: The opening words of this Article should be amended to read as follows:

“There shall be set up by the signatories after consultation with the Control Council for Germany one or more international military tribunals etc.”

While the Control Council must, of course, be consulted as to the setting up of the Tribunal within Germany, the responsibility for the appointment of its members must rest with the Allied Governments concerned. It is important to emphasize the independence of the Tribunal and it would be a mistake to place it under the Control Commission.

2. *Article 8*: It is suggested that Article 8, which gives power to the International Tribunal to establish its own rules, should be deleted and an obligation should be placed upon the Chiefs of Counsel representing the four Allied Governments to prepare and submit to the Tribunal rules for their approval. It is thought that the initiative with regard to the rules ought to come from the signatory Governments through their Counsel. If this is accepted, it would seem that the proper place to insert the new provision would be at the end of Article 11 and it is suggested that the following subparagraph be added to the end of that Article:

“(c) Recommending rules of procedure for adoption by the International Military Tribunal. Any rules so adopted by the Tribunal shall not be inconsistent with the provisions of this Agreement.”

3. *Article 12*: The United Kingdom Delegation submit the following re-draft of this Article.

“12. The Tribunal shall be bound by this declaration of the signatories that the following acts are criminal violations of international laws:

(a) Violations of the laws, rules and customs of war and such acts shall include, but shall not be limited to, mass murder and ill-

treatment of prisoners of war and civilian populations and the plunder of such populations.

- (b) Launching a war of aggression.
- (c) Invasion or threat of invasion of, or initiation of war against, other countries in breach of treaties, agreements or assurances between nations or otherwise in violation of international law.
- (d) Entering into a common plan or enterprise aimed at aggression against, or domination over, other nations, which plan or enterprise included or intended, or was reasonably calculated to involve or in its execution did involve, the use of unlawful means for its accomplishment, including any or all of the acts set out in sub-paragraphs (a) to (e) above or the use of a combination of such unlawful means with other means.
- (e) Atrocities and persecutions and deportations on political, racial or religious grounds, in pursuance of the common plan or enterprise referred to in sub-paragraph (d) hereof whether or not in violation of the domestic law of the country where perpetrated.

‘International law’ shall be taken to include treaties, agreements and assurances between nations and 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 the public conscience.”

NOTE: It may be assumed that a common plan to carry out the crimes set out in (a), (b) and (c) is, under most legal systems, in itself a crime, but it is suggested that it is not safe to rely on this assumption. It is doubtful whether this Tribunal will administer any law other than that set out in its constitution and for that reason alone it seems necessary to include a sub-paragraph on the lines of sub-paragraph (d). Unless a charge can be made upon the lines of sub-paragraph (d), there may be some danger that some of the conspirators may escape, as it may not be possible to fix each and every one of them with the actual perpetration of any of the specific crimes set out in sub-paragraphs (a), (b) and (c). The chief crime of which it is alleged that the leaders in Germany are guilty is the common plan or conspiracy to dominate Europe and it is therefore most desirable to include this crime specifically in the statutes of the Court. Moreover, the protocol will become a public document of the first importance and for this reason it is essential that the main charge to be made against the major criminals should appear in it. The lay public will not understand its omission.

4. *Articles 17 and 18:* These Articles should be deleted in their present form and the following Articles substituted therefor:

“17. An International Military Tribunal shall not be bound by

technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedures and shall admit any evidence which it deems to have probative value. It shall employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make written proffers of proof; making extensive use of judicial notice; receiving affidavits or statements of witnesses, depositions, recorded examinations before or findings of military or other tribunals, copies of official reports, publications and documents or other evidentiary materials and all such other evidence as is customarily received by international or military tribunals.

18. An International Military Tribunal shall (a) confine trials strictly to an expeditious hearing of the issues raised by the charges, (b) take strict measures to prevent any action which will cause unreasonable delay and rule out any irrelevant issues including attempts to introduce irrelevant political propaganda, (c) deal summarily with any contumacy, imposing appropriate punishment including exclusion of any defendant or his counsel from some or all further proceedings but without prejudice to the determination of the charges."

5. *Article 20*: This Article should be deleted and the following Article substituted.

"20. The sentences shall be carried out in accordance with orders of the Control Council for Germany and the Control Council may at any time reduce or otherwise alter the sentence but may not increase its severity."

XV. Observations of French Delegation on American Draft, June 28, 1945

OBSERVATIONS OF THE FRENCH DELEGATION ON THE DRAFT AGREEMENT SUBMITTED BY THE AMERICAN DELEGATION

[Translation]

Without prejudice to the position adopted by the French Representative during the San Francisco conversations, the French Delegation agree to take the proposal of the American Delegation as a basis for discussion.

In order to facilitate the work of the Conference, they reserve their right to call for modifications during the course of the discussions and in the present Aide-Memoire deal only with the problem of the prosecution of the accused before the International Military Tribunal.

After the preliminary exchange of viewpoints on the various national systems, the French Delegation maintain their conviction that the establishment of an International Prosecuting Commission should not merely be drawn from the legal systems of the four countries, but should take primarily into account the object in view.

The four Powers intend to prosecute the major criminals in order to satisfy the call for justice of public opinion, and in the name of all the United Nations. Our aim is therefore to draw up an international procedure for the punishment of the major criminals which would satisfy the expectations of all nations, the lack of precedents giving the greater flexibility to the procedure to be followed.

If one takes as basic principle the view that the Prosecuting Body should present their cases against the major war criminals (including organizations) before the International Military Tribunal in order to ensure a speedy and impartial punishment, the following considerations must necessarily be taken into account:

1. First Stage of the Proceedings

The case of the accused must be prepared in such a way that the evidence collected be sufficient to ensure the conviction of the accused.

The four Prosecuting Officers would therefore be entrusted, as is proposed in the American Agreement, with the entire and sole responsibility of conducting the preliminary investigation, of preparing the bill of accusation and of preferring the charge before the International Military Tribunal. In actual fact, evidence is now in process of being collected by a large number of organizations, and in the detailed rules of procedure which are to be laid down for the preparation of the cases, it must be borne in mind that the object in view is to collect reliable information, and not to adhere strictly to certain rules of procedure followed in national Codes of law.

If therefore the rules laid down by national legal systems for the collection of evidence are not always strictly complied with, the four Prosecuting Officers should nevertheless be able to make use of such evidence after having ascertained its reliability. The lack of formality should not be a cause for its dismissal.

This example is put forward in order to show how difficult it would be to lay down in definite and all-inclusive rules of procedure the detailed system by which cases should be prepared. The French Delegation are of opinion that only very broad and general rules of procedure should be drawn up for the Prosecuting Officers in the matter of the preparation of the charges.

Complete authenticity and veracity of the collected evidence would in our view be guaranteed by the fact that the Prosecuting Commission would be made up of four Officials who, since they would meet to pass judgment on the value of the evidence, would thereby exercise a mutual control over each other, in so far as would be necessary to ensure that the case rests upon a solid foundation of facts.

All the guarantees which might be borrowed from the internal systems of the four countries would in effect only embarrass the work of the Prosecuting Officers and would be irrelevant, since the object in view is to establish a new system of judicial inquiry with no limitations other than those imposed by its ultimate purpose, an impartial judgment.

Once the case has been prepared and accepted by the four Prosecuting Officers, it passes into the second stage of the proceedings.

2. At This Stage, Various Possibilities Can Be Considered:

a) The preparation of the case should be concluded by the framing of a bill of accusation, which, in the opinion of the French Delegation, should provide for

- the terms of the charge
- the evidence on which the indictment is based
- an indication of the relevant provisions of law.

All the evidence which the Prosecuting Officers have seen fit to prepare is sent to the Tribunal at the same time as the bill of accusation.

Once this has been done, one of the judges is appointed as rapporteur and entrusted with the study of the case and the subsequent presentation of a report before the Court.

b) The preparation of the case is concluded by the framing of a bill of accusation, which would be the only document transmitted to the Court, which would receive no other documentary evidence until the day of the trial and would only become acquainted with the case at the time of the trial itself.

3. Third Stage

The Court proceedings will differ according to whichever of the two solutions proposed in the preceding paragraph is adopted.

In the example quoted in 2 (a), the Court are acquainted with the case before the trial and the trial is mainly devoted to clearing up certain matters on which discussion appears to be necessary. This solution naturally offers the advantage of a speedy procedure.

This method is not, as might be argued, prejudicial to the impartiality of the Court, since the Counsel for the Defence will also have been able to study the case from the very day on which it was transmitted to the Court and will have been in a position to lodge observations with the Court before the opening of the trial.

Against this method may nevertheless be raised the argument that the Court must sit, with absolute impartiality, on the day of the trial. If this argument were to prevail, the second method outlined in 2 (b) would have to be followed.

In this case, the Court hear the proceedings dispassionately. One wonders if the Judges would be allowed to ask questions, and if it would not be better to entrust the four Prosecuting Officers with the duty of cross-examining the accused and of discussing with the Counsel for the Defence the contradictory evidence.

The French Delegation set forward these observations, merely in order to throw light on the problem raised by the constitution of an International Prosecuting Commission. They reaffirm their conviction that such an organism should be set up, not along the lines laid down by a theoretical reasoning, but in the light of the aim sought by the four Powers, in the interest of all the United Nations.

They believe it to be difficult, if not impossible, to establish the Statute of the Prosecuting Commission without taking into account at the same time the results which a decision arrived at in this matter would have on the development of the Court proceedings. The two problems are closely related.

XVI. Comments and Proposals of Soviet Delegation on American Draft, June 28, 1945

[Translation]

EMBASSY OF THE U.S.S.R.
IN GREAT BRITAIN

June 28, 1945.

(DEAR MR. JACKSON:)

I have the honor to send you the comments of the Soviet Delegation on the American draft entitled "Executive Agreement regarding the Judicial Prosecution of War Criminals of European Axis Countries" and the proposals of the Soviet Delegation on the basic questions for inclusion in the Statute on the International Military Tribunal.

Attachment: as stated.

(Sincerely,

NIKITCHENKO)

MR. JACKSON,
Head of the American Delegation.

Comments of the Soviet Delegation on the American Draft Entitled "Executive Agreement Regarding the Trial of War Criminals of the European Axis Countries"

The present comments are preliminary in character and do not exclude the possibility of amendments and additional proposals being presented in the course of discussion.

1. In the opinion of the Soviet Delegation the text of the American draft agreement should be divided into two parts.

One part should represent an agreement, in the proper sense of the word, concerning the punishment of the principal war criminals of the European Axis countries and the creation for this purpose of an International Military Tribunal, with appropriate expansion and presentation of the motives of the agreement.

In this case the text of the agreement could include in some form or other points 1, 2, and 3 of the American draft.

The other part of the American draft, in the opinion of the Soviet Delegation, should be developed as a "Statute of the International Military Tribunal" to be confirmed by the agreement.

The comments of the Soviet Delegation regarding the proposed structure and possible content of the "Statute of the International Military Tribunal" are presented separately.

The following articles of the American draft in appropriate wording could be included in the "Statute of the International Military Tribunal" with the additions and amendments which we propose below.

2. Article 5 of the draft agreement should be changed so that the presidency of the International Military Tribunal will be held by a representative of that one of the four countries signatory to the agreement on whose territory the trial takes place, and in all other cases should be held in rotation.

3. Article 6 of the draft is in need of the following addition: In case of a tie, the deciding vote is cast by the President.

4. Article 7 should be amended so that the sessions of the Tribunal may take place on the territories of the various states (without referring to Germany, Austria, Italy) by decision of the Tribunal reached in agreement with those states. Under such arrangements preference should be given to the territory of that state toward which any given accused person has committed the most serious crimes.

This part of the draft agreement should include an article providing that all official documents concerning the trial of the principal war criminals should be reproduced in English, Russian, and French, and also in the language of the country on whose territory the Tribunal is sitting.

The trial should also be conducted in the language of that one of the four signatory countries on whose territory the session of the court is taking place, and in all other cases in accordance with the decision of the Tribunal.

5. The reference to the possibility of arraigning organizations before the International Tribunal should be excluded from the first part of article 10.

The second part of this article should be amended to provide that representatives appointed by the Soviet Union, the United States of America, the United Kingdom, and the French Republic form the Investigating Commission.

6. The wording of article 11 of the draft should be amended to correspond to the definition of the functions of the Investigating Commission.

7. Article 12 should be supplemented by a reference to responsibility for murdering and torturing prisoners of war, and for carrying away civilian population into slavery in Germany.

8. Paragraph "c" of article 16 should be eliminated for the reasons set forth by the Soviet Delegation at the session of June 26.

9. The draft agreement should include provisions for criminal prosecutions to be instigated by the Investigating Commission upon the proposal of any one of the Governments which participate in the agreement, or on the initiative of the Tribunal or of the Investigating

Commission, and likewise a provision that arraignment should be effected on the basis of an act of accusation presented by the Investigating Commission.

10. Article 18 should be supplemented by providing that official acts and documents of commissions formed in the various Allied states for investigating Fascist crimes shall have the same legal significance as official acts drawn up by the Investigating Commission.

11. Article 19 of the draft should be supplemented by including a reference to the right of the Control Council in Germany to cancel a sentence and to hand over the case for further examination.

12. Articles 21 and 22 of the draft, concerning the criminal responsibility of organizations, should be eliminated for the reasons which were set forth by the Soviet Delegation at the session of June 26.

13. Articles 23 and 24 of the draft should be amended to provide that the expenses required for the support of the International Military Tribunal, of the Investigating Commission, and of their staffs should be paid for out of funds set aside by the Control Council in Germany.

14. Article 25 of the draft should be eliminated since it is not related to the organization of the International Military Tribunal.

15. Article 26, in the opinion of the Soviet Delegation, in its amended form, should be included, not in the statute of the Tribunal, but in the text of the agreement.

Basic Questions for Inclusion in the Statute on the International Military Tribunal

(Proposals of the Soviet Delegation)

The Commission for the conclusion of an agreement on the punishment of the principal war criminals of the European Axis Powers is confronted with the question of developing the American draft into a statute on the International Military Tribunal which would serve as a basis for the organization and activity of the Tribunal and would, by that fact, assure the earliest possible beginning of the trials of the principal war criminals.

In the present first stage the Soviet Delegation considers it timely and appropriate to present for consideration by the Commission the range of the basic questions which must find their solution in the statute on the International Military Tribunal for the purpose of fulfilling the principle of the swift and just punishment of military criminals as proclaimed in the Crimea declaration.

It seems necessary that the statute on the IMT should first of all refer to the *general principles* of the structure and activity of the IMT. This includes the definition of the tasks of the IMT and the range of

crimes subject to its jurisdiction. It should also cover the questions concerning the divisions of IMT, the language of its documents, and also the question of giving the IMT the right to work out an instruction regulating in more detail the procedure of its activity.

In the following, *second* section of the statute, it is necessary to decide questions connected with the personnel of the IMT. Such are the questions concerning the method of appointing judges and their surrogates, of the disqualification and recall of judges, and of the quorum of the IMT. The *third* section should regulate the questions connected with the organization and activity of the *International Investigating Commission* attached to the IMT: the functions of the International Investigating Commission, its composition and method of activity. Further, the statute on the IMT should contain sections setting forth the *procedural* norms, regulating the handling of investigating and judicial trials of war criminals subject to the jurisdiction of the IMT. This includes provisions concerning the *instigation of a criminal prosecution* (the initiative in instigating an accusation, activities of investigation, the act of accusation), concerning the method of *bringing accused criminals to the court*, concerning the *sessions of the court* (the place of session of the IMT, the presidency at the sessions of the IMT, the participation of substitute members of the IMT, the language of the court sessions), concerning the organization of the *process of trial* (participation of the party or parties bringing the accusation and of the defense, guarantees of the rights of the accused and assuring swiftness of trial, the question of evidence in cases under the jurisdiction of the IMT).

Further questions arise logically concerning *substantive* law, including questions of the basic principles of the responsibility of war criminals (significance of official position, significance of orders, responsibility of abettors) and their punishment (form of punishment, question of confiscation of property).

The concluding section of the statute of the IMT should regulate questions connected with appeals against the sentences passed by the IMT, modification of such sentences, question of the carrying out of sentences passed by the IMT.

As is obvious from the short listing of questions, presented above, which should be regulated by the statute of the IMT, a considerable majority of them have not only been foreseen by the Americans, but the concrete solutions set forth in the American draft are fully acceptable as a basis for elaborating the provisions of the statute of the IMT.

Among them are the following proposals set forth in the American draft: Definitions of the functions of the IMT and of the range of crimes subject to its jurisdiction (Articles 1 and 12 of Justice Jackson's draft), the references to the position of the IMT and of its

divisions (Article 5 of Justice Jackson's draft), provisions regarding substitutes (Article 6), concerning instructions (Article 8), concerning procedural guarantees for the rights of the accused and expeditious procedure of the court (Article 16), concerning evidence (Articles 17 and 18), concerning responsibility of abettors (Article 13), concerning the significance of the official position and superior orders (Articles 14 and 15), concerning punishment, concerning modification and execution of sentence (Articles 19 and 20), concerning expenditures (Articles 23-25).

The statute on the IMT includes provisions regulating the organization and activity of the International Investigating Commission. The Investigating Commission is not referred to in Justice Jackson's draft; however one must note that the functions of the proposed Investigating Commission and the functions which are set forth in Justice Jackson's draft for the Office of Prosecuting Attorneys (Article 10 of the draft) are very similar.

On the other hand, in the list of questions to be regulated by the statute on the IMT there is no special reference to the responsibility of organizations, as set forth in Justice Jackson's draft; however, the provisions regarding the responsibility of abettors embraces the responsibility of the members of the criminal organizations.

The present considerations are preliminary in character. Their purpose is to make more precise the positions of the delegations and to contribute to the systematic and rapid development of the work of the Commission.

XVII. Minutes of Conference Session of June 29, 1945

SIR DAVID MAXWELL FYFE [*presiding*]. It is suggested that each delegation explain its memorandum of proposed amendments to the American draft proposal [IX]. I shall proceed, if it is agreeable, with our draft of amendments.

[EXPLANATION OF UNITED KINGDOM MEMORANDUM] {XIV}

The first point in the United Kingdom memorandum deals with article 5 of the United States draft. That is where the draft says that there should be set up by the Control Council for Germany one or more international military tribunals. We suggest that they should be set up by the signatories, that is, the governments of the Four Powers represented here, after consultation with the Control Council of Germany—I do not think I could improve upon the words of the memorandum. While the Control Council must be consulted, the responsibility for the tribunals must rest with the governments concerned. It is important to emphasize the independence of the Tribunal, and it would be a mistake to place it under the Control Council. It should be a government problem rather than a Control Council problem. Any comments?

GENERAL NIKITCHENKO. Perhaps it would be best to run through the memorandum.

SIR DAVID MAXWELL FYFE. The next point has to do with article 8. The draft reads: "An International Military Tribunal shall have the power to establish its own rules of procedure, which shall be not inconsistent with the provisions of this Agreement."

Our suggestion is that this body and the chiefs of the various delegations represented here should prepare and submit to the Tribunal rules for their approval. We considered that the initiative with regard to rules ought to come from the governments, and, if this is accepted, we suggest a new provision at the end of article 11 which would provide for recommending rules of procedure for adoption, and that any rule so adopted by the Tribunal shall not be inconsistent with this agreement. The purpose of this is to give a lead to the Tribunal as to the lines on which they should proceed. We give them the right to approve, but we envisage circumstances under which we may have to

make alterations to suit the evidence as it eventually comes on and think it would be useful if we suggested to the Tribunal lines on which to proceed.

MR. JUSTICE JACKSON. May I suggest that it may be desirable to retain in some place the substance of number 8, whereas your suggestion in your commentary might be understood to eliminate it?

SIR DAVID MAXWELL FYFE. We should retain the provision giving the power to adopt the rules after counsel suggests them.

GENERAL NIKITCHENKO. Why not, in deciding the statutes of the Tribunal, lay down the basic grounds on which the Tribunal is to operate.

SIR DAVID MAXWELL FYFE. I agree. We are in agreement with that. That is what is intended by the Tribunal. The rules so adopted by the Tribunal shall not be inconsistent with this agreement. The provisions would lay down certain rules.

PROFESSOR TRAININ. There is a distinction between the basic rules of the document and the question of actual procedure. In regard to the formulation of the basic rules on which the Tribunal will operate, that is undoubtedly the duty of the Four Powers in this agreement, but in addition to that there will be the question of establishing the methods of procedure to be adopted by the tribunals themselves, and the Soviet Delegation is of the opinion that that part of the regulation should be left to the Tribunal to work out on their own. There are basically two parts—the basic rules and the rules of procedure which are based upon them.

SIR DAVID MAXWELL FYFE. I am in agreement with the division into the two parts. I ask the Soviet Delegation to reserve for consideration whether, while accepting this provision, we should not give a lead to the Tribunal on the question of detailed procedure. It might help the Tribunal because it has not got an existing code of procedure to work on.

We now pass to number 12. This is the declaration of legal principles and the United States draft can be summarized as (a) violation of international law; (b) violation of municipal law and domestic law; (c) invasion or threat of invasion, or initiation of war against other countries in breach of treaties, agreements, or assurances between nations or otherwise in violation of international law, et cetera. Now we suggest first of all that violations of the laws, rules, and customs of war and such acts shall include, but shall not be limited to, mass murder and ill-treatment of prisoners of war and civilian populations and the plunder of such populations. Then "launching a war of aggression" may involve a discussion of different schools of thought as to whether that is an existing offense against international law, and there is the further question whether we are breaking new ground. That we think ought to be discussed and is one of the matters which this Conference

should consider. Then we come to (c)—invasion or threat of invasion of, or initiation of war against, other countries in breach of treaties, agreements, or assurances between nations or otherwise in violation of international law. Then we introduce (d)—the common plan or enterprise aimed at aggression against or domination over other nations and calculated to involve the unlawful means of violation of international law. We think that it is important that that should be made clear in the declaration of legal principles because we think it is the gist of the offense which is believed by most of the people in the world.

Then (e) deals with atrocities and persecutions in pursuance of the plan and whether they are in violation of the domestic law of the country where perpetrated; that is, it would include atrocities and persecutions in Germany if they were legal by German law. I think you will find that that is set out in the note, and, if you will look about two thirds of the way down in the note, you will find we say, "The chief crime of which it is alleged that the leaders in Germany are guilty is the common plan or conspiracy to dominate Europe and it is therefore most desirable to include this crime specifically in the statutes of the Court. Moreover, the protocol will become a public document of the first importance and for this reason it is essential that the main charge to be made against the major criminals should appear in it. The lay public will not understand its omission." I think really that this last bit that I have read gives the gist of the argument I put forth.

Could I add one point? I apologize. I should have drawn attention to the introduction at the beginning of number 12: "The Tribunal shall be bound by this declaration of the signatories that the following acts are criminal violations of international laws . . ." What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won't be any discussion on whether it is international law or not. We hope that is in line with Professor Trainin's book.

GENERAL NIKITCHENKO. May I ask a question? This list of crimes which has been outlined here—Is that to be taken to apply only to those crimes which have been committed during the process or duration of the war, or may we take it it equally applies to any crimes since then? For instance, any activities which the Germans might undertake now. Would they be included under this provision?

SIR DAVID MAXWELL FYFE. I don't think we had considered that point. We should be prepared to and try to face it. I have no objection to it. There is still, of course, a state of war existing, and therefore it would seem probably to be covered.

GENERAL NIKITCHENKO. We might understand that this list is not exhaustive in regard to crimes which may be tried by the International

Military Tribunal, that there may be other violations which are not actually listed.

SIR DAVID MAXWELL FYFE. We might consider the redrafting of (a) so that it should "include but not be limited to"

JUDGE FALCO. This question should certainly be discussed a little further for the moment. I suggest that the Four Powers have taken supreme command in Germany, actually commanding Germany, and, if there are infractions of law, it is for the Control Council of Germany to establish their tribunals and try those new perpetrators. For the moment I do not see any object in mixing the two things and having Germany's criminals brought before the Tribunal for trial of war criminals. I want to put this before the Conference.

SIR DAVID MAXWELL FYFE. One word for consideration here. We are dealing with major war criminals. We cannot have two trials of the major war criminals. There will be nothing to prevent the Control Council and the various national commissions from dealing with the infractions of the law they are administering apart from this. We are rather considering this as limited to the major criminals.

GENERAL NIKITCHENKO. We do not make it as a suggestion. It was merely for elucidation on the point.

MR. JUSTICE JACKSON. We would take it that (b) covers launching a war of aggression. If there were conviction on that, (c) and (d) might become somewhat superfluous. But (c) is launching a war of aggression in violation of treaties, et cetera, and (d) is launching it by a combination of terrorism and means which they have used, et cetera, so that those three are read together to make a complete picture.

JUDGE FALCO. On the question which has been raised by article 12, we have seen the proposal which had been made at San Francisco. It is very near our point and except for some details bearing on (b) and (c) we could very easily agree on the same line.

SIR DAVID MAXWELL FYFE. Now the fourth point deals with the basic principles of the operation of the Tribunal [articles 17 and 18], and, if I might, I'll just give a word of explanation of each of the sub-heads of its contents. "An International Military Tribunal shall not be bound by technical rules of evidence," that is, by the rules of evidence which each country demands in its own courts. It shall "adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value." That makes clear that it is for the Tribunal to decide whether the evidence has value in the direction of proof even though a national code might not allow proof by that form. Next, "it shall employ with all possible liberality simplifications of proof, such as, but not limited to: requiring defendants to make written proffers of proof." That is, the defendants may be compelled to put in writing

the purpose for which evidence is going to be called in order to prevent mere political speeches being put in under the guise of evidence. Otherwise a witness may suddenly be called into the box; we do not know what he is going to say, and he starts making political speeches in defense of German activities. Then, "making extensive use of judicial notice." That is, the Tribunal can take into account matters that are well known. "Receiving affidavits or statements for witnesses, depositions, recorded examinations before or findings of military or other tribunals, copies of official reports, publications and documents or other evidentiary materials and all such other evidence as is customarily received by international or military tribunals." That is, if there has been taken up an inquiry with a reasonable official basis in certain matters, then that can be put in evidence without the formality of proof.

I think it would be convenient if I dealt with 18, which is supplementary, before any further comments. Paragraph 18 emphasizes our desire that there will not be delay or interruption or the misuse of the hearing for political purposes. Subparagraph (a) deals with confining the trials to expeditious hearing of the issues raised by the charges; (b) takes strict measures to prevent any action which will cause any delay and rules out irrelevant issues, including attempts to bring in political propaganda. That is what we envisage. There are two possibilities: the defendants themselves may try and make a noise or interrupt the court or interrupt the witnesses and proceeding. With defendants who are likely to be sentenced to death, in the face of the court sending them to prison for a few weeks—the ordinary penalty for contempt of court—it would only be playing their game and interrupting the trial. The only sanction to be effective would be to exclude their counsel or themselves from further right to put forward their defense. If they treat the court with contempt, then they will be taken as desiring not to continue their defense, and the court will determine their defense in the absence of counsel where necessary.

PROFESSOR TRAININ. The general principle laid out and explained is quite clear, and the only question which might possibly arise is whether some of the points which are outlined should really be agreed upon in the principles of establishment of the Tribunal or whether they should not appear better in the regulations governing the procedure of the Tribunal.

JUDGE FALCO. [*Not translated.*]

SIR DAVID MAXWELL FYFE. Of course, we are ready to consider any suggestions for taking anything out of the main document and putting it into regulations. We thought these were worthy of being basic principles but will consider with great care and regard any suggestions of the Soviet Delegation.

MR. JUSTICE JACKSON. The words here, "including attempts to introduce irrelevant political propaganda" are words with which I have difficulty. If an offer of proof is irrelevant, it should be excluded merely because it is irrelevant. If it is relevant to the defense, would it be conceivable to exclude it because it might have unpleasant political implications? I suspect that critics will point at this phrase as indicating that there is something in our own positions that we are fearful of having exposed, if, even though it is relevant, we are proposing to exclude lines of inquiry which would be inconvenient for ourselves politically. I suggest that a formula might be found which would be adequate to admonish judges who, after all, are nationals of our own countries and equally interested with ourselves in keeping the trials on the level that would not quite so brazenly invite accusations against us all. In the United States I know it would be asked, "Who got that in and why, and who is afraid and why?" Those unfriendly to Britain will say, "I told you so", and those unfriendly to Russia will say, "I knew it all the time." I think it is a phrase in danger of political misuse.

JUDGE FALCO. As an informal suggestion, could we say, "To prevent all attempts to use any political propaganda which the major war criminals would put before the trial"? This is only an informal suggestion.

SIR DAVID MAXWELL FYFE. I should be very pleased to consider the suggestion. I think there are two things to avoid—one is Nazi propaganda; the other is the trial of the actions of the countries of the prosecutors. We don't want the trial to be swung over by the defense in an attempt to attack and have a trial in the eyes of the public of the action of the prosecuting countries. I think in the second I am inclined to agree with Mr. Justice Jackson.

MR. JUSTICE JACKSON. I am not disagreeing with the idea but I think we should have a little more care as to how it is expressed. General Donovan has suggested that following "irrelevant issues" the phrase "of whatever kind or nature" would be sufficient to admonish our judges and not arouse our critics.

SIR DAVID MAXWELL FYFE. Then the next and last item is article 20, which states that sentences, when and as approved by the Control Council, should be carried into execution in accordance with orders of the Control Council for Germany.

We suggest that the approval of the Control Council should be cut out, that is, that the findings and sentences of the Tribunal should not be subject to approval but that, when the Tribunal has imposed sentence, it ought to be carried out. If it be death, the execution will be carried out, or, if it be imprisonment, that should be carried out in accordance with the orders of the Control Council, and the Control

Council may reduce or otherwise alter. "Reduce" is to lessen the sentence, but keeping the same kind. "Alter" would be substituting a different kind of sentence but may not increase its severity.

GENERAL NIKITCHENKO. The Control Council could presumably cancel the sentence and demand a retrial of the case.

SIR DAVID MAXWELL FYFE. I am afraid that is a point that we don't see eye to eye. We think that the Tribunal ought to be left to say the final word as to the finding. That is, as to the conviction—we don't want any interference with the finding of the Tribunal. We hope that the Tribunal will be of sufficient standing that its conclusion on conviction or not should be sufficient. We also think with regard to sentence that all that should be given to the Control Council is the opportunity to lessen but not to cancel. That is a point which we will have to discuss because there is a difference of viewpoint there.

Judge Falco apparently agrees with us.

GENERAL NIKITCHENKO. The Soviet Delegation is raising the question of how we should act in case, for instance, at the time of the trial the Tribunal is not in possession of the whole of the material affecting the case and brings out its verdict and sentence with insufficient material in its possession, so that the sentence may appear to be inadequate to public opinion. The Control Council having discovered further material or it having been discovered elsewhere, it becomes evident that the sentence is quite inadequate to the crime committed. In those circumstances how would it be possible to secure that the whole case would come up for reconsideration and additional sentence be imposed?

SIR DAVID MAXWELL FYFE. If these circumstances occur—and I hope it will be prevented by our preparation and examination of the evidence—but assuming that it did occur, I should suggest that the better method would be a new trial on the more serious charge.

GENERAL NIKITCHENKO. In order to try the accused on more serious charges, the original sentence would have to be annulled to provide the opportunity of a new trial on the different charge.

SIR DAVID MAXWELL FYFE. Take for example how it works in our law. If somebody attacks somebody else, then he may be tried for assault, but, if within a year death supervenes, he may be charged subsequently for murder, for which the sentence is death. The fact he had been tried for assault would not prevent it because it would be the new charge of death.

GENERAL NIKITCHENKO. In that case we could try them again without actually canceling the first sentence.

SIR DAVID MAXWELL FYFE. I do not think there is any difference between us as to what we want to do—that is to insure that the most serious charge we know about is brought against the accused. The only

point that I am anxious to make is that the status of the Tribunal should be kept as high as possible, and it should not appear to be subject to an administrative body. That is my general point. I am in full sympathy for any serious charge and the most serious charges being brought against all the defendants we select.

That concludes the British memorandum. Would it be convenient to go around the table and have the French Delegation deal with its memorandum?

[EXPLANATION OF FRENCH MEMORANDUM] [XV]

PROFESSOR GROS. The first part of the French memorandum is only a reminder of the position which has been taken in San Francisco and, naturally, the proposal which has been put before us on the charges. As I have said, the British proposal is partly inspired by that proposal. So that reservation which we made in the first part is not so important as it would look at first sight.

As we said the other day, the Four Powers agree to press the cases against the major war criminals in the best way to insure a speedy punishment, whatever forms we use. We have given a note on the French procedure in criminal prosecutions, but it is only a recommendation and we would not think of insisting on adoption of the French procedure.

MR. JUSTICE JACKSON. How would you permit the defense to submit the case? Would you have him given a particular time after the prosecution has presented its entire case or have him answer each document as it is submitted?

PROFESSOR GROS. He would speak once only. He could call witnesses. He would arrange with the prosecutor beforehand for appearance of witnesses so that a refusal of such witness could be given before and not at the trial.

MR. JUSTICE JACKSON. May I say one word, Mr. Chairman, about the French memorandum? I think the spirit of it is admirable. The thought that we will compare our systems and try to use the best of each for this purpose is the spirit in which we want to work, and there is a great deal of good in both systems. Many things are not as troublesome in practice as we think in theory, and I agree fully with your suggestion that what we want is to get a practical procedure rather than an adaptation of any nation's procedure. I think it is a very helpful memorandum.

[EXPLANATION OF SOVIET MEMORANDUM] [XVI]

GENERAL NIKITCHENKO. The first is with regard to the character of the trial. We are not dealing here with the usual type of case where it is a question of robbery, or murder, or petty offenses. We are dealing

here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations by the heads of the governments, and those declarations both declare to carry out immediately just punishment for the offenses which have been committed.

Second, the procedure that we want to work out should be such as to insure the speediest possible execution of the decisions of the United Nations, and the regulations that we set down for this Tribunal must be worked out with that in view. In this connection the Soviet Delegation is in complete agreement with statements made by the French Delegation with regard to the formulation of rules and regulations to achieve maximum speed. The object should not be to select any individual national system of trial. All these systems have good points. In the British and American there is probably too much latitude allowing the possibility to the accused of dragging out the process of the trial and causing unnecessary delay. As we now have to deal with something completely new, it is necessary for us to select the best of the different systems with a view to achieving speed in arriving at a decision.

Third, with regard to the position of the judge—the Soviet Delegation considers that there is no necessity in trials of this sort to accept the principle that the judge is a completely disinterested party with no previous knowledge of the case. The declaration of the Crimea Conference is quite clear that the objective is to bring these criminals to a just and speedy trial. Therefore, the judge, before he takes his seat in court, already knows what has been quoted in the press of all countries, and it is well known about the criminal as accused and the general outline of the case against him. The case for the prosecution is undoubtedly known to the judge before the trial starts and there is, therefore, no necessity to create a sort of fiction that the judge is a disinterested person who has no legal knowledge of what has happened before. If such procedure is adopted that the judge is supposed to be impartial, it would only lead to unnecessary delays and offer opportunity for the accused to bring delays in the action of the trial.

Fourth, the Soviet Delegation points out that, at the time when the declaration was made by the leaders of the United Nations on the question that the chief criminals should be tried, it was not certain whether these criminals would actually be tried by a court or would be punished by some purely political action. That is to say, they might have been dealt with by means other than a trial. Since then it has been decided that they shall go through a process of trial, but the object of that trial is, of course, the punishment of the criminals, and therefore the role of the prosecutor should be merely a role of assisting the

court in the actual cases. That is the role of either the investigation committee or Chiefs of Counsel as proposed in these drafts. The difference is that the prosecution would assist the judge, and there would be no question that the judge has the character of an impartial person. Only rules of fair trial must, of course, apply because years and centuries will pass and it will be to posterity to examine these trials and to decide whether the persons who drew up the rules of the court and carried out the trials did execute their task with fairness and with justice but subject to giving the accused an opportunity for defense to that extent. The whole idea is to secure quick and just punishment for the crime.

Those are the main considerations which the Soviet Delegation had in mind when it presented its views upon the draft of the American Delegation. The views now expressed are to be regarded as preliminary and do not exclude the possibility of alterations or additions which may arise in later discussion.

In the opinion of the Soviet Delegation, the American draft should be divided into two portions. One portion should contain the principles of an agreement for the punishment of the chief war criminals of the European countries and the establishment for this purpose of an International Military Tribunal with the corresponding motivations and reasons for the agreement arrived at. The text of the agreement could include points 1, 2, and 3 of the American draft in one form or another. The other part of the American draft, in the opinion of the Soviet Delegation, should be the terms of reference of the International Military Tribunal which will be confirmed in the agreement. The terms of reference of the International Military Tribunal should form an integral part of the agreement and should be attached to it.

The Soviet Delegation puts forth the example of the San Francisco agreement, where the International Court is established and where the constitution of that Court is definitely stated to be an integral part of the agreement of the whole organization; and this agreement would set out the motives and the aims of the court and would establish the rules and regulations under which to operate.

On the assumption that the agreement should be short and the regulations should form an integral part of the agreement, we proceed then to consider how the various points put forward in the American draft can be adapted to this purpose.

With regard to paragraph 5 of the American draft, the Soviet Delegation considers that this should be amended in the following sense: that the president of the International Military Tribunal should be the representative of the particular one of the powers which have signed the agreement on whose territory the trial is taking place, and, in all other cases, the presidency of the court should be taken in rotation.

With regard to paragraph 6, the Soviet Delegation considers that there should be an addition to this in the sense that, if voting in the Tribunal is equal, then the vote of the president shall be decisive. When the voting is divided two and two, then the vote of the president should decide the direction of the verdict. If it were a question of a regulation that there must be three in favor of any particular verdict, that would be different, but here we have the question of a simple majority and, therefore, the president should undoubtedly have the casting vote. And if he gives that casting vote, then the verdict shall be pronounced by those two in whose favor he casts.

The court decides by this majority the question of both guilty or not guilty, and the question of suitable punishment, except where the question of the death sentence is involved. Wherever it is a question of the death sentence, in the opinion of the Soviet Delegation, the majority should be three.

With regard to paragraph 7, this should be altered in the following sense: that the sessions of the Tribunal may take place on the territory of any state without being limited to either Germany, Austria, or Italy, in accordance with the decisions of the Tribunal itself and by agreement with these states. The preference with regard to the scene of trial should be given to that government in relation to which the particular accused has committed the most serious offenses.

There should be a provision in this part of the terms of reference that all official documents in connection with the chief war criminals must be drawn up in English, Russian, and French, and also in the language of the state in whose territory the trial is taking place. This is essential if delay is to be avoided in regard to interpretation and translation of documents during the process of the trial which would, of course, tend to delay the proceedings considerably. The court proceedings should also be carried on in the language of that particular one of the Four Powers in whose territory the trials are taking place, and in other cases the Tribunal itself should decide what language is to be used in the trial.

In regard to paragraph 10, in the opinion of the Soviet Delegation the question of allowing the International Tribunal to try organizations should be deleted.

The Soviet Delegation explains this point by the fact that organizations such as the S.S. or the Gestapo have already been declared criminal by authorities higher than the Tribunal itself, both in the Moscow and the Crimea declarations, and the fact of their criminality has definitely been established. We cannot imagine any position arising in which the Tribunal might possibly bring out a verdict that any one of these organizations was not criminal when it has most definitely been labeled so by the governments.

In the second part of this paragraph, an alteration should be made setting forth that the Representatives appointed by the Soviet Union, by the United States, by the United Kingdom, and by the French Republic should form an investigation committee.

Paragraph 11, in view of what has just been said with regard to an alteration of paragraph 10, should be amended accordingly and should define the functions of the investigation commission.

Paragraph 12 should be amplified by a reference to responsibility for murder or ill-treatment of prisoners of war or for the deportation of persons into slavery in Germany.

Paragraph (e) of article 16 should be omitted for the reasons which have already been given by the Soviet Delegation at the meeting on June 26. That is to say, trial of organizations by the Tribunal could not be permitted.

The next point is that in the suggested terms of reference there should be a statement that the criminal prosecution should be instituted by the investigation commission on the suggestion of each of the four governments who have signed the agreement, or upon the initiative of the Tribunal, or on the initiative of the investigation committee. That is one point. The second point is that the actual trial should be carried out on the basis of an indictment which should be prepared and presented by the investigation committee, although it is not stated in this document that with the indictment all the relevant evidence should be presented by the investigation committee.

With regard to article 18 the Soviet Delegation considers that this should be amplified by stating that all accounts and documents which have been created in various Allied countries for the investigation of Fascist crimes should have equal legal right with the accounts and documents which are prepared by the investigation itself.

Article 19 should be amplified by a statement of the right of the Control Council in Germany to annul the verdict of the Tribunal and order a new trial, and the Soviet Delegation points out that the Control Council in Germany is the body which exercises supreme authority in that country, and therefore, it cannot be deprived of the right of confirmation, et cetera, of the verdicts of the Tribunal. The Delegation agrees that the Control Council should have the right to reduce or alter the sentence, not to increase it, but it must have the right, if new material comes to it, to demand a retrial of the case.

Articles 21 and 22 of the draft, regarding the criminal responsibility of organizations, should be omitted for the reasons that have already been explained by the Soviet Delegation.

Articles 23 and 24 of the draft should be altered to read that the expenses for the maintenance of the International Military Tribunal, of the investigation commission, and all of its organizations should

come from funds to be supplied by the Control Council in Germany.

Paragraph 25 should be omitted as having no bearing on the organization of the International Military Tribunal.

Article 26, in the opinion of the Soviet Delegation, should not be in the terms of reference of the Tribunal but should be included in the text of the agreement itself. At the beginning of this statement the Soviet Delegation has suggested the inclusion of articles 1, 2, and 3 of the American draft into the agreement, and this should be included along with it.

We have another document for discussion.

SIR DAVID MAXWELL FYFE. What is the other document?

GENERAL NIKITCHENKO. It is the outline of the terms of reference for the International Military Tribunal.

SIR DAVID MAXWELL FYFE. I am wondering whether we should try the expedient of a subcommittee for getting the agreement into form. They might be able to get certain parts of it agreed to and to bring back to the Conference the points which need further discussion. I should like you to turn that procedure over in your minds.

The Conference adjourned until 2:30 p.m.

PROFESSOR TRAININ. The final draft will probably be worked out in the subcommittee proposed this morning; at present I would like to give you only a general idea. The terms of reference are divided into several sections:

The first section is fundamental, or general, principles. Here we shall have to say something about the tasks, what crimes would be tried by this Tribunal, whether there would be one or several tribunals, what language would be used there, and the question of instructions.

The second section deals with the personnel of the Tribunal, namely, with the question of the order of appointment of the judges and their deputies, the question of the quorum of the Tribunal, and the question about recall of these judges.

The third section deals with the question of investigations and prosecution, in other words, the functions of what is called in the American draft "the Chief of Counsel".

The sections which I have just described are the general sections forming a kind of introduction. The sections that follow deal with the actual procedure, how the plans will be presented to the court and what actions will be taken. These sections are in the order of the procedure. The first one deals with the question as to who the criminal is. The next one deals with the question of who is going to bring

the particular criminal to trial after the crime has been established. The next section deals with the question of the actual function of the Tribunal; namely, where it will take place, what will be the language used, who will be present, et cetera. The last of the sections referring to the procedure cites the problem, deals with the actual process of the legal proceedings, that is, the part which will be taken by the prosecution and the defense, the guarantee of the rights of the defendants and the securing of the promptness of the proceedings, the question of preferences regarding the accusation of all cases under the jurisdiction of the Tribunal. That is followed by the section dealing with the questions of material or substantive law, namely, the question of the actual basis of the responsibility of war criminals, also what part the official position of the criminal would play and what part the order received by the criminal would have on the matter, what is the responsibility of those who helped the criminal in any way, and, last, the question of their punishment, namely, what kind of punishment would be inflicted. Then comes the section dealing with the appeal from the decision of the Tribunal, about any alterations, modifications in the decision, and then how the verdicts of the Tribunal would be carried out actually. The last section deals with the expenses.

We would like to point out that the majority of the paragraphs in this draft of terms of reference correspond to the main points in the American draft. The paragraphs of the terms of reference dealing with the problems of the Tribunal correspond to articles 1 and 12 of the American draft. The problems of the Tribunal and the scope of its activity correspond to articles of 1 and 12 of the American draft. The section regarding the composition of the Tribunal and of its sections or provisions corresponds to article 5 of the American draft. The section concerning the deputies corresponds to article 6, the one on instructions to article 8. The guarantee of the rights of the defendant and promptness as to trial, et cetera, corresponds to article 16, that on proof to articles 17 and 18. The responsibility of those who helped the criminals corresponds to article 13. The part which the official position of the criminal plays refers to articles 14 and 15. The punishment and any change in the verdict or the carrying out of the verdict correspond to articles 19 and 20, and expenses to articles 23 to 25. All of these considerations are of a preliminary nature, but we thought it advisable to put them before the commission for consideration.

GENERAL DONOVAN. I would like to ask, what does the Professor consider the rights are that are guaranteed by this section he refers to?

PROFESSOR TRAININ. I have in view the rights of the defendant to be defended, his right to receive the indictment, the right of giving all the necessary explanations during the proceedings, and the right

also to receive a copy of the indictment in his own native language.

GENERAL DONOVAN. Are those all the rights you consider should be guaranteed?

PROFESSOR TRAININ. These observations have been in a kind of preliminary way; in the course of discussion, of course, other rights may occur to us.

MR. JUSTICE JACKSON. You refer to one or several tribunals. In the event that we should decide that it is better to have several tribunals, in what way would you have the distribution of cases between them, that is, would you think of one tribunal for the trial of American prisoners, another for the trial of British prisoners, another for the trial of French defendants, another for the Russians? How would you think of the several tribunals functioning with reference to each other?

MR. TROYANOVSKY. What do you mean by American prisoners?

MR. JUSTICE JACKSON. Those in American hands.

PROFESSOR TRAININ. This question has not been considered yet, and it is very difficult for me to give any details. I can only say that all these tribunals, if several, should be formed under the same principle; that is to say, if the tribunal is supposed to consist of representatives of the four nations, then all of them should be equally of the same character. It is a question of having in each tribunal four judges, four representatives of the Four Powers.

SIR DAVID MAXWELL FYFE. Would the number of tribunals depend upon the number of defendants we select ultimately? It would depend on the number of cases to be tried, and, since we don't know the number, it may eventually be decided in the consideration of instructions—just as was suggested in the American draft.

MR. JUSTICE JACKSON. Of course, we have thought of trying to get as much as possible of this done in one trial. The United States would not welcome the idea of a long continued series of trials, and we would like to combine in some single effort at least all trials to which we are to be parties. That is one of the reasons why we suggested the trial of organizations, to reach a large number of persons with a small number of trials. We would not welcome a long series of trials running into dozens or hundreds.

GENERAL NIKITCHENKO. It is certainly preferable to have one tribunal if the one tribunal can deal with all the cases together and similarly to what was suggested in the American draft. Our idea is this, that certainly it would be better to have one, but, if it became obvious that that one could not deal with all the cases before it within a short period of time, then it would be advisable to have one or more tribunals. As for the question of trying an organization to reach all its members, I do not think it would be right, and I do not think it

is practicable. Say, for instance, the State Ministers are tried as such for the Nazi Government. The Gestapo is one organization and therefore can be tried in one sitting or one tribunal. But then the trial will refer to various members of the Gestapo who are spread all over the place, and various individuals may be tried afterwards either in the occupational courts or in the national courts.

MR. JUSTICE JACKSON. That would involve literally hundreds of thousands of trials if we reached all members, would it not?

GENERAL NIKITCHENKO. But an international tribunal should not deal with such individuals because individuals committed greater atrocities and their crimes must be dealt with by the national court.

SIR DAVID MAXWELL FYFE. That might be met by something of this kind. The International Tribunal, when it tried the vice ministers or party leaders, might declare that one of their methods of carrying out the plan of conspiracy was to use these organizations which had acted in a certain way, and then you would have a judgment against the organizations which could be used by the national courts.

I think we have had all the memoranda which have been put forward on the American redraft. I think we should now consider what is the best method of producing an agreed doctrine. I wonder if the Soviet representatives have seen the memorandum of April 30, 1945 [V], which was delivered to the representatives of each of the Four Powers at San Francisco. It was explanatory of the reasons for the various American proposals and, in a sense, I suppose, constituted a basis for the acceptance in principle of the proposal and the subsequent negotiations.

GENERAL NIKITCHENKO. No, we have not seen it but are acquainted with the results of the negotiations which took place at San Francisco between Foreign Ministers and in regard to the proposal of Judge Rosenman.

MR. JUSTICE JACKSON. I did not bring copies because I thought everyone had had it—and I know your Foreign Minister was given copies at San Francisco. But I shall endeavor to get photostats of the document because it gives the reasons why some of the proposals were advanced. Everyone else here has had it.

SIR DAVID MAXWELL FYFE. What do you feel, Mr. Justice Jackson? It is your original memorandum, and you have now heard the various memoranda on it. I suggested, before we adjourned this morning, that one possibility was to form a subcommittee to try to consider what are the outstanding points and refer them back to the next meeting, but, of course, I am anxious to hear what all the delegates consider doing.

MR. JUSTICE JACKSON. It seems to me that we are in pretty good agreement as to promptness of trial and as to the kind of tribunal—

so far as being a military tribunal as distinguished from a civilian tribunal—which should conduct the trial. And as to the substantive law of the crimes we have little difference. But in the matter of procedure we are quite wide apart because of the fact that our legal traditions are so far apart. We will reconcile these differences only with difficulty. While they appear to be merely matters of procedure, they are matters of procedure so deeply ingrained in the thought of the American people that some of the theories of procedure mentioned here could not be supported by us. Whether right or not, I do not attempt to say. Different systems have their own merits. Systems which work with one temperament will not with another, and no one has been more severely critical than I of the American system of criminal justice, which, as suggested by the Soviet delegates, leads to great delay and sometimes miscarriage by delay. Nevertheless, each of us has the problem of making the results here acceptable in the sight of his people, and we shall have to consider procedure in that light. Our interest in the matter is to see that the representations that have been made to our people that this was a criminal war and was carried out in criminal fashion are followed by the procedure that is appropriate to trial of that kind of offense, and we want to do everything we can to cooperate in doing it. But we do not want to have a result which in the light of history will fail to justify the procedures which we have taken. We think of this as rather more than trying certain persons for some specific offenses. There is involved in this the whole Nazi drive to dominate the world. There is involved in this the basis on which the United States engaged in its lend-lease operation, the belief that this war was illegal from its inception. So, in the light of all these things, we shall have to give consideration to many suggestions which transcend the function of a subcommittee. I think we shall want to prepare a memorandum in the light of what we now know, supplemental to the memorandum given you.

SIR DAVID MAXWELL FYFE. If I may add to that, General Nikitchenko said this morning at the conclusion of the first paper that the ordinary rules of fair trial must apply—that is, fairness and justice in the eyes of history subject to quick and just punishment. Now, as far as that is concerned, there would be little argument if effect could be given to what I have just quoted taken down from General Nikitchenko; and I wondered whether we could consider this method, which is an adaptation of Professor Gros' suggestion, as being one on which we could find a synthesis of our different views—that the prosecuting body, those of us around this table, when we have prepared the indictment and got together the evidence on which the indictment is based, might forward that indictment and the evidence or a full summary

of the evidence to the court, who would then transmit it to the defendants. That is, the court would get it, and that would meet General Nikitchenko's point that the court should be fully informed of the prosecution. On the other hand, if it is passed to the defendants, it would mean the defendants had had fair notice of what they had to meet; they would then be compelled to say which part of it they accepted and which part they disputed, and these matters could come before the court. I put that forward as being a method of trying to find a synthesis between the different systems of prosecution. I am very anxious, as I think we all are, that we should not fall apart because of our different approach to our work and, at the risk of pressing all my colleagues, I should ask them to consider whether a committee, however informal and noncommittal it need be, could not try to find in fair detail what are the points of agreement and what are the points that need further discussion—a subcommittee. All delegations would be entitled to put in any memoranda criticizing my suggestions or anything else. It seems to me that, if we had just four of our number and a secretary trying to find out points we want to direct our mind to, it would be helpful.

PROFESSOR GROS. We think that the subcommittee would be useful if we could send some parts of those problems to them as a drafting committee. However, I do not think the discussion has been sufficient in the Conference, notably on the question of trial of the organizations. We would like to have those questions discussed in the full Conference because we think it is one of the most important, if not the most important, and I do not see any point in sending that back to a drafting committee until it has been sufficiently discussed here. Also the substantive law and the other questions of aggression. There is no use sending the drafting of that article to any subcommittee if we have not discussed exactly what we mean or want to mean. So I would suggest we send back to the drafting committee the question of prosecuting, that one question only, and discuss the other in the Conference.

GENERAL DONOVAN. Can the subject be separated? Doesn't it all have to be considered together? Here is the question of your prosecuting group and the function they will perform.

PROFESSOR TRAININ. As it has been pointed out by the representative of the American Delegation, there are quite a number of questions on which we have already reached an agreement. I can add one more—assuring authoritative and very prompt dealing with the Nazi criminals. That is to say, to work out such a procedure would not be an easy matter at all because we must justify absolute authority and at the same time apply it extremely quickly because the quickness of dealing with the criminals is of great importance. It seems to me that all those points on which an agreement has already been reached could

be very usefully submitted to that subcommittee, which could work out the details and overcome the practical difficulties.

SIR DAVID MAXWELL FYFE. Would it be practical, Mr. Justice Jackson, to ask the committee to select the points that agreement has been reached on, while we retain for the Conference the discussion of the outstanding points such as mentioned by Professor Gros?

MR. JUSTICE JACKSON. I think we are in a philosophical difference that lies at the root of a great many technical differences and will continue to lie at the root of differences unless we can reconcile our basic viewpoints. As the statement of our Soviet colleague said, they proceed on the assumption that the declarations of Crimea and Moscow already convict these parties and that the charges need not be tried before independent judges empowered to render an independent decision on guilt. Now that underlies a great deal of their position, and we don't make that assumption. In the first place, the President of the United States has no power to convict anybody. He can only accuse. He cannot arrest in most cases without judicial authority. Therefore, the accusation made carries no weight in an American trial whatever. These declarations are an accusation and not a conviction. That requires a judicial finding. Now we could not be parties to setting up a mere formal judicial body to ratify a political decision to convict. The judges will have to inquire into the evidence and reach an independent decision. There is a great deal of realism in Mr. Nikitchenko's statement. There could be but one decision in this case—that we are bound to concede. But the reason is the evidence and not the statements made by heads of state with reference to these cases. That is the reason why, at the very beginning, the position of the United States was that there must be trials rather than political executions. The United States feels we could not make political executions. I took that position publicly. I have no sympathy with these men, but, if we are going to have a trial, then it must be an actual trial. That is the position of the American Government, and it troubles me a bit to think of trying to solve by a subcommittee so fundamental a disagreement as to trial. It raises the question of whether procedural differences are not so great that the idea of separate tribunals for each nation for the trial of its separate groups of prisoners may not be the easiest and most satisfactory way of reconciling it. I do not know, but just put that forward.

GENERAL NIKITCHENKO. Perhaps I am mistaken, but I understood that our purpose is not to discuss the philosophy of law but try and work out an agreement, the purpose of which would be the carrying on of justice in the naming of the war criminals. I cannot deny that in various countries there are various systems of carrying out the justice and some of them may have preferences, but I am quite sure that the

aim of those systems, whatever they may be, is always the same, namely, the carrying out of justice. It seems to me that our purpose and task here is exactly that very task, that is to say, to work out a system by which this justice could be carried out quickly and fairly. We could see what is in all the systems that could be taken out from them and applied for our purpose. In other words, we should work out on the basis of those systems a new system, a practical system, to deal with the cases which are before us.

MR. JUSTICE JACKSON. I agree with that view of it.

SIR DAVID MAXWELL FYFE. So do I.

GENERAL NIKITCHENKO. The French Delegation put forward here a number of problems concerning the criminal prosecution and legal procedure. As regards the accusation, there is not much difference in essence and little from the point of view of our task. It is not so important who will put forward the actual accusation of the criminal, whether it would be the government, or the Control Council, or individuals, or on the basis of information received by individuals, or some other authority or person. The accusation must be properly considered and all the evidence collected. It may be collected by the Chiefs of Counsel or whatever the name of the organization may be. It does not matter the name. It is for us to decide the composition and structure of procedure, and, when this evidence is collected, the accusation will be presented to the accused person so that he would be sufficiently guaranteed that he will have his defense. For example, a man is accused of having committed all kinds of crimes in concentration camps. All the evidence would be presented to him, and then it would be for the accused person to acknowledge or to protest against such accusation; and, if his evidence were sufficient to prove he had never committed those crimes, then there would be no case to be presented against him. Altogether, it seems that, although there may be various differences in the systems which exist in various countries, still the essence is always the same, and it is a question of various forms which lead to the same object.

When all the material is collected, all the evidence received, and the accused person is interrogated properly by the prosecutor or by the Chiefs of Counsel or by any other properly authorized person, then it is the business of that organization, like the Chiefs of Counsel for instance, to prepare the actual indictment, attach to it all the evidence, and hand it over to the Tribunal. And then the Tribunal's task will not be so terribly complicated because all the material is before it, the defendant will be called, the witnesses will be called, and the task of the Tribunal will be simply to check whether all the evidence against the accused person is sufficiently valid and valuable and whether the witnesses are sufficiently trustworthy and in sufficient number. If the

defendant asks to call further witnesses, it will be the business of the Tribunal to decide whether they should be called or not. The differences apparently are mainly in this, that in our court the president of the court does not actually conduct a case. He simply directs it and guides the other judges sitting with him in the court; the actual decision is taken by them by majority of votes. As far as the material is concerned, material for prosecution in the majority of courts, there are already national commissions investigating crimes. There is already a large amount of material. We do not know exactly all the names of the defendants but know what categories of persons are going to be tried, and that material will be of great help to the prosecution and to those who investigate into their crimes. Therefore, when all the material is collected, properly checked by the prosecutor or Chiefs of Counsel, and handed over to the Tribunal, probably the Tribunal will not take much time to try the criminals. It may take one week or may take several weeks. The main cases and complicated cases after such substantial and detailed preparation should take a very short time.

I am glad to make a proposal. Before we decide whether a subcommittee should be formed or not and which questions should be considered by it if formed, I think it is very important for us to decide the fundamental question of whether we should work out one document comprising everything or two documents, one dealing with the actual agreement concerning particulars of principle and the other one, the terms of reference. If we decide this question, after that it would be easier for us to pick out from the questions which we are discussing those on which there is no diversity of opinion between us—the questions of principle on which we have all agreed. And then that series of questions all agreed upon in principle could be passed to the subcommittee for drafting first. But first of all, it is essential from our point of view to decide whether it is going to be one agreement or two and then to select from each of those two the questions which are more or less all clear in order to pass others on to the subcommittee.

SIR DAVID MAXWELL FYFE. Mr. Justice Jackson, do you see any fundamental difficulty in having it in the form of an agreement?

MR. JUSTICE JACKSON. As far as we are concerned, we would be willing to accept the Soviet Delegation's suggestion dividing the document into two parts. I think that would be acceptable to us, keeping in mind, however, that we want to keep it in the form of an executive agreement and not a treaty.

SIR DAVID MAXWELL FYFE. It seems we all agree that the document should be in two parts, the agreement and the terms of reference, the terms of reference being annexed or incorporated in the document. Mr. Justice Jackson points out that it is to be an executive agreement and not in the form of a treaty.

GENERAL NIKITCHENKO. Would it be necessary to use the exact words, "executive agreement," or would it be possible to say "in accordance with the principles laid down in the Moscow declaration the following governments conclude the following agreement"?

MR. JUSTICE JACKSON. We will have to keep it clear that it is an executive agreement on behalf of the President, as Commander-in-Chief; otherwise it would have to be ratified by the United States Senate, which would incur delay.

SIR DAVID MAXWELL FYFE. Then we are agreed on that point. Now the question is, what is the best method of providing that agreement? Mr. Justice Jackson, I can see you are not in full agreement on the question of the subcommittee. We have all been quite frank in this matter. I am trying to find the best method. Would it suit you better if you produced a further draft incorporating as much as you could of what has been put forward in these memoranda and pointing out where there was difficulty and discussing it in the full Conference? How much time would you like?

MR. JUSTICE JACKSON. We would endeavor to have it ready to bring here by Monday. We shall try to have it ready far enough in advance to be translated.

After further discussion regarding time necessary for translation, Sir David Maxwell Fyfe announced he would arrange the next meeting when the document was ready for the Conference.

XVIII. Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945

EXECUTIVE AGREEMENT RELATING TO THE PROSECUTION OF EUROPEAN AXIS WAR CRIMINALS

1. In accordance with the Moscow Declaration of October 30, 1943, concerning the responsibility of the Nazis and Hitlerites for atrocities and crimes in violation of International Law, and in accordance with other statements of the United Nations regarding the punishment of those who have committed, been responsible for, or taken a consenting part in, such atrocities and crimes, the Government of the Union of Soviet Socialist Republics, the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, acting by their duly authorized representatives, concluded the following agreement to which the adherence of all members of the United Nations is provided for, in order to provide the necessary practical measures for the prompt prosecution and trial of the major war criminals of the European Axis Powers, including the groups and organizations responsible for or taking a consenting part in the commission of such crimes and in the execution of criminal plans.

2. All members of the United Nations shall be invited by the Government of the United Kingdom, acting on behalf of the other Signatories hereto, to adhere to this Agreement. Such adherence shall in each case be notified to the Government of the United Kingdom, which shall promptly inform the other parties to this agreement.

3. The Signatories agree that the Control Council for Germany shall establish policies and procedures governing (a) the return to the scene of their crimes of persons in Germany charged with criminal offenses, in accordance with the Moscow Declaration, and (b) the surrender of persons within Germany in the custody of any of the Signatories who are demanded for prosecution by any party to this Agreement.

4. The parties to this Agreement agree to bring to trial before an International Military Tribunal, in the name of their respective peoples, major criminals, including groups and organizations referred

to in Article 1. To this end the Soviet Union, the United States, the United Kingdom, and France have each designated a representative to act as its Chief of Counsel. The Chiefs of Counsel shall be responsible for determining, preparing the charges against, and bringing to trial the persons and organizations so to be tried.

5. The Soviet Union, the United States, the United Kingdom, and France shall also promptly designate representatives to sit upon an International Military Tribunal which shall be charged with trying such persons, groups, and organizations.

6. There is hereby adopted the Annex to this instrument which (a) declares applicable International Law and specifies acts constituting criminal violations of International Law, (b) sets out the powers and duties of the Chiefs of Counsel, (c) provides for the establishment, jurisdiction, procedures, and powers of an International Military Tribunal, and (d) makes provision for the punishment of those convicted before such International Military Tribunal.

Annex

1. This Annex is adopted pursuant to the Executive Agreement made this day by the Union of Soviet Socialist Republics, the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, which Agreement provides for the adherence thereto of all members of the United Nations who may elect so to adhere.

2. The purpose of this Annex, in pursuance of the aforesaid Executive Agreement, is to make detailed provisions for the necessary practical means and measures to carry out the declaration issued at Moscow on October 30, 1943, and other statements of the United Nations on the question of punishment of war criminals insofar as they relate to the trial and punishment of major war criminals.

3. To this end this Annex (a) declares applicable International Law and specifies acts constituting criminal violations of International Law, (b) sets out the powers and duties of the Chiefs of Counsel for the purpose of bringing the major war criminals, including groups and organizations, to trial for their criminal violations of International Law, (c) provides for the establishment, the jurisdiction, procedures, and powers of the International Military Tribunal to be established for the purpose of trying such criminals for their crimes, and (d) makes provision for the punishment of those convicted before such International Military Tribunal.

4. For convenience, (a) the four Signatories will sometimes be referred to as "the Signatories;" (b) the members of the United Nations adhering hereto as provided in the preceding Article will sometimes be referred to as "the Adherents," and (c) the Signatories

and all Adherents will sometimes be collectively referred to as "the parties to this Agreement."

5. The Tribunal shall be bound by this declaration of the Signatories that the following acts are criminal violations of International Law:

- (a) Violations of the laws, rules, and customs of war. Such violations shall include, but shall not be limited to, mass murder and ill-treatment of prisoners of war and civilian populations and the plunder of such populations.
- (b) Launching a war of aggression.
- (c) Invasion or threat of invasion of, or initiation of war against, other countries in breach of treaties, agreements or assurances between nations, or otherwise in violation of International Law.
- (d) Entering into a common plan or enterprise aimed at domination over other nations, which plan or enterprise included or intended, or was reasonably calculated to involve, or in its execution did involve, the use of unlawful means for its accomplishment, including any or all of the acts set out in sub-paragraphs (a) to (c) above or the use of a combination of such unlawful means with other means.
- (e) Atrocities and persecutions and deportations on political, racial, or religious grounds, in pursuance of the common plan or enterprise referred to in sub-paragraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated.

"International law" shall be taken to include treaties, agreements, and assurances between nations and 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 the public conscience.

THE INTERNATIONAL MILITARY TRIBUNAL

6. There shall be set up by the Signatories an International Military Tribunal which shall have jurisdiction to hear and determine any charges presented pursuant to Article 10. Such International Military Tribunal shall consist of four members, each with an alternate, to be appointed as follows: one member and one alternate each by the Soviet Union, the United States, the United Kingdom and France. The alternate, so far as practicable, shall be present at the sessions of the Tribunal. The presiding officer shall be selected by vote of a majority of the members of the Tribunal, and if they are unable to agree, the respective appointees of each of the Signatories shall preside in rotation on successive days.

PROVISIONS FOR BRINGING DEFENDANTS TO TRIAL

7. The parties to this Agreement agree to bring to trial before the International Military Tribunal at ----- or such other place as the parties may unanimously agree in the names of their respective peoples, the major criminals, including groups and organizations, referred to in Article 2.

8. Chiefs of Counsel appointed by the Signatories shall be charged with:

- (a) determining the persons, groups, and organizations against whom in their judgment there exists sufficient proof of criminal violations of International Law set out in Article 5 above to warrant their being brought to trial before the International Military Tribunal;
- (b) preparing the charges against such persons and organizations;
- (c) determining the proof which in their judgment has sufficient probative value to be offered in evidence against any or all such persons, groups and organizations;
- (d) instituting and conducting before the International Military Tribunal prosecutions of such persons, groups and organizations.

Determination of the matters set out in sub-paragraphs (a) through (d) above shall be by agreement of the Chiefs of Counsel, provided that any Chief of Counsel may (1) bring to trial before such International Military Tribunal any person in the custody of his Government or of any Government which consents to the trial of such person, and any group or organization, representative members of which are in the custody of his Government, if, in his judgment such person, group, or organization has committed any criminal violation of International Law defined in Article 6 hereof; and (2) introduce any evidence which in his judgment has probative value relevant to the issues raised by the charges being tried.

9. The Chiefs of Counsel shall also be charged with recommending rules of procedure for adoption by the International Military Tribunal.

CONSTITUTION OF TRIBUNAL

10. The International Military Tribunal shall have the power (a) after receiving recommendations of the Chiefs of Counsel, to establish its own rules of procedure, which shall not be inconsistent with the provisions of this Agreement; (b) to summon witnesses, including defendants, and to require their attendance and testimony; (c) to require the production of documents and other evidentiary material; (d) to administer oaths; (e) to appoint special masters and other officers

to take evidence, and to make findings, except findings of guilt, or certify summaries of evidence to the International Military Tribunal whether before or during the trial, and (f) generally to exercise in a manner not inconsistent with the provisions of this Agreement plenary authority with respect to the trial of charges brought pursuant to this Agreement. Its judgment of guilt or innocence shall be final and not subject to revision.

11. There shall be lodged with the Court prior to the commencement of the trial an indictment, supported by full particulars, specifying in detail the charges against the defendants being brought to trial. No proof shall be lodged with the Court except at the trial, and copies of any matters to be introduced in writing shall be furnished the defendant prior to their introduction.

12. In the event of the death or incapacity of any member of the International Military Tribunal, his alternate shall sit in his stead without interruption of the proceedings. All actions and decisions shall be taken by majority vote of the members.

13. In the conduct of the trial, questions may be put by each Chief of Counsel, or his representative, or by any member of the Tribunal, in his own language, and shall be translated and communicated to the witness, the defendants, and each member of the Tribunal in his own language. The witness may answer in his own language, and the answers will be translated in like manner. Written matter introduced in evidence shall be translated into the languages of the defendants and of each of the members of the Tribunal. A record of the trial will be kept in the language of each of the members of the Tribunal and in German, and each such record shall be an official record of the proceedings.

FAIR TRIAL FOR DEFENDANTS

14. In order to insure fair trial for defendants the following procedure is established:

(a) Reasonable notice shall be given to the defendants of the charges against them and of the opportunity to defend. Such notice may be actual or constructive. The Tribunal shall determine what constitutes reasonable notice in any given instance.

(b) The defendants physically present before the Tribunal will (1) be furnished with copies translated into their own language, of any indictment, statement of charges, or other document of arraignment upon which they are being tried; (2) be given fair opportunity to be heard in their defence and to have the assistance of counsel. The Tribunal shall determine to what extent and for what reasons proceedings against defendants may be taken without their presence.

SUBSTANTIVE PROVISIONS FOR LIABILITY AND DEFENCE

15. In the trial, the Tribunal shall apply the general rule of liability that those who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and responsible for the acts of each other.

16. Any defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained.

17. The fact that a defendant acted pursuant to order of a superior or to government sanction shall not constitute a defense per se, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

PROVISIONS REGARDING PROOF

18. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedures and shall admit any evidence which it deems to have probative value. It shall employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make written proffers of proof; making extensive use of judicial notice; receiving sworn or unsworn statements of witnesses, depositions, recorded examinations before or findings of military or other tribunals, copies of official reports, publications and documents or other evidentiary materials and all such other evidence as is customarily received by international tribunals.

19. The Tribunal shall (a) confine the trial strictly to an expeditious hearing of the issues raised by the charges, (b) take strict measures to prevent any action which will cause unreasonable delay and rule out irrelevant issues of any kind whatsoever, (c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings but without prejudice to the determination of the charges.

PUNISHMENT

20. Defendants brought to trial before the Tribunal shall, upon conviction, suffer death or such other punishment as shall be determined by the Tribunal to be just.

21. The sentences shall be carried out in accordance with written orders of the Control Council, and the Control Council may at any time reduce or otherwise alter the sentences but may not increase the severity thereof.

TRIAL OF GROUPS OR ORGANIZATIONS

22. Groups or organizations, official or unofficial, may be charged before the Tribunal with criminal acts or with complicity therein by producing before the Tribunal and putting on trial such of their number as the Tribunal may determine to be fairly representative of the group or organization in question. Upon conviction of a group or an organization, the Tribunal shall make written findings and enter written judgment on the charges against such group or organization and the representative members on trial.

23. Upon conviction of any group or organization, any party to this Agreement may bring charges against any person for participation in its criminal activities pursuant to the provisions of Article 15 hereof before any occupation or other Tribunal established by it. In any such trial the findings of the International Military Tribunal as to the criminality of the group or organization shall be binding upon the occupation or other Tribunal. Upon proof of membership in such group or organization, such person shall be deemed to have participated in and be guilty of its criminal activities unless he proves the absence of voluntary participation. A person so convicted shall suffer death or such other punishment as the Tribunal may deem just in light of the degree of his culpability.

24. Any party to this agreement may, either in a proceeding described in Paragraph 23 or in an independent proceeding, charge any person, before an occupation or other Tribunal, with any crime other than the crimes referred to in Paragraph 23, and such Tribunal may, upon his conviction, impose upon him for such crime punishment independent of and additional to the punishment imposed for participation in the criminal activities of such group or organization.

EXPENSES

25. The expenses of the International Military Tribunal shall be charged by the Signatories against the funds allotted for maintenance of the Control Council, and the expenses of the Chiefs of Counsel shall be borne by the respective Signatories.

RETURN OF OFFENDERS TO THE SCENE OF THEIR CRIMES

26. The Signatories agree that the Control Council for Germany shall establish policies and procedures governing (a) the return of persons in Germany charged with criminal offenses to the scene of their crimes in accordance with the Moscow Declaration and (b) the surrender of persons within Germany in the custody of any of the Signatories who are demanded for prosecution by any party to this Agreement.

Memorandum to Conference of Representatives of the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and the Provisional Government of France, Submitted by the United States To Accompany Redraft of Its Proposal

The Moscow Declaration left the higher German authorities whose crimes were not geographically localized to be punished by "joint decision" of the powers involved.

The United States proposal is based on the idea that the "joint decision" should be reached through hearings having the characteristics of a judicial inquiry rather than of a political fiat. Its underlying assumptions are that decisions should be reached through an Inter-Allied Tribunal, and that it should be done through a main trial of the principal individuals and the organizations which they represent. It is assumed that the trial could take place at a single fixed place, and that the trial would be by some procedure neither our own nor that of any one country but acceptable to our public as a fair judicial determination of the fact of guilt.

We do not propose adoption of our American Court procedure. One of the chief reasons for suggesting a Military Commission is that it affords opportunity for special procedures adapted to the unprecedented nature of our case.

The United States, as the memorandum submitted with the original proposal at San Francisco indicates, has conceived of this case as a broad one. It must be borne in mind that Russian, French, English, and other European peoples are familiar with the Hitlerite atrocities and oppressions at first-hand. Our country, three thousand miles away, has known of them chiefly through the press and radio and through the accusations of those who have suffered rather than through immediate experience. German atrocities in the last war were charged. The public of my country was disillusioned because most of these charges were never authenticated by trial and conviction. If there is to be continuing support in the United States for international measures to prevent the regrowth of Naziism, it is necessary now to authenticate, by methods which the American people will regard as of the highest accuracy, the whole history of this Nazi movement, including its extermination of minorities, its aggressions against neighbors, its treachery and its barbarism.

For this reason, the American representatives conceive of this case as more than the trial of many particular offenses and offenders. It involves our whole attitude towards the waging of aggressive war, which we think, as Professor Trainin has pointed out in his book, is an international crime. It is mainly on this basis that our country

justified, prior to our own entry into the war, its lend-lease and other policies of support for the anti-Nazi cause.

We have not envisaged this case as a trial of isolated criminal acts. We envisaged it as a trial of the master planners in which the criminality consists of making and executing the master plan to attack the international peace. We are, of course, interested in proving the many manifestations of that plan in local offenses and terrorisms, but in this main case we are interested in establishing them as proof of the design. We are of course interested in bringing all these individual criminals to justice in other appropriate proceedings.

The United States proposal, therefore, contemplates a single main trial of representative Nazi leaders and of the organizations which were the important instrumentalities of the Hitlerite movement. This is what we consider the function of the main international tribunal. It may be necessary, subsequently, to have other trials of individuals, but it will not be necessary to try again the questions decided by the main trial.

We are ready to consider appropriate procedures to this end drawn from Russian, British, French, American, or any other, experience. The United States would not welcome a situation in which I would be expected to participate in a large number of individual trials, held in various parts of Europe, to try particular outrages. My present organization is not set up for that work. My function is to get at the groups which have master-minded the attack, by such barbaric methods, on the peace of the world. Our occupation courts will of course handle appropriate individual cases.

It would seem that the primary reason for an International Tribunal is the fact that many local trials, while useful in themselves, will fail to disclose the general design which is back of the multitude of local offenses and that, therefore, the attention of the International trial must be focused on the broader aspects of the Hitlerite conspiracy.

We submit a redraft of our proposal attempting to retain its essential purposes and yet to meet as far as possible the suggestions of the Russian, French, and British memoranda.

I call attention to the official statement of the responsibility which the United States conceives it has for the trial of prisoners in its possession as outlined in my report to the President, a copy of which we have provided. By reason of the President's unqualified endorsement of it, the essentials it states represent the President's views as well as my own.

ROBERT H. JACKSON

Chief of Counsel for the United States of America.

30 June 1945.

XIX. Draft of Agreement Presented by Soviet Delegation, July 2, 1945

DRAFT AGREEMENT Between the Governments of the U.S.S.R., U.S.A. and the UNITED KINGDOM and the Provisional Government of the FRENCH REPUBLIC on the PUNISHMENT OF WAR CRIMINALS, Submitted on JULY 2, 1945

In accordance with the Moscow Declaration of October 30, 1945 [1943], concerning the responsibility of the Hitlerites for their atrocities and in accordance with other statements of the United Nations regarding the punishment of war criminals, the Governments of the Union of Soviet Socialist Republics, the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Provisional Government of the French Republic acting in the interest of all the United Nations have concluded the following Agreement:

1. To establish for the trial of major war criminals, whose crimes are not restricted to a definite locality, an International Military Tribunal the jurisdiction and activity of which shall be determined by its Statute.

2. To approve the Statute of the International Military Tribunal which forms an integral part of this Agreement.

3. To turn over to the International Military Tribunal upon its demand all the major war criminals who are under the jurisdiction of the International Military Tribunal.

4. Each of the Signatories shall separately take the necessary measures to provide for the surrender to the International Military Tribunal of the war criminals who are to be found on the territory of countries who are not parties to this Agreement.

5. To surrender, upon the demand of the Governments of any of the countries which have signed this Agreement or adhered to it, the war criminals who have committed crimes on the territories of those countries.

6. All members of the United Nations shall be invited by the Government of the United Kingdom, acting on behalf of the other Signatories hereto, to adhere to this Agreement.

Such adherence shall in each case be notified to the Government of the United Kingdom, which shall promptly inform the other parties to this Agreement.

7. This Agreement becomes valid immediately on the day of its signing.

XX. Minutes of Conference Session of July 2, 1945

At the opening of the Conference, General Nikitchenko handed the other delegates a draft agreement embodying Soviet proposals [XIX].

SIR DAVID MAXWELL FYFE [*presiding*]. Gentlemen, we have the redraft of the American agreement in the form of an agreement and an annex [XVIII], and we have just received the draft of the Soviet agreement [XIX]. If it would be convenient, I shall ask Mr. Justice Jackson to say something about his redraft.

GENERAL NIKITCHENKO. With regard to the second part of the Russian proposal, we shall be able to present that in Russian today, but, if the Conference prefers to wait until tomorrow, we can also present it with the English translation.

SIR DAVID MAXWELL FYFE. Would it be convenient to hear Mr. Justice Jackson on the American draft in the meantime?

MR. JUSTICE JACKSON. We made a redraft which was a rearrangement in the form which we understood was desired of all the essential features of our plan, and I have addressed to the delegations a short memorandum which is intended to be a plea that before you abandon or reject some parts of our proposal a little more consideration be given to it.

I understand the Soviet memorandum to reject the possibility of trying organizations. The American proposal is that we utilize the conspiracy theory by which a common plan or understanding to accomplish an illegal end by any means, or to accomplish any end by illegal means, renders everyone who participated liable for the acts of every other and in connection with that to utilize these closely knit voluntary organizations as evidence of a conspiracy. That is a rough way of describing our proposal. That is the heart of our proposal. Without that it means many trials, which we are not set up to engage in. To my mind, rejection of this plan leaves nothing of our proposal as to organizations which is really worth considering. Therefore, it seems to me that we should give some consideration, before it is rejected, to its merits and to any possible alternative.

These organizations constitute the means through which, under the American proposal, a large number of people can be reached with a small number of long trials—perhaps one main trial. The difficulty

in our case is that we have in the neighborhood of perhaps 200,000 prisoners. We don't want to have 200,000 trials. Some of them perhaps ought to be tried individually on charges of individual criminal actions; but also they should be tried for their part in the planning of extermination of minorities, the aggressive warfare, the atrocities against occupied nationals, and offenses of that character. We think this should be done in a single effort so far as the collective guilt is concerned. Any other plan means moving about from place to place and in many territories, and going back, we think, substantially to the first part of the Moscow declaration rather than carrying out the second part, by which we hope to reach the principal Hitlerite planners. We see no way that we can unite in trial of these large numbers except on some basis such as we suggest, and we would be disappointed if some plan of that kind were not acceptable. If that were acceptable, the procedures by which the prosecution could be conducted, we think, could be worked out so that it would represent the best that is in our several procedures as adapted to military tribunals. We think use of the military tribunal relieves us all of trying to carry our ideas of ordinary court procedure into this trial.

We assumed from the negotiations before London that the American suggestion, including trial by conspiracy principles and the trial of organizations, was generally acceptable. We understood that there was objection by the Soviet Union to recognizing the legality of the existence of these organizations after the surrender. We are quite ready, of course, to agree that these organizations have no present legal existence, but that does not prevent effectiveness of a trial concerning their criminal character in the past when concededly they were in fact in existence, nor prevent use of membership as evidence of conspiracy. We think the objection that nothing should be done to give recognition to their present validity is a proper one that we can accede to without any impairment of our position that participating in them was a conspiracy. We would be ready to put in a provision expressly recognizing that they have been dissolved by virtue of the surrender and acts of the military government and that no recognition of their legal existence from now on is to be implied by the terms of the agreement.

We are entirely willing to take up the discussion of any counterproposal, but our discussion of a counter proposal would, of course, proceed upon the basis that our draft is still before the Conference for consideration and has not been rejected. If that is so understood, we are ready to take up anybody's proposal.

PROFESSOR GROS. Actually, very divergent opinions have been expressed on the question of organizations. We studied the new American memorandum and again the Soviet objections and have endeavored to understand these divergent views, and we shall try to suggest ways to reconcile them.

First, what are the facts which we are discussing? Countless crimes have been committed by those organizations during the war—the Gestapo groups, S.S. Systematic criminal activities have been committed against the peoples of the occupied countries of which two of these delegations can speak from personal knowledge, and systematic criminal activities have been going on for years. These systematic criminal activities are no accident. The association of those groups was not accidental. These gangs in many localities were tied by one allegiance to a major organization—Gestapo, S.S., S.A., or others. If we want to reach the major war criminals, these major organizations must be our target. On that first point I cannot really see a divergence of views between the American and Soviet suggestions on the facts.

Now, as Mr. Justice Jackson said much better than I would be able to say, if we do not try these organizations as organizations, what will be the situation? I propose to suggest that it would not be satisfactory in the interest of the Four Powers nor in the interest of the United Nations to fail to try them. I submit that war criminals will not be punished merely under the declaration of Moscow or of Yalta. They should be punished even without those two declarations. They should be punished because they merit punishment of war criminals, and those two declarations are only reaffirmation of the principles of international law. But the question of application remains completely open and the declaration of Crimea, as I read it, has little significance by its own terms—“We are determined to . . . bring all war criminals to just and swift punishment”

I will insist again on those terms of the declaration. We are committed to bring all war criminals to justice, and we cannot take those words as a legal pronouncement but only as a declaration of intentions reserving all question of application.

Now that the political solution of the punishment of war criminals has been put aside and provision has been taken to punish them only after trial, we would like to have a situation before the Tribunal where the organizations would be duly exposed to the working of that plan and function and pronounced not merely “illegal” but “criminal”. That could have been done by the heads of state, but, as it was not and will not be done by them, it must be done by the Tribunal. It is not enough to wipe out the Nazis from now on, but it must be proved and explained to the public opinion of many countries what has been going on in Germany and Europe for years. I don't suppose there can be any divergence of opinion in the four delegations on that second point. If we are not in accordance on the facts, we should be in accordance on that big objective. Now perhaps, if we are not in complete agreement, I will just indicate what would be the

position of the French for the moment and adapt it to any suggestion of the other delegations. It is on the question of the result of the trial of an organization before the Tribunal. We do not think of it as punishing equally all members of the organization, but the situation would be more like this: First, if a special crime is alleged against one of the members, a special trial will be put against him in the local court or in the occupation court. Second, if, on the contrary, certain supposed members can prove that they are not members of the organizations, that they had no knowledge of the purposes of the organizations, that they had been forced into membership, then they could probably be discharged. Third, in the case of other members against whom no special crime can be proved or who cannot prove their innocence, the organization would in a sense be what the British call "outlawed", and we do not insist upon the kind of punishment that would be applied to them. It might even be decided by higher authorities.

Now, can we really have such a trial? I understood in one of the last meetings that the Soviet Delegation said it was impracticable to have such a trial for organizations. Most of their criminalities would no doubt be collective crimes. Such collective crimes are known in the French system of law and in the Belgian system of law, and we may be making a mistake but I think also in the Soviet system of law—crimes committed by gangs. What we demand is, in fact, the application by the International Military Tribunal of the same process of charging and punishing gangs. I know that in those systems of law trials are required against members before punishing them, but we consider that the trial of 10 or 15 leaders of an organization is the trial of all the organization and leave open for the rest of the members the question of individual punishment. If we do not try to find any solution, we will be back to the difficulty of letting them go or of punishment without trial at all. This latter solution would be difficult to sustain years after the capitulation of Germany, but a decision of the Tribunal would be the leading precedent, and the necessity of trial is such that even after the declaration of Crimea and the declaration of Moscow we still need it. This being so, I wonder if we could try to come to an agreement, as we all want the same results. Taking the idea of the Soviet draft which I just received this morning and have not been able to study in detail, could we put "groups of persons or associations" in article 2 under the range of crimes [XXIII, Soviet draft], and then there would be no disagreement among us? We would propose that as a formal suggestion.

Now we would like to ask the Soviet Delegation what part of those ideas it could accept because it would help come to an understanding and we would know whether we could agree that those gangs of crim-

inals must be taken as a whole, and what do they suggest as a mode of punishment if there is not one single trial?

SIR DAVID MAXWELL FYFE. I would like to direct what I have to say to what I understand was the difficulty as to the organizations, and I begin by quoting the passage in the Crimea declaration which I think caused that difficulty: "It is our intense inflexible purpose to bring all war criminals to just and swift punishment . . ."—and these are the important words—"to wipe out the Nazi party, Nazi laws, organizations and institutions, remove all Nazi and military influences from public office and from the cultural and economic life of the German people." As I understood Mr. Nikitchenko's difficulty, it was this: that implies that the organizations are illegal and should be destroyed, and therefore it would be difficult to leave to a court as an open question whether the organizations were illegal. That I understand as the difficulty.

It seems to me that the answer is that we must place before the court and the court must determine what these organizations have actually done. Assuming for the moment that we were prosecuting Kaltenbrunner, one thing that would be alleged against him would be that he carried out the conspiracy by means of the Gestapo, and the purpose and method and actions of the Gestapo would be a part of the charge and part of the proof. Therefore, it will be part of our method of proof against the individuals to show that these organizations were part of the carrying out of the general plan. I should hope that the court would declare that this was so in the judgment they would pass.

It, therefore, seems to me that whatever form we took we should be bound to bring the question of the purposes, methods, and acts of the organization before the court, and in doing so we would not be going contrary to the Crimea declaration but merely bringing it into effect. The result of that would be, as Professor Gros has pointed out, that it would be declared that these organizations were not only illegal but criminal in their action. This would be binding on the occupation courts and on our military courts and every individual member of the organizations who could be brought up and charged with their membership in the absence of any additional charge. By this means we should avoid the result that thousands of members of the Gestapo and S.S. would be walking free in Germany when everyone knew they had committed abominable crimes, that is, in a case where we would not prove a specific crime against the member with the evidence available.

GENERAL NIKITCHENKO. The Soviet Delegation states that they have very carefully studied the documents they have before them, including the new American draft, and from that and also from what was said around the table do not see that there is any brief for the very pessimistic view expressed by Mr. Justice Jackson that there is a ques-

tion of such fundamental difference in views between us that either the American draft with regard to the trial of organizations has to be accepted or that we are in complete disagreement.

We consider that some of the misunderstandings are undoubtedly based on what is not a clear idea of what the Soviet Delegation is ready to suggest, and, if we are able to make quite clear what our proposals really amount to, then a lot of the objections which have been raised around the table will automatically disappear.

The basic question is the responsibility of organizations and whether it is possible to get a legal declaration by the court that organizations are criminal. The view that the Soviet Delegation has excluded the possibility of the trial of members of organizations for criminal participation in the work of such organizations is not correct.

The Soviet law, criminal law, fully recognizes in exactly the same way as the French, and probably others, the collective responsibility of members of an organization for the crimes committed by the organization. The theory of the Soviet criminal law fully recognizes the trial of gangs or organizations and the responsibility of the members of such organizations in addition to any individual responsibility they may carry for individual acts. Where we do not agree is in the idea that the trial of organizations should form actually the basis of the agreement for the trial of criminals. An organization is not a physical body, but the members of that organization are physical, and, if they have committed individual crimes as members of the organization, then they should be tried individually as physical persons who have committed acts because they were members of a criminal organization.

In order to establish the criminal nature of the criminal actions of the organizations, in the opinion of the Soviet Delegation, it is necessary to investigate the actions of individuals of the organization and to establish the fact that they have committed criminal acts by virtue of their adherence to the organization. How otherwise can we establish that the organization has in fact committed criminal acts unless we are able to prove whether individuals belonging to it have committed such crimes?

Does the trial, by the court, of individuals necessarily exclude the fact of the trial referring to the organization? In fact, what they are proposing is that the members of the organizations—S.S., Gestapo, and so on—have committed certain crimes in certain definite places, which crimes can be proved, and the whole group will be tried. It is immaterial whether the number of prisoners is 10 or 100 or any other number, but the fact that those individual prisoners are tried and convicted does, in fact, prove that the whole organization to which they belong is in effect a criminal organization. The way to establish that proof is not by the trial of the organization as such but by the trial of the individual members.

SIR DAVID MAXWELL FYFE. May we have a restatement of that, as it is of vital importance and we seem nearing an agreement?

GENERAL NIKITCHENKO. The Soviet Delegation consider that the Tribunal could try not merely individuals but groups. It would be immaterial whether those groups consist of members of the German Government, of the S.S., of the Gestapo, or any other organization, and it would also be immaterial how many of the persons accused were on trial at any one time, but the main point would be that the establishment of the criminal responsibility of those individuals would in effect establish the criminal responsibility of the whole organization to which they belong.

I would just like to note that the main difference between the Soviet and American plans appears to be that the American Delegation suggests the trial of the organization and then, having established the criminal character of the organization, to proceed from that to the trial of the individual adherents of the organization. The Soviet Delegation considers that that approach would not be the right one to secure conviction and punishment for individual members.

The second question is, what would be the consequences of a verdict by the court in regard to certain members of an organization upon other members of the same organization who might not be before the court? The Soviet criminal law is based on the fact of the individual criminal responsibility of the individual person. It is immaterial whether he committed some action alone or as a part of a gang; he has to carry individual responsibility for the action he has committed, one way or the other. We therefore consider that a decision of the court which establishes the criminal responsibility of the heads or the leaders of any organization of that kind automatically establishes the criminal responsibility of the various subordinate members of the organization. But that does not mean that the national courts or the occupation courts can apply punishment to all the members of an organization simply on the basis of the decision by the Tribunal of the trial of the individual members of that organization.

It is not our task to define the functions of either national or occupational courts. According to the national laws of the various countries the basis on which criminal responsibility is established differs, and it may be that in the American and the British legal systems the court has to have the precedent of a declaration of illegality before it can proceed against the individual members. The Soviet law does not require any such precedent to base itself on. It simply takes the trial of the individual and the establishment of whether his actions were criminal or not as the basic part of the trial.

I am not prejudging in any way what form or in what text the decision to which we will come here will be set out. That will have to be worked out in the course of discussion, of course, but I wanted the

other delegations to understand correctly the views of the Soviet Delegation on this question of criminal responsibility of individuals and organizations.

With regard to the question of whether we agree that these organizations are criminal or not, there is, of course, only one answer, but it is not necessary in order to establish the criminality of the organization to have a separate trial of the organization itself. The duties of the Military Tribunal will be to try the chief war criminals, and whatever decision the court comes to on the criminality of those chief war criminals will apply to the organization which they represent. I think that replies to the question which Professor Gros put forth.

If anything is not clear in what I have said I should very much like the delegations to set out their questions, and I will try to make the position of the Soviet Delegation clear.

PROFESSOR TRAININ. I would like to say a few words with regard to the American memorandum. This sets forth two principles: the first is the authority of the Military Tribunal, and the second is mutual understanding. With regard to authority, the Soviet Delegation fully agrees that the position and authority of the Military Tribunal should be placed as high as it is possible to place it, and, in regard to mutual understanding, we trust we shall do everything to play our part in the proceeding.

I should like to say in regard to the question of the responsibility of organizations that certainly in the Soviet draft there is no specific mention of the responsibility of organizations. But that does not mean that the establishment of criminal responsibility of organizations will not in effect be arrived at. The absence of mention of the responsibility of organizations in the Soviet draft does not mean the exclusion of them and the Soviet draft does not set forth the responsibility for membership of criminal organizations. But in our opinion this principle should not be included in the agreement between the Four Powers but should be included in the statute of the Military Tribunal. In the American draft, paragraphs 23 and 25, this question of criminal responsibility of organizations is mentioned, and provided that question is included, not in the agreement but in the statute of the court, I am quite sure that in one form of words or another it can be included. The words in which this is included are a question of drafting which, of course, can be materially agreed, but the main point is that in paragraph 22 of the American draft the fact is brought out that the trial of individuals can establish the responsibility of the organization to which they belong, and no doubt, once this is recognized, it will be fairly simple to reach some form of drafting.

I am not going to waste the time of the Conference on suggestion of various drafts that will have to be worked out in a drafting com-

mittee, but in conclusion would just like to express my appreciation of the remarks made by Mr. Justice Jackson where, if I understand it correctly, he has confirmed that it is only on this one point that there is really any major difference between the views of the Soviet Delegation and those of the other delegations.

Mr. JUSTICE JACKSON. I think our difference on this point is not as serious as I had taken it to be. From the fifth paragraph of the comments submitted to us, and as translated by us [XVI], the Soviet Delegation suggested that the reference to the possibility of arraigning organizations before the Military Tribunal should be excluded from article 10, and again in the twelfth paragraph suggested that articles 21 and 22 concerning criminal responsibility should be eliminated. I, and our Delegation, took it that the elimination without substituting anything else left it impossible to reach the groups at all, and it was on that basis that it looked like a wide difference of opinion. I should be glad to point out that I think the suggestions you have made this morning left us much closer together than I had supposed.

GENERAL NIKITCHENKO. Could we answer that question? I should like to say that, when we examined the first draft of the American proposal, we actually made our notes on that draft, and what we were protesting against really was the wording of 21 and 22. We understood from this, perhaps incorrectly, that it was the question of the trial of organizations without individuals and that the organization would simply be tried as a body. We considered that to be wrong. We considered that the trial of the organization should be through the individuals, and therefore we suggested the exclusion of that portion of the memorandum.

Mr. JUSTICE JACKSON. An essential step in declaring the criminal character of such organizations as we are dealing with here is not stated in our memorandum and perhaps caused this misunderstanding. We assumed it without stating it because in our philosophy it would be a necessary step. We propose to reach the organization through proof of what individuals did, just as you suggest. We take the same step of trying what the members did, what the common plan was through proof of what individuals agreed to, and we attribute what they did and agreed to do through the group to the organization. Then we take the next step of attributing the common principles that ran through the organization to the members. We, too, believe in individual responsibility and for that reason could not attribute the acts of the leaders to the members unless we proved that the acts of the leaders were within some common plan or conspiracy. The mere fact that leaders did some particular act, unless within the plan of the conspiracy and within its probable scope, might not bind others to that act. Therefore, we have to tie the acts of individuals to the organization and then the organizational purposes and methods to the in-

dividual members. But we do not think we are speaking of a great difference of substance. I think the difference is not as great as it appeared to be.

GENERAL NIKITCHENKO. I would just like to ask one question. Does the decision, when it has been reached in respect to an organization, by the court in this case, apply to all members of that organization; and, once the organization has been established as a criminal one, does that mean that punishment can be meted out to all members of that organization by national or other courts, or is it still necessary that those members should be put through a process of trial, either individually or in groups or gangs, or any other way?

MR. JUSTICE JACKSON. There would have to be an opportunity given to an individual, before he could be brought under the general plan, to show that there was a mistake in identification, that he was not a member in fact, or to show that he joined because he was forced to join, or some reason why the general finding of guilt should not be applied to him as an individual. He must have a chance to bring forward his individual situation, but he does not have a chance again to question the finding that the organization is guilty of particular plans or designs or offenses. That is settled in the one trial and all that he can thereafter be heard to say concerns his particular connection with the criminal design.

SIR DAVID MAXWELL FYFE. To put it quite bluntly, he could not be heard to say that the Gestapo, having been found to be a criminal organization in the trial, was not a criminal organization.

MR. JUSTICE JACKSON. Now let us see what we are trying to reach by this method that we might not reach otherwise. Let us suppose that there is a very active member of the S.S.—active in organizing, active in getting in new members—but he never took a personal part in a single crime. He helped to formulate the general plan; he knew about it; he knew the methods; he knew that their plan was to exterminate minorities, to run concentration camps, to do all these things; but you cannot prove by any witness that he was present when a single offense, standing by itself, was committed. By reason of his membership in this common criminal plan and by reason of his participation in it, we would expect to reach him. Now the difficulty is that there are several hundreds of thousands of members of these organizations. You cannot get witnesses, at least we haven't thought we could get witnesses, to prove where each was at all times and prove what he did. It is very hard to identify persons who are in uniform and to get accounts of their part in acts of the organized military or paramilitary units. Therefore, we would expect to be able to show what offenses were committed, and then every person who was a part of that general plan, whether he actually held the gun that shot the hostages or whether he sat at a desk

somewhere and managed the accounting, would be responsible for the acts of the organization.

It may not bear on this particular plan directly, but it may bear on the thinking that is back of it as to whether one treats, in his system of jurisprudence, organizations as juridical persons, for purposes of trial. We in our system treat corporations and certain associations and organizations as juridical persons, and permit them to come into court and sue; and while we are not applying that principle in its entirety here, it perhaps makes it less unusual to us to think of trying an organization than it would if you do not treat organizations as juridical persons. I am wondering if your system does treat organizations under some circumstances as juridical persons.

PROFESSOR TRAININ: The question of juridical person is quite well known to the Soviet legal system, but it is applied in civil law, and they do not recognize this principle in their criminal law. In the criminal law it is necessary to bring home the responsibility to individual persons and not to condemn organizations. That does not in the least prevent the conviction of a person for adherence to or membership in a criminal organization, and the Soviet law provides for the trial of gangs or criminal associations, and it also provides for the trial of an individual for being a member of a criminal organization.

MR. JUSTICE JACKSON. I think the statement was made that the conviction of heads under the Soviet system would establish the responsibility of the members. That would be a somewhat more drastic application of the principle than we would be familiar with. It is not only necessary that the individual be responsible, which he is if he knowingly becomes a member of the gang, but that he have some opportunity in trial to defend what he has done. That is to say, you cannot, under our system, attribute guilt to a person who has not had an opportunity to appear and defend on the main issues. Therefore, it is necessary under our conception of reaching that individual that he shall have the right, at least by some representative arrangement, to be heard. That can be given him only, as we see it, if you put the organization on trial and give notice to the membership as far as can be given that the organization is on trial and that the members who are to be affected by the judgment may appear and defend it. That is, a mere decision that the heads of an organization had made a criminal conspiracy would not be sufficient to convict any member who was not a party to the trial or given an opportunity to be heard in some way, and that is why we had provided under the section on "Fair Trial for Defendants" [paragraph 14] that "reasonable notice shall be given to the defendants of the charges against them and of the opportunity to defend", that "such notice may be actual or constructive", and that "the Tribunal shall determine what constitutes reasonable notice"

Probably nobody, or at least few persons, in Germany would step forward and admit that they were members of these organizations. But under our system we would have to give them some notice and an opportunity to be heard. That does not necessarily mean that the Tribunal would have to hear each individual, but it would be necessary that in some way they have an opportunity to be heard before you can attribute guilt to them.

GENERAL NIKITCHENKO. Perhaps that point has not been quite clearly understood. According to the Soviet criminal law the members of a criminal organization are tried individually, but their being found guilty, if they are found guilty, does not mean that the organization to which they belong is declared to be a criminal organization. The Soviet law provides, in the case of criminal trials, for the trial of persons for infringement of the law itself and the commencement of the process of the courts against them. Whether it is a single individual or a gang, the man or the gang must be tried, and there is no automatic provision that because one has been convicted all other members are thereby pronounced guilty.

In fact, in the Soviet criminal law, when the trial of a member of an organization has proved that the organization to which he belongs is a criminal one, the responsibility is not on the individual to come forward and confess that he was a member of such an illegal organization. The responsibility is on the prosecuting organs of the court to bring a charge against that individual, and, when the prosecution brings such a charge and the individual is placed on trial, he is then given the opportunity of proving or disproving whether the accusations made against him by the prosecution are correct or whether he has acceptable legal defense against those accusations.

MR. JUSTICE JACKSON. The question I would like to ask about that is, when the member is brought to trial, would he be entitled to try again the question as to whether the organization was criminal or just entitled to try whether he participated in it voluntarily?

GENERAL NIKITCHENKO. The Soviet Delegation says that under the Soviet law there would be no question whatever of a man being permitted to raise the point again whether the organization itself was criminal or not. Once the court had decided in any case, no subsequent trial could raise the question whether it is criminal or not. It has definitely been pronounced criminal. What he can do is to produce at the trial evidence that he did not belong to the organization, or took only a minor part in its proceedings, or possibly did not know for what purposes the organization existed, or perhaps that he was forced to join it, but those factors would be considered by the court as providing the basis for his acquittal or reduction in penalty in his individual case.

MR. JUSTICE JACKSON. That is a very excellent statement of what we

are trying to get expressed in our document as to the method we would pursue here.

GENERAL NIKITCHENKO. I would like to add that what has been said, of course, refers to Soviet law, that in international law there is nothing which would cover the question of criminal responsibility of persons or organizations except one agreement which covers the question of acts of terrorism, to which of course the Soviet Delegation is a party. But in the American draft of this paragraph 5, which they ask to be included, they set forth actions which are to be presumed criminal. The opinion of the Soviet Delegation is that it is not the function of the International Military Tribunal to define what actions are or are not criminal in the case of war criminals, but that that is already understood.

MR. JUSTICE JACKSON. Reverting to the question of the method of trial of gangs.

MR. TROYANOVSKY. There was a slight misunderstanding in the translation.

GENERAL NIKITCHENKO. [Restatement.] Article 5 of the American draft does, in fact, set forth the points which should form the nucleus of an international law.

MR. JUSTICE JACKSON. Coming back to the question of the trial—the reason we prefer the main trial to establish the guilt of the organizations, with that trial to include the most responsible leaders that we now have in captivity, is that we will have, for a long period of time, people showing up in various parts of Germany who are members of these organizations but who could not be obtained for trial at the present time. We do not want to have to go through a trial of the main issues every time a group or a number of them is captured. What we want to do is to get the organizational trial over with so that as fast as they are found they can be brought before a military court or a subsidiary tribunal, not the main tribunal—brought in and, if they can establish that they are not members or took only a minor part or anything else that should be considered on their behalf, they can be heard on that, but not again on the question of whether their organization had been a party to criminal conspiracies. We can go ahead as soon as we establish that the organization is criminal as such, and then the individual members can be dealt with as fast as they can be identified and found.

GENERAL NIKITCHENKO. That is quite right, and the accused will have no opportunity of acquitting the question of guilt of the organization laid down either by the agreement or by verdict of the Military Tribunal. The question of the guilt of the organization cannot be reopened once the criminality of that organization has been established. The only question we are emphasizing is that each individual member

of an organization should not be subjected to punishment as soon as his connection has been discovered, and that as and when such individuals are found they must nevertheless be given an opportunity to bring forth a defense, and the punishment to be meted out to them will be according to the part taken.

MR. JUSTICE JACKSON. I think we all agree. By Mr. Nikitchenko's reference to the conditions of paragraph 5 of our memorandum, I do not take it that he objects to including a statement of the acts which are considered criminal violations of international law, but it is a matter of draftsmanship as to the place it should go in the agreement.

GENERAL NIKITCHENKO. No doubt at a later meeting we will be discussing the draft of this paragraph, but as to including such a paragraph in the document the Soviet Delegation has no objection whatsoever. This article must, in fact, become the point of international law on which the guilt of individuals or of organizations will eventually be based.

MR. JUSTICE JACKSON. We agree.

SIR DAVID MAXWELL FYFE. Would it be convenient to break off at this point? I would like to say how pleased I am that we have been able to reach an agreement on a great many points at this sitting.

The Conference adjourned.

XXI. Minutes of Conference Session of July 3, 1945

MR. ROBERTS [*presiding*]. Perhaps I might say that the Attorney-General is sorry he cannot be here. He is in Liverpool electioneering until tomorrow evening.

There are now before the Conference the Russian statute, which has not been discussed, and the American annex, which has not been discussed. Perhaps it would be convenient first for Mr. Justice Jackson to discuss the questions of principle arising on his document with reference, perhaps, to the Russian document [XIX].

MR. JUSTICE JACKSON. Mainly, I would like to be sure that we understand what some of the provisions of the Soviet draft contemplate. For example, paragraph 3 requires a turnover to the Tribunal upon its demand of all major war criminals. I do not quite understand how the Tribunal could be in a position to receive custody or take care of prisoners, and I was wondering what kind of organization for that purpose is contemplated.

GENERAL NIKITCHENKO. In this draft agreement only the principal question is provided for, that is, that the criminals should be turned over. As to how they are to be kept under custody or otherwise would be established by the Tribunal itself with the Control Council. The fact is the Control Council for Germany has sufficient apparatus and facilities for keeping the necessary prisoners under guard.

MR. JUSTICE JACKSON. Where does it have the facilities?

MR. TROYANOVSKY. Do you mean the right, or the facilities?

MR. JUSTICE JACKSON. The facilities.

GENERAL NIKITCHENKO. The Control Council, being the supreme authority in Germany, would naturally have such facilities for placing custody guards, et cetera, especially since the permanent residence of the Tribunal is to be in Berlin, or may be in Berlin. Thus it would act in direct contact with the Control Council.

If the prisoners should be on the territory of some other country than Germany, they would be kept in the custody of that government—of the government of that country—and turned over for the trial.

MR. ROBERTS. Do you mean any more than to provide that these criminals should be made available to the Tribunal?

GENERAL NIKITCHENKO. In the opinion of the Soviet Delegation, criminals should be at the demand of the Tribunal, placed under its

control. As for the technical consideration as to how that should be done—

GENERAL DONOVAN. But the Tribunal is a court and not a prison. The general forces are taking care of them now. If the court gets them when it calls for them, that should be enough.

GENERAL NIKITCHENKO. The question is that the Tribunal might have the ability to try those criminals, that they should be available for the trial.

GENERAL DONOVAN. Then the Soviet Delegation would be satisfied if on the day of trial the prisoner should be produced by the signatory that has that prisoner in custody and be made available during the period of the trial. Isn't that all you want?

GENERAL NIKITCHENKO. Yes, that is right.

GENERAL DONOVAN. To be sure we all understand, it is not pressed that the Tribunal should get control and custody of these prisoners but simply have them available when called for trial.

PROFESSOR TRAININ. The main principle touched upon here is that prisoners should be available for trial.

MR. JUSTICE JACKSON. And for sentence—to serve any sentence.

GENERAL NIKITCHENKO. That is right. This article is set forth here in order to avoid a situation under which a tribunal might decide upon the recommendation of the investigation commission to try some criminal, and that criminal would not be made available by the signatory which has him in custody. To avoid that, this article is put into the agreement.

MR. ROBERTS. It is merely a question of drafting, isn't it? The question being—

GENERAL NIKITCHENKO. No, the signatory, the government concerned, should make available to the Tribunal anyone whom the Tribunal wants to try, anyone that government has in its hands.

MR. ROBERTS. It really is the Chiefs of Counsel who want him tried and not the Tribunal.

GENERAL DONOVAN. No, because the Chiefs of Counsel are in charge of the trial and not the Tribunal. That is a basic principle.

MR. JUSTICE JACKSON. In the fifth paragraph of the same instrument reference is made to the surrender, upon the demand of any of the governments, of war criminals who have committed crimes on the territories of those countries. As I explained yesterday, what we have tried to do is to reserve that question for settlement by our governments and to provide that nothing we do prejudices or controls that arrangement. I would not be in a position to make a flat agreement that anyone demanded should be turned over, nor would I be in a position to negotiate about the questions which may be involved in turnovers since I am confined in my authority to the international case.

GENERAL NIKITCHENKO. When the Soviet Delegation put this paragraph in the agreement, it based its reasoning on the fact that the working out of this is involved in the procedure on responsibility for criminals. In Mr. Justice Jackson's first draft of the agreement, [IV] it is stated that this agreement is worked out in accordance with the Moscow declaration and the part about the turning over of the criminals is quoted.

In the second American draft of the agreement [XVIII], paragraph 3, it is stated that the signatories agree that the Control Council in Germany shall establish the principles and procedures governing the return of prisoners in Germany, et cetera.

GENERAL DONOVAN. Would it meet the wishes of the Soviet Delegation if there were a recital that the signatories would arrange policies and procedure for that?

GENERAL NIKITCHENKO. But recognizing the principle of surrender?

GENERAL DONOVAN. That is right.

GENERAL NIKITCHENKO. The principle of the surrender of criminals has already been established in the Moscow declaration, and the Soviet Delegation, in the execution and carrying out of this principle and taking into consideration the fact that the American Delegation also decided it necessary to mention it, decided to put that point in the agreement as an obligation for the signatories to turn over the prisoners. As for the procedure, that of course could be established later. This paragraph does not in itself establish the procedure. The procedure should be established by the governments themselves.

JUDGE FALCO. [*Not translated.*]

GENERAL DONOVAN. So your position is, Mr. Falco, that the major criminals in the custody of the major signatories would be turned over for trial but not for surrender, and, in the case of those not major criminals, policies and procedures would be set up to turn over and surrender them.

SIR THOMAS BARNES. But why put that in this?

GENERAL NIKITCHENKO. The investigation commission, or the Tribunal, however it may work out, would have to decide who are the major criminals and who are not. Therefore, in any case, it would have to do with the question of minor criminals, of criminals who are not major criminals, and it would seem to us natural to put that point in the agreement as was stated in the American draft, but we think that it is not necessary to restrict those prisoners only to those prisoners who are in Germany but state the principle of surrender as applied to all prisoners.

MR. ROBERTS. I should prefer it if this paragraph were struck out because this agreement only deals with major war criminals. It seems covered by article 3, under which we have all undertaken to make

available for trial major war criminals.

PROFESSOR TRAININ. These two problems of major and minor criminals are, after all, closely related, and this relationship was set forth in a correct manner in the American revised draft agreement as well as in the first draft of the agreement [IX] in article 21, where it is stated that the person charged with responsibility, et cetera, should be turned over to the occupation courts. Of course, here we should not concern ourselves with the activities of the occupation courts, but the point of surrender should be set forth in order to set out more fully the provisions of the Moscow declaration.

MR. JUSTICE JACKSON. The purpose of paragraph 26 of our annex and of the predecessor clauses in the previous draft is not to determine what shall be done about it but to reserve it so as to be clear we were not prejudicing the right of the Control Council to set up procedures governing the minor criminals. In other words, it is a reservation rather than a provision governing procedures.

Shall we regard it as acceptable if we reserve the question in some manner for the governments to establish, making clear that we are not interfering in this agreement with the declaration of Moscow?

GENERAL NIKITCHENKO. The right of national tribunals to try prisoners in their custody has not been infringed upon; so there would be no necessity to make a reservation on that point. But since we are drafting this agreement in accordance with the Moscow declaration, the principle of the Moscow declaration concerning the surrender of prisoners should be set forth—the principle itself.

MR. JUSTICE JACKSON. Since it has been already set forth, do we need to repeat the Moscow declaration here? And doesn't the provision of the agreement as submitted by the Soviet Delegation go further than the Moscow declaration? In other words, here is the provision which says that, upon the mere demand of any government that it wants to try somebody, we must turn him over even though we may desire to try him. That, to my mind, would put us in the position where, if we want to try a person and any other government is demanding him, we might be charged with bad faith, and we do not want to make any commitments that we may not live up to. I would have no authority to commit my Government to a thing of that kind.

GENERAL NIKITCHENKO. The question of the drafting of this provision might, of course, be set later, but in principle it reflects the first paragraph of the first amendment draft, in which it is stated that the German officers and members of the Nazi party who are responsible for atrocities, et cetera, would be sent back to the countries in which

their crimes had been committed. That is the principle which is set forth in the Soviet provision, too.

MR. JUSTICE JACKSON. In ours, we have provided that the Control Council shall establish policies and procedures and that is what we think should be done—that we should not undertake to set up in our agreement policies and procedures about this, that these questions should go to the Control Council rather than be determined here since we are only dealing with major criminals.

MR. ROBERTS. I might say this is our view, too. This is an agreement dealing with major criminals, and it is a little out of place here and really is not our business.

GENERAL NIKITCHENKO. The Soviet Delegation agrees that the question of procedure in the matter of turning over criminals should be settled either by the governments or the Control Council.

PROFESSOR GROS. I think it is a question on which we all agree in principle and think it is only a question of wording of the fifth paragraph, but I am under the impression that we could accept such a change as would imply we are not encroaching upon the territory of the Council.

GENERAL NIKITCHENKO. The question of drafting would really be settled in the drafting committee, but at the present time we should settle the question in principle that in a provision of this sort a reservation should be included in the agreement.

MR. JUSTICE JACKSON. The principle as suggested by Professor Gros would be acceptable to us.

MR. ROBERTS. And to us.

PROFESSOR GROS. May I say that there seems to be more than a question of drafting here? The Soviet draft invites the Control Council to set up the procedure. I think that that reservation is necessary.

GENERAL NIKITCHENKO. In this case and the case of minor criminals, the principle of the Moscow declaration should be set forth and an obligation of the countries should be repeated, the obligation which had been set forth in the Moscow declaration.

GENERAL DONOVAN. When the document says “without prejudice”, isn't that just what happens?

PROFESSOR TRAININ. It is not quite the same, and we base all our deductions on the Moscow declaration. In regard to the major criminals we worked it out in great detail. As for the other criminals we have just to repeat the principle of obligation which had been set forth in the Moscow declaration.

GENERAL NIKITCHENKO. Apparently everybody agrees that the minor criminals should be turned over, and we have no doubt that is so. We see no reason why it should not be set forth in the agreement.

GENERAL DONOVAN. But everyone wants them turned over in the

ordinary manner and turned over so that they would get the worst punishment they could get. But the one who demands him should get the prisoner where, if he were tried, he would get a heavier punishment for a heavier crime.

GENERAL NIKITCHENKO. No, we did not have that in view.

GENERAL DONOVAN. But that would be the effect.

PROFESSOR TRAININ. Naturally he should be tried in the court where he committed the gravest crimes, and, if this provision is not definite enough in that regard, it could be redrafted.

GENERAL DONOVAN. But that is all the draft suggested without surrendering the principle.

PROFESSOR TRAININ. Not exactly.

GENERAL DONOVAN. But near enough. Whatever the form, as long as we reach the result, doesn't that satisfy us?

PROFESSOR TRAININ. Naturally the prisoner should be tried in the country where he had committed the gravest crimes, and if this provision is not definite enough in that regard it could be redrafted. If a person is recognized to be a major war criminal, he is not liable to be turned over to the local court.

GENERAL DONOVAN. But another one might be a witness.

GENERAL NIKITCHENKO. He would also be turned over.

MR. JUSTICE JACKSON. Now I would like to ask some questions about the Soviet draft of article 3 of the statute [XXIII]. This apparently contemplated the establishment of several tribunals, and we were wondering just how you would have several tribunals function. We can see merit in the idea of having several tribunals if, for example, you decided that you wanted to try your prisoners and those that you want to indict by your procedure, and we wanted to try ours by our procedure, which would probably be quicker than trying to work out a new joint procedure. But if there are to be several tribunals all under identical procedures, sitting in various parts of Europe, we do not know just how they would function and wonder whether you would explain just what you have in mind about it.

GENERAL NIKITCHENKO. In this article we provided for the same thing as was stated in article 5 of the first American draft—that one or more tribunals could be established. It would be better, of course, if there would be just one tribunal. The Soviet Delegation thinks everyone would agree to that, but it might happen that the number of cases would preclude the establishment of only one tribunal and that tribunal would not be able to handle that number of cases. In order to expedite matters it would be better to set up two or three tribunals, and each of these would then function in an identical manner according to the same procedure. The Soviet Delegation could, if that would be desirable, agree to providing for only one tribunal.

MR. JUSTICE JACKSON. If it became necessary to have more than one,

might it not be simpler if we did not provide that they must all have identical procedures and set up a tribunal which would try those you wish to try by your procedure while we used our procedure to try ours? That is to say, we have a good deal of differences of tradition about procedure, and it is hard to reconcile them. If we agreed on the general principles of substantive law that should apply, I don't know that it is necessary that everybody proceed exactly alike, providing they are proceeding to the same end. I have been wondering whether, if more than one tribunal became necessary, it might not be simpler for each of us to use the procedure he is more familiar with, and which would be acceptable to his own people, rather than try to set up a new procedure. We could agree on the applicable principles of criminal law.

GENERAL LORD BRIDGEMAN. I think perhaps I should say here that we on this side of the table realize the difficulties you have mentioned, but we do attach a great deal of importance to having only one tribunal if it is at all possible. We feel it would be very much better to have one tribunal.

GENERAL NIKITCHENKO. That is really what we provided for. This should be an international tribunal. We might call subdivisions of it branches or chambers, but unless all four countries are represented in it then it would lose its character of being an international tribunal.

MR. JUSTICE JACKSON. Yes, but what I am thinking of is that it would not lose its character but it would not be necessary that each division or chamber should proceed by the same procedure. By that I mean this—we have certain things that in the tradition of our people we must do, otherwise our people would think we had not given a fair trial. You have certain things which you must do or your people will criticize you. I quite realize that. Trials in our several countries are not run in the same way. They may be equally good. What we were thinking was that perhaps the best way to do would be to proceed before separate divisions, each using the procedure he was familiar with. I only submit it for your consideration.

MR. TROYANOVSKY. The representatives of the four countries in each?

MR. JUSTICE JACKSON. Yes, in each chamber.

PROFESSOR TRAININ. Also as a matter of suggestion, it might be that one branch of the Tribunal might function in Berlin and another in some other country, and due to that fact it would have some special points of procedure. But these are merely suggestions.

PROFESSOR GROS. In principle those are pessimistic views, and we would hope that it would be possible to find an international procedure for one international tribunal. Evidently it is difficult, but it is much more important to have one international tribunal than to have two or three or four which might, perhaps, have different jurisdiction and, in a practical way, we might have trouble dividing the major war crim-

inals in these channels. I think we might perhaps go along the same lines and only come back to the same suggestion if we could not find an agreement.

MR. JUSTICE JACKSON. There is a question that arises on article 5 concerning the Control Council and in article 9 in reference to the recall of members of the Tribunal. As to number 5, the Tribunal is attached to the Control Council. Article 9 gives the Control Council the right to recall a member of the Tribunal and to replace him by another.

Under the procedures of the United States and under our legal philosophy, once a court is set up it is completely independent of the executive, and there could be no recall by the executive authority of a member of the tribunal. A tribunal subject to recall by the executive in our country would not be regarded as an independent court nor its findings as independent findings. Therefore, we would not find acceptable the provision for the recall of a member of the Tribunal nor for the attachment to the Control Council if by that it is meant that it is in any sense subordinate to the Control Council.

GENERAL NIKITCHENKO. The Soviet Delegation is of the opinion that, since the International Military Tribunal is a temporary inter-Allied organization and not a permanent national court, it is difficult always to apply the principles of national legal systems in regard to it. For instance, our judges are elected and, of course, the Soviet Delegation considers that principle could not be very well applied in this case. Also, it would not favor the principle that a judge would have the power or right to remain sitting unchanged under any circumstances. In this case it is necessary to establish new principles for a temporary organization which would not function for a very long time.

The Soviet Delegation also took into consideration article 5 of the American draft, in which it is stated that control of the International Military Tribunal should be established by the Control Council. This is really the significance of article 5 of the Soviet draft, that, since it is to be established by the Control Council, it would function sort of attached to the Control Council.

MR. JUSTICE JACKSON. We agree that it might be set up by the Control Council, and we would agree, too, that we cannot apply the principles of any one nation, but, in our view, if a member of the Tribunal is subject to recall without any reason being given, it is not an independent court. We feel strongly about an independent court to the point where we would not have much confidence in the decision of any other kind of court. I am wondering what kind of circumstances you would have in mind as justifying a recall, and perhaps we could provide for them in some other way.

GENERAL DONOVAN. One thing occurs to me as I look at the word

“recall”. We may be applying different meaning to the word. Do you mean replacing? Certainly you would have the right to replace a disabled judge, but I wonder what reason you would have in mind for using the word “recall”.

GENERAL NIKITCHENKO. Yes, that would be the meaning—replace.

MR. JUSTICE JACKSON. Replace for what reason—sickness or death or inability to go on, or replace him because his decisions were not satisfactory?

GENERAL DONOVAN. You ought to tell them first that we are asking that because of a little American political history.

GENERAL NIKITCHENKO. If the Government has the right through the Control Council to appoint a member of the Tribunal, it should also have the right to replace him if that may be necessary—if a member is needed for the fulfilment of some other duties in some other place, or he may be ill even though he might not be actually confined to his bed. In that case the government should have the right to replace him by some other person.

JUDGE FALCO. [*Not translated.* Judge Falco spoke in general support of the American view and in support of an independent tribunal.]

GENERAL NIKITCHENKO. In the American draft it is also stated that the Control Council should appoint members of the International Military Tribunal, each with an alternate, et cetera.

MR. JUSTICE JACKSON. It would make some difference what causes the vacancy. We do not state that they may recall the judges or discharge them. It would also make some difference if you mean that, if there are several trials, a long series of trials, a change could be made between trials so to speak; but if you meant that in the middle of a trial a judge could be removed, that would be something different. I am wondering which you have in mind.

GENERAL NIKITCHENKO. No, not in the middle of a trial.

MR. ROBERTS. From our point of view we appreciate the point raised by the United States and the French, but feel after the explanation given by the Soviet that there is little difference between us. A judge would not be changed during the trial except for reasons of illness, et cetera.

MR. JUSTICE JACKSON. There are one or two questions that arise on subsection 3 with reference to the investigation commission. We have a somewhat different philosophy of the prosecuting officer's function than the Soviet memorandum discloses. We do not think of the prosecution as a commission but rather as four separate representatives. However, that should be determined in article 12, where reference is made to the fact that the members should be appointed by the Control Council. The President of the United States has already appointed me for this purpose; the Control Council has no right to recall me, and it

could not be conceded. In other words, we are past that point. Our representative is named and is representative of the President of the United States and not of the Control Council.

GENERAL LORD BRIDGEMAN. I think we should say at this point that that is our view, too. The Attorney-General has likewise been appointed to represent our Government. It brings me back to article 8 where the same position arises. We took the view the other way around as our representative could be appointed by the Government just the same way the Chief of Counsel is appointed. Perhaps those two points stand together.

PROFESSOR TRAININ. Just one consideration. In the American draft, article 10, apparently the Chiefs of Counsel are regarded as a sort of commission since they would take decisions by a majority vote.

MR. JUSTICE JACKSON. It was not intended to be a commission in the formal sense but rather that the representatives or Chiefs of Counsel should meet together and decide these things by informal conversation. But, of course, a majority would govern in most situations although we have reserved the right of each counsel to present his case even though other counsel might not agree with him. That is to say, each counsel would have the right to bring forward evidence on behalf of his country even though no other country would be interested in that part of the case.

GENERAL DONOVAN. As we look at it, each Chief of Counsel is sitting here separately and independently representing his government, but each Chief of Counsel works with the others in cooperation to advance the trials of these people. It is not a formal auxiliary board but simply a group of lawyers working together.

GENERAL NIKITCHENKO. Would they then act together or would each one act independently?

GENERAL DONOVAN. No, they would act together. I would use the word "collaboration" if it had not fallen into such bad use now. But not in any formal way.

PROFESSOR TRAININ. But to turn a case over to the Tribunal they would have to decide upon that together, would they not?

GENERAL DONOVAN. Yes.

MR. JUSTICE JACKSON. Will you refer to the American draft under the heading, "Provisions for bringing defendants to trial"? We state that the normal way of functioning would, of course, be by agreement. Ordinarily, I suppose, there will be no disagreement, but it is also necessary to protect the position of each one of the governments to some extent because each one wants to be sure that its own case is presented. Therefore, it is provided in the American draft that any Chief of Counsel may bring to trial any person in the custody of his own Government, et cetera. [*Quoting*]. In other words, four members proceeding by agreement would be the normal procedure, but no

government could be prevented from proceeding against its own prisoners and making its own case against its prisoners by any number of counsel who would not want to proceed. You see, in that way a certain measure of independence is preserved, while at the same time there is provision for normally acting together.

GENERAL NIKITCHENKO. I beg your pardon. To which document do you refer?

MR. JUSTICE JACKSON. Paragraph 8 of the last document that was passed to you—the annex to the draft.

GENERAL NIKITCHENKO. In the Soviet draft it is stated that proceedings should be carried out by the whole commission, but it also provides that investigations may be carried out by the whole commission on request by the individual members. In this respect we try to provide for an independent action by the individual members of the commission, but as a rule it considers that decisions should be taken by majority vote of the representatives because the commission or the Chiefs of Counsel is a representative body of the four Governments.

MR. JUSTICE JACKSON. The probability is that the difficulty or difference arises from the fact that you regard, under your system, the investigation as embracing many of the things which we regard as the function of the trial. I notice in your article 15 that you provide that the indictment shall be accompanied by all of the evidence pertaining to the case. Now you see, we do not do that, and therefore what we have reserved is the right to act independently in the trial of the case if necessary, as well as in the investigation, while you have reserved the right to act independently only in the investigation. I do not see how we could act on the basis that all evidence pertaining to the case must accompany the indictment because that leaves nothing for the trial but to read the evidence, whereas we call witnesses and frequently give a great deal of evidence that is not in the indictment. The indictment in our practice is intended to state an outline of the charges rather than all the evidence. We are quite willing in this case to put in a great deal of evidence for the indictment or as supplementary to it in some form, but do not think we could deprive the trial of all functions of taking the evidence.

GENERAL NIKITCHENKO. In order to insure on the one hand the impartiality and justice of the trial and at the same time speed up the procedure, the Soviet Delegation considers that it would be best to divide the procedure in two stages as set forth in the annex—first, the collection of evidence by the commission acting as a whole or independently at the request of the commission. As for what constitutes evidence, that is set forth in the American draft and those details could be put in the final draft in the final annex.

This first stage of the proceedings includes the examination of the

defendants and witnesses and the collection of documents, and if a defendant denies his guilt he can refer to other evidence. It would be the duty of the commission, the Chiefs of Counsel, to look through that additional evidence which the defendant has pointed out. After the collection of evidence an indictment is drawn up in which the protocols of examination of defendants and witnesses and documents, as for instance the documents of various national investigation commissions, are included. Thus, during the preliminary investigation the defendant has every chance of refuting his guilt, and the commission of investigators or the Chiefs of Counsel would be bound to take that into consideration and to look to any additional evidence to which the defendant might refer.

After the collection of evidence has taken place, the commission does not take a decision on whether the person is guilty or not. It just decides on whether there is sufficient evidence to warrant starting court proceedings, to warrant turning the case over to the court, and at the same time the defendants are furnished with all the evidence the commission had collected in the case so that they know exactly with what they are charged.

The task of the Tribunal, after it had received the indictment with all the evidence, would not be to hear that evidence but to decide which of the witnesses should be called for examining in regard to the points raised by the charges, and, summing up all the evidence and the results of the examinations, to pass judgment.

The defendant should have the right to defend himself, to demand witnesses for examination, evidence which had not been refused by the commission, to call on witnesses and to act through the help of his counsel for the defense of himself personally. When everything has been cleared up, all the evidence necessary produced, then the prosecutor sums up the case for the prosecution followed by the counsel for defense, or the defendant himself if he wishes to defend himself without aid of counsel. After this the judges, in the absence of the defendant's prosecutor or counsel, pass judgment.

In the opinion of the Soviet Delegation this procedure would on the one hand insure a fair trial since the defendant would be given every chance to refute the evidence produced against him and would, on the other hand, insure him promptness of trial since most of the preliminary work would have been done before.

PROFESSOR TRAININ. It must be emphasized that before court proceedings start not only the court itself but the defendant and his counsel for defense would be furnished with the indictment and all the evidence.

The Conference adjourned until Wednesday, July 4, 1945, at 11 a.m.

XXII. Minutes of Conference Session of July 4, 1945

SIR THOMAS BARNES [*presiding*]. When we stopped yesterday, we were discussing the functions of the Chiefs of Counsel or investigation commission, and I think we arrived at a common ground. We heard a helpful statement by Mr. Nikitchenko and do not know whether Mr. Justice Jackson would like to comment on what was said.

MR. JUSTICE JACKSON. There is nothing that I would think of adding at this time. I think it is a matter of trying to reconcile the draftsmanship largely. We may have differences that will develop in draftsmanship, but I think it is in readiness to be considered on the basis of draftsmanship.

There are one or two other subjects on which we would like a little discussion in order to make clear what we intend. In article 1 of the Soviet draft [XXIII], where the purpose of the Tribunal is set forth to be the just and prompt punishment of the major war criminals, we would like to see "trial" in place of "punishment" or "trial and punishment". At least we would like to make clear in the draft, or whatever draft comes out of this, that the function of the Tribunal is to try as well as to punish.

GENERAL NIKITCHENKO. Of course, in the draft we can produce the necessary corrections, and, therefore, the Tribunal is not only to punish but definitely to charge.

MR. JUSTICE JACKSON. In the fifth subdivision, article 16, we would not think it appropriate for the Tribunal to return the case to the commission for further investigation. In other words, our conception of the Tribunal is that it has no function in regard to the prosecution, but its function is to determine the merits of the case as presented.

A similar observation would be in order as to article 17. We think that the Tribunal would not have the function of deciding what witnesses should be called nor the place of hearing, but that that function, so far as calling witnesses is concerned, is one for the prosecutors, and the place of trial is one which would have to be fixed by agreement, having in view the facilities available and the general desires of the military authorities in connection with it.

GENERAL NIKITCHENKO. It is the business of the commission to collect the material for prosecution while the business of the Tribunal is to judge on the material collected. The opinion is that in case the material is insufficient and the Tribunal thinks the case has not

been sufficiently investigated, it would be better to refer it back to the commission to collect additional material than to have the case come out that the material was insufficient to prosecute.

As far as the place or the time of the trial should be concerned, of course, it has to be in conjunction with the military authorities or the Control Council. It should suit and fit in with their requirements. Further, if the commission, when they investigate, find out they must call a number of witnesses, that should have some bearing on where the trial should take place.

MR. JUSTICE JACKSON. The provision of article 18 as to the place of trial: it seems to us that the last sentence relates to local criminals under the other part of the Moscow declaration and that the international group of criminals should be tried at some one stated place. If the crimes are committed in the locality, it would then be appropriate that they be considered local criminals under the Moscow declaration rather than in our group, and we think great difficulties would follow trying to determine where one of the international criminals had been criminal at his worst. Therefore, we would omit this provision as to the international criminals.

GENERAL NIKITCHENKO. There is a similar paragraph in the American version, or a similar sentence. It is rather difficult without a concrete case in hand to decide whether the criminal should be charged in the place where he committed his worst crime or in a general sense, and it is not advisable to bind the court beforehand to the decision it should take. The paragraph is not binding but just a suggestion.

MR. JUSTICE JACKSON. I wonder what sentence in our draft General Nikitchenko thinks conveys this meaning. We did not intend such a meaning.

SIR THOMAS BARNES. Paragraph 7 deals with this question but not in the sense stated.

GENERAL NIKITCHENKO. The provision is slightly different in article 7.

SIR THOMAS BARNES. Do you accept the provision of article 7 of the American draft?

GENERAL NIKITCHENKO. We are prepared to change the Russian draft or the American draft.

SIR THOMAS BARNES. I was asking whether the Soviet Delegation was willing to accept article 7 as drafted by the United States.

GENERAL NIKITCHENKO. It is not a sufficiently serious question to have division of opinion and could be drafted to say the court should have the right to say where it should take place.

MR. JUSTICE JACKSON. We have some difficult problems in reference to the place of trial. We have problems which, as we see it, are not problems for the court but are problems for the governments involved.

If prisoners to a considerable number are brought to trial, there are security problems and the matter of custody, feeding, and billeting. There is the matter of having access to them for interrogation. All of those are things for which we do not depend on the court and about which we would not think the court ought to have any function but on which we, for ourselves, would depend on the American Army as to choice of any place of trial. Then, too, there is the question of the facilities for the trial. Now this is an important question. Many of these provisions turn on it, and therefore we think we should discuss it. We are told that as far as the American occupation authorities are concerned, they do not want us to conduct these trials at a place which is also the seat of government, such as Berlin or Frankfurt, because those points are already crowded, it is difficult to obtain sufficient building space, difficult to obtain facilities, and they prefer, as I understand their attitude for security reasons and others, that these trials should take place at some point other than the seat of government. Now that would mean that the trials would not take place at Berlin as has been suggested, and it has been suggested to us that Nürnberg would be an appropriate place from the security point of view of the American Army. It may also be appropriate from the point of view that the Nazi movement had its birthplace there.

Of course, I am not speaking of the individual trials which would follow a main trial, nor of other trials in which individual defendants should be tried. I am thinking of the main case against the Nazi leaders, the organizations, et cetera, in which we see no occasion for more than one trial. For that we think there should be a fixed location because it will involve the bringing in of a great many prisoners and a great many problems of handling the people who will have a right to be present.

GENERAL NIKITCHENKO. The place where the main trial should take place could not be decided just now. On the general lines suggested by Mr. Justice Jackson, the trial of the whole organization could take place in Nürnberg, but there would be other trials identified with a certain country—for instance, Frank, who committed crimes in Czechoslovakia and who might be demanded by the local population for local trial so that they might be sure the criminal had been caught and suffered just punishment. The same would apply to other criminals, and it would be advisable to try them in the country where they had committed their main crimes.

Any trial that should take place in occupied Germany should take place by agreement of the central Control Council, but trials in other countries should be in agreement with the local government.

MR. JUSTICE JACKSON. Of course, our difference in viewpoints may be caused by the fact that we seem to be talking about different kinds

of cases. Karl Hermann Frank's case has already been dealt with in this way. We have advised our State Department that, so far as we are concerned, we have no objection to turning over Frank to the Czechoslovakian authorities for trial, provided, first, that he is protected against any mob violence and is tried; second, that the Americans, whose prisoner he has been, shall have the right on behalf of this group to have a representative present at any interrogation and have a copy of the interrogation; third, that we shall also have the right to have a representative present at the trial and have a copy of the trial proceedings for use here; that, if sentenced to death, he shall not be executed until our trial is over and we know that we do not need him; and that he will be returned to us at any time we feel we need him for the purposes of this trial. Now we do not think we have anything to do with the trial of Frank or need make any provision here for it. We are thinking of making provision for the main trial or trials, and that is why we want to leave as much as possible of local things to local people and confine our document to the main conspiracy case involving the top people, and the top people only.

MR. TROYANOVSKY. Would you mean an American representation at the trial?

MR. JUSTICE JACKSON. A representative on our behalf whose interrogation would be available to everyone who joins in the prosecution of Frank. At the present moment we are not sufficiently organized here so that anybody is collecting evidence on behalf of the group, but I am frank to say that for the United States we are going ahead getting evidence every place we can get it and have been for a month, and we expect to make it available to all prosecutors.

GENERAL NIKITCHENKO. We quite agree. Local crimes should be tried locally. We only gave Frank as an example, but there are other main criminals who ought to be charged by the international court but still whose activities refer mainly to certain countries and can be localized, and we had those in mind when we made the amendment to the draft.

There are criminals who may be claimed by different governments, like France or Britain, those who have committed mainly crimes against their governments. For example, Göring was mainly responsible for the attacks on London, and therefore the British Government might claim that his trial should take place in London.

MR. JUSTICE JACKSON. Where does the Soviet Delegation think Göring's trial should take place?

GENERAL NIKITCHENKO. I would not like to suggest a place where Göring should stand trial. He may be charged as one of the main criminals in Nürnberg. On the other hand, if Britain should think

he should stand trial in England, I do not think we should have the power to refuse such a claim if reasonable.

SIR THOMAS BARNES. But Göring is a major war criminal. In respect to his local crimes, that ought to be subsidiary to the main trial.

MR. TROYANOVSKY. He would be tried as a major criminal, but perhaps in London?

GENERAL NIKITCHENKO. I quite agree he should be tried as a main war criminal and by the International Military Tribunal, but the place of that Tribunal may be London if the British Government should think it satisfactory.

SIR THOMAS BARNES. We had come to think all major war criminals should be tried in Germany.

PROFESSOR GROS. It seems there are two questions here: one which is essential, and one which is secondary. The essential question is the seat of the Tribunal; the secondary one is that, under certain circumstances, which would be exceptional, some committee could decide for certain reasons that the trial should be sent to another country—but that should be exceptional. The Governments agreed the trial should be in Germany, and I think it should be for exceptional reasons. It seems most important to have those people tried there and tried as major war criminals because they are responsible for all crimes against the United Nations. Taking the case of Göring—he is responsible for many crimes in Europe, and it would be very difficult to settle the question of where he should be tried other than Germany. I think we could agree on a permanent seat for the trial, and I feel that the Soviet Delegation should have no objection to Nürnberg except where it will be decided by the Governments that such trials should be in other countries.

GENERAL DONOVAN. Would not that decision be made by the Chiefs of Counsel right here?

PROFESSOR GROS. I would not care to pronounce on that.

GENERAL DONOVAN. We wouldn't want you to pronounce. We just wanted your opinion.

GENERAL NIKITCHENKO. Our opinion is that, as embodied in article 5, the seat of the Tribunal could be fixed in Berlin where the main Control Council is. As in article 18, that means where the session should take place, and I think it might take place in other countries when convenient or in other parts of Germany as required.

MR. JUSTICE JACKSON. We have thought we could use the procedure which is used by the British, and I think to some extent by the French, and by ourselves by which a tribunal takes evidence through a deputy, or a master or auditor—there are various names for him—a delegate of the court who would go to particular localities where there may be evidence, hear that evidence, and report it back. We thought

that with the main tribunal sitting at Nürnberg, if there were evidence to be taken in Poland, in Czechoslovakia, or in London or elsewhere, the Tribunal would reach that by sending a master to take that testimony. In fact, that is one of the ways the taking of testimony in this case would be speeded up greatly—by the use of masters—and that is why we provided in our draft the use of masters for that purpose. That is in paragraph 10 of our draft.

GENERAL NIKITCHENKO. The collection of material and witnesses should be in the hands of a commission and not the Tribunal, and when trial takes place we do not see how a person could be sent out to another country to collect material. That is why we think a permanent seat of the Tribunal should be in one place, and all cases should go there unless the Tribunal should think they do not want to decide now where it should sit.

MR. JUSTICE JACKSON. The master, under our procedure, would not go out during the trial but as a part of the preparation. But I think we have each other's viewpoints sufficiently in mind so that we understand what the problem is.

MR. ROBERTS. I think we visualize what the Soviet Delegation visualizes—that the evidence be collected before the Tribunal sits, and then, once the trials start, they should be continuous.

MR. JUSTICE JACKSON. Our thought of using masters, sitting as delegates of the court, would be that what had been received by them would in effect be received by the court and would so be put into the record as to avoid a duplication.

PROFESSOR TRAININ. The work of the master should be carried out by the commission on the preliminary work. When the case is ready and goes to court, then additional questions may be put by the court and several points may be elucidated by the court, but the master's work really coincides with the work carried out by the commission.

MR. JUSTICE JACKSON. In article 22 is the statement that all attempts to use the trial for Nazi propaganda and for attacks on the Allied countries should be decisively ruled out. We are in agreement with the principle, but I should not like to see it go into the document in this form. If that statement should remain in the document or any statement like it, it might be the basis for attacks on the Allied countries on the ground that there is something that we are fearful of. Although we are sometimes disappointed in judges, we would expect to name to the court judges who could be relied upon, as much as the prosecutors, not to allow this trial to become that sort of propaganda instrumentality, and we would much prefer either more restrained instructions or no instructions on that subject.

PROFESSOR TRAININ. This question could be discussed further, and I think it could be softened down considerably.

MR. JUSTICE JACKSON. The other, and I think the last problem that it seems necessary to discuss here, is in article 34, in which the Control Council is virtually given powers of an appellate court over this trial. That we would not like to see. We think that the trial should be conducted by judges of high standing and that it should not be subject to review by a nonjudicial body such as the Control Council. It would offend deeply the American view of the independence of the court and would quite deprive the trial of the kind of credit that we think its decision should have in the United States. If exercised, it would be deeply resented and, therefore, we think it should not be included.

MR. ROBERTS. I think our view coincides with that of Mr. Justice Jackson.

JUDGE FALCO. We agree.

MR. TROYANOVSKY. Do you accept the right of mitigation of punishment by the Control Council?

MR. JUSTICE JACKSON. We do.

SIR THOMAS BARNES. We agree.

GENERAL NIKITCHENKO. If the Control Council has the power to mitigate sentence, they should also have the power to rescind it. For example, if a case has been judged on insufficient evidence, would the Control Council be allowed to pass it back for retrial?

MR. JUSTICE JACKSON. Our viewpoint would be this: the Control Council would have the power of mitigation of sentence, but it should have no function whatever with reference to the finding of guilt or innocence. The finding made by the court or Tribunal as to guilt or innocence would be a final and conclusive disposition of that matter. As prosecutors we might decide to prosecute on another charge, or I suppose the Tribunal might possibly dismiss without prejudice to supplementing the proof or something of that kind. But we would not think that the Control Council or anyone else should be in a position to interfere with the finding of guilt or innocence.

MR. ROBERTS. That is our viewpoint too.

MR. JUSTICE JACKSON. That, I think, gives us the principal points that we were troubled about. We want to express our thanks to our Soviet colleagues for their patience in trying to enlighten our understanding, and to our other colleagues for bearing with us so long, but I think it is important that we understand each other about these things.

MR. ROBERTS. I think we should also like to express our gratitude, even though I have not had the privilege of being here the whole time.

GENERAL NIKITCHENKO. I am very thankful that all the delegations had so much patience to listen to all the viewpoints.

MR. JUSTICE JACKSON. The American version in paragraph 21 corresponds very much to the Soviet point of view as expressed here, but it is confined to mitigating sentences. The findings of guilt or innocence are not made reviewable by our draft.

GENERAL NIKITCHENKO. I do not think the Control Council could decide a question of guilt. They are only discussing punishment. But if the Council finds the evidence insufficient to arrive at a decision, it should be able to pass it back to the Tribunal for retrial.

MR. JUSTICE JACKSON. We have two steps here—one, the finding of guilt, a conviction. That merely says you are guilty but does not decide what shall be done with you. That is one step. Then the next step is the decision on the sentence, which is the amount of punishment the convicted should bear for the guilt. Now the sentence in our procedure is subject to revision, or pardon, or commutation without touching the finding of guilt necessarily. That is what we have referred to in that paragraph so that the Control Council might revise the sentence downward but not touch the finding of guilt, which a new trial in our procedure would do.

PROFESSOR GROS. The French Delegation thinks also there should be a possibility of modification of the sentence by the Control Council in the same lines which have been put before the Conference by the American Delegation. Now, if I understand the function of the commission, it is the discovery of new evidence on the trial, but, if that discovery is made by authorities under the Control Council, we might perhaps think of a situation in which the Control Council would go to the prosecutors and tell them, "On this trial we have new evidence", but it would be on the authority of the prosecuting commission and not on the decision of the Control Council. In this way the two authorities would be joined in the result, and it would be exactly the result the Soviet Delegation wants.

GENERAL DONOVAN. Under our system it would be the duty of the prosecutor to do that very thing.

MR. JUSTICE JACKSON. The suggestion was made, I have forgotten whether by General Nikitchenko or by the chairman, at a preceding meeting that we name a drafting committee consisting of one from each delegation to take up the details and see how far we can get with the drafting. As far as our Delegation is concerned, we are prepared to accept that suggestion and proceed in that way. I do not know whether further discussion is desired. I shall ask to be excused in a minute because the fourth day of July is a day on which we annually revive our historic hostility toward the British, but just for a noon hour, and I would like to join the American colony in London at their luncheon. You see, General Nikitchenko, we too are revolutionists.

GENERAL NIKITCHENKO. At this time I trust the hostility will be in a more or less friendly form.

SIR THOMAS BARNES. Would both the American and the Soviet drafts be used in conference or could they be incorporated in one instrument?

MR. JUSTICE JACKSON. We would leave that to the subcommittee, and Mr. Alderman will represent us. He will meet with the other representatives whenever it is convenient and will bring in such help at any time as he feels he needs.

SIR THOMAS BARNES. It would be helpful if we could have two separate columns showing the American draft in one column and the Soviet plan in the other with its corresponding clauses.

GENERAL NIKITCHENKO. I should like to know if the structure, the general form, of the Soviet draft is acceptable.

MR. JUSTICE JACKSON. I do not think we have any serious objections to most of the structure. We are not inclined to stick to any particular form.

PROFESSOR GROS. Is it agreed that the subcommittee will discuss also the drafting of the agreement?

[It was so agreed.]

MR. TROYANOVSKY. The Soviet Delegation would prefer that there be four members of the subcommittee with alternates.

MR. JUSTICE JACKSON. Do you want the alternates present?

GENERAL NIKITCHENKO. No.

MR. JUSTICE JACKSON. That is acceptable, and Mr. Alderman will name his alternate at any time he will not be able to be present. At whose call should the subcommittee meet? I'd suggest that you settle on the time so that at least your first meeting will not be delayed.

SIR THOMAS BARNES. I suppose there would not be any objection to Mr. Dean's being present at the subcommittee meetings as he represents the Foreign Office, who would really have to be consulted in the last resort on this matter. That is why he is present here at the Conference.

[No objection.]

The first meeting of the subcommittee was fixed for Thursday, July 5, 1945, at 10:30 a. m. at Church House.

Note: On Saturday, July 7, 1945, Mr. Justice Jackson, with a number of his staff, flew to Wiesbaden, where certain former German officials of anti-Nazi sympathy, who had fled to Switzerland and had been brought to Wiesbaden by Allen Dulles of the Office of Strategic Services, were

interviewed and their statements taken. Also, a collection of captured documents of importance to the case was examined.

Proceeding to Frankfort, the group conferred with Gen. Lucius D. Clay, who advised that Nürnberg would be the most suitable place for trials. Going on to Nürnberg, Mr. Justice Jackson and members of the staff inspected the Palace of Justice and the jail, obtained dimensions and floor plans, and examined billeting facilities. After proceeding to Salzburg and stopping at Munich, he visited the Paris offices set up on the Rue Presburg for preparation of the case. A large collection of documents was under examination there.

XXIII. Draft Showing Soviet and American Proposals in Parallel Columns

EXECUTIVE AGREEMENT

LAST SOVIET DRAFT

In accordance with the Moscow Declaration of October 30, 1945,¹ concerning the responsibility of the Hitlerites for their atrocities and in accordance with other statements of the United Nations regarding the punishment of war criminals, the Governments of the Union of Soviet Socialist Republics, the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Provisional Government of the French Republic, acting in the interest of all the United Nations, have concluded the following Agreement:

LAST AMERICAN DRAFT

1. In accordance with the Moscow Declaration of October 30, 1943,¹ concerning the responsibility of the Nazis and Hitlerites for atrocities and crimes in violation of International Law, and in accordance with other statements of the United Nations regarding the punishment of those who have committed, been responsible for, or taken a consenting part in, such atrocities and crimes, the Government of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, acting by their duly authorized representatives, [have] concluded the following agreement to which the adherence of all members of the United Nations is provided for, in order to provide the necessary practical measures for the prompt prosecution and trial of the major war criminals of the European Axis Powers, including the groups and organizations responsible for or taking a consenting part in the commission of such crimes and in the execution of criminal plans.

¹ Oct. 30, 1943, is correct.

1. To establish for the trial of major war criminals, whose crimes are not restricted to a definite locality, an International Military Tribunal the jurisdiction and activity of which shall be determined by its Statute.

2. To approve the Statute of the International Military Tribunal which forms an integral part of this Agreement.

3. To turn over to the International Military Tribunal upon its demand all the major war criminals who are under the jurisdiction of the International Military Tribunal.

4. Each of the Signatories shall separately take the necessary measures to provide for the surrender to the International Military Tribunal of the war criminals who are to be found on the territory of countries who are not parties to this Agreement.

5. To surrender, upon the demand of the Governments of any of the countries which have signed

4. The parties to this agreement agree to bring to trial before an International Military Tribunal, in the name of their respective peoples, major criminals, including groups and organizations referred to in Article 1. To this end the Soviet Union, the United States, the United Kingdom and France have each designated a representative to act as its Chief of Counsel. The Chiefs of Counsel shall be responsible for determining, preparing the charges against, and bringing to trial the persons and organizations so to be tried.

5. The Soviet Union, the United States, the United Kingdom, and France shall also promptly designate representatives to sit upon an International Military Tribunal which shall be charged with trying such persons, groups, and organizations.

3. The Signatories agree that the Control Council for Germany shall establish policies and procedures governing (a) the return to the scene of their crimes of persons in Germany charged with criminal offenses, in accordance with the Moscow Declaration, and (b) the surrender of persons within Germany in the custody of any of the Signatories who are demanded for prosecution by any party to this Agreement.

this Agreement or adhered to it, the war criminals who have committed crimes on the territories of those countries.

6. All members of the United Nations shall be invited by the Government of the United Kingdom, acting on behalf of the other Signatories hereto, to adhere to this Agreement. Such adherence shall in each case be notified to the Government of the United Kingdom, which shall promptly inform the other parties to this Agreement.

7. This Agreement becomes valid immediately on the day of its signing.

2. All members of the United Nations shall be invited by the Government of the United Kingdom, acting on behalf of the other Signatories hereto, to adhere to this Agreement. Such adherence shall in each case be notified to the Government of the United Kingdom, which shall promptly inform the other parties to this agreement.

6. There is hereby adopted the Annex to this instrument which (a) declares applicable International Law and specifies acts constituting criminal violations of International Law, (b) sets out the powers and duties of the Chiefs of Counsel, (c) provides for the establishment, jurisdiction, procedures, and powers of an International Military Tribunal, and (d) makes provision for the punishment of those convicted before such International Military Tribunal.

LAST DRAFT OF SOVIET STATUTE

I. GENERAL PROVISIONS

Article 1

Tasks of the Tribunal

In pursuance of the Agreement concluded by the Governments of the Union of Soviet Socialist Republics, the United States of

LAST DRAFT OF AMERICAN ANNEX

1. This Annex is adopted pursuant to the Executive Agreement made this day by the Union of Soviet Socialist Republics, the

America, and the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, an International Military Tribunal (henceforth called Tribunal) shall be established for the just and prompt punishment of the major war criminals of the European Axis Powers.

United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, which Agreement provides for the adherence thereto of all members of the United Nations who may elect so to adhere.

2. The purpose of this Annex, in pursuance of the aforesaid Executive Agreement, is to make detailed provisions for the necessary practical means and measures to carry out the declaration issued at Moscow on October 30, 1943, and other statements of the United Nations on the question of punishment of war criminals insofar as they relate to the trial and punishment of major war criminals.

3. To this end this Annex (*a*) declares applicable International Law and specifies acts constituting criminal violations of International Law, (*b*) sets out the powers and duties of the Chiefs of Counsel for the purpose of bringing the major war criminals, including groups and organizations, to trial for their criminal violations of International Law, (*c*) provides for the establishment, the jurisdiction, procedures, and powers of the International Military Tribunal to be established for the purpose of trying such criminals for their crimes, and (*d*) makes provision for the punishment of those convicted before such International Military Tribunal.

4. For convenience, (*a*) the four Signatories will sometimes be re-

Article 2

Range of Crimes

Among the crimes coming under the jurisdiction of the Tribunal are:

a) initiation of war in violation of the principles of International Law and in breach of treaties;

b) launching a war of aggression;

c) atrocities and violence in regard to civilian populations, deportations of civilians to slave labour, murder and ill-treatment of prisoners of war, destruction of towns and villages, plunder and other violations of the laws and customs of war;

d) the use of war as an instrument of Nazi policy intended for the extermination and plunder of other peoples.

ferred to as "the Signatories," (*b*) the members of the United Nations adhering hereto as provided in the preceding Article will sometimes be referred to as "the Adherents," and (*c*) the Signatories and all Adherents will sometimes be collectively referred to as "the parties to this Agreement."

5. The Tribunal shall be bound by this declaration of the Signatories that the following acts are criminal violations of International Law:

(a) Violations of the laws, rules, and customs of war. Such violations shall include, but shall not be limited to, mass murder and ill-treatment of prisoners of war and civilian populations and the plunder of such populations.

(b) Launching a war of aggression.

(c) Invasion or threat of invasion of, or initiation of war against, other countries in breach of treaties, agreements or assurances between nations, or otherwise in violation of International Law.

(d) Entering into a common plan or enterprise aimed at domination over other nations, which plan or enterprise included or intended, or was reasonably calculated to involve, the use of unlawful means for its accomplishment, including any or all of the acts set out in sub-paragraphs (*a*) to (*c*) above or the use of a combination of such unlawful means with other means.

(e) Atrocities and persecutions and deportations on political, racial, or religious grounds, in pursuance of the common plan or enterprise referred to in subparagraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated.

“International Law” shall be taken to include treaties, agreements, and assurances between nations and 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 the public conscience.

Article 3

Branches of the Tribunal

One or several Tribunals may be established depending on the number of cases to be tried. The procedure of the establishment and activity of all the Tribunals shall be identical and shall be governed by this Statute.

THE INTERNATIONAL MILITARY TRIBUNAL

6. There shall be set up by the Signatories an International Military Tribunal which shall have jurisdiction to hear and determine any charges presented pursuant to Article 11. Such International Military Tribunal shall consist of four members, each with an alternate, to be appointed as follows: one member and one alternate each by the Soviet Union, the United States, the United Kingdom and France. The alternate, so far as practicable, shall be present at the sessions of the Tribunal. The presiding officer shall be selected by vote of a majority of the members of the Tribunal, and if they are unable to agree, the respective appointees of each of the Signatories shall preside in rotation on successive days.

Article 4**Instructions**

For a more detailed definition of the procedure the Tribunal shall draw up instructions. These instructions shall not be inconsistent with this Statute.

Article 5**The Tribunal and the Control Council for Germany**

The Tribunal shall be set up in Berlin and shall be attached to the Control Council. The relations between the Tribunal and the Control Council shall be governed by Articles 9, 34, 35 and 36 of this Statute.

Article 6**Language of the Official Documents**

All official documents of the Tribunal and of the International Investigation Commission (Articles 11-12 of this Statute) are to be kept in English, Russian and French as well as in the language of the Allied country on whose territory the sessions of the Tribunal may take place.

PROVISIONS FOR BRINGING DEFENDANTS TO TRIAL

7. The parties to this Agreement agree to bring to trial before the International Military Tribunal at _____ or such other place as the parties may unanimously agree to in the names of their respective peoples, the major criminals, including groups and organizations referred to in Article 2.

13. In the conduct of the trial, questions may be put by each Chief of Counsel, or his representative, or by any member of the Tribunal, in his own language, and shall be translated and communicated to the witness, the defendants, and each member of the Tribunal in his own language. The witness may answer in his own language, and the answers will be translated in like manner. Written matter introduced in evidence shall be translated into the languages of the defendants and of each of the members of the Tribunal. A record of the trial will be kept in the language of each of the members of the Tribunal and in German, and each such record shall be an official record of the proceedings.

Article 7**Surrender of Criminals**

The International Investigation Commission and the Tribunal shall have the right to demand of any state the surrender of prisoners charged with crimes set out in Article 2 of this Statute.

RETURN OF OFFENDERS TO THE SCENE OF THEIR CRIMES

26. The Signatories agree that the Control Council for Germany shall establish policies and procedures governing (a) the return of persons in Germany charged with criminal offenses to the scene of their crimes in accordance with the Moscow Declaration and (b) the surrender of persons within Germany in the custody of any of the Signatories who are demanded for prosecution by any party to this Agreement.

II. COMPOSITION OF THE TRIBUNAL**Article 8****Members of the Tribunal and Their Alternates**

The tribunal shall consist of four members. The members of the Tribunal and their alternates shall be appointed by the Control Council—one member of the Tribunal and one alternate each by the USSR, USA, Great Britain and France—after consultation with the governments of their respective countries.

(See Article 6 above, as follows:)

6. There shall be set up by the Signatories an International Military Tribunal which shall have jurisdiction to hear and determine any charges presented pursuant to Article 11. Such International Military Tribunal shall consist of four members, each with an alternate, to be appointed as follows: one member and one alternate each by the Soviet Union, the United States, the United Kingdom and France. The alternate, so far as practicable, shall be present at the sessions of the Tribunal.

The presiding officer shall be selected by vote of a majority of the members of the Tribunal, and if they are unable to agree, the respective appointees of each of the Signatories shall preside in rotation on successive days.

Article 9**Challenge and Recall of the
Members of the Tribunal**

The members of the Tribunal cannot be challenged by the defendants, the prosecution or the counsel for the defence. The Control Council upon the proposal of the respective governments may recall a member of the Tribunal or his alternate and replace them by other persons.

Article 10**Quorum and Voting**

The presence of all the four members of the Tribunal shall be necessary to make up the quorum. The Tribunal shall take decision by a simple majority vote. In case the votes are evenly divided, the vote of the Presiding Officer shall be decisive. Death sentences shall be imposed by the affirmative vote of at least three members of the Tribunal.

12. In the event of the death or incapacity of any member of the International Military Tribunal, his alternate shall sit in his stead without interruption of the proceedings. All actions and decisions shall be taken by majority vote of the members.

**III. INTERNATIONAL
INVESTIGATION COMMISSION****Article 11****Tasks of the International
Investigation Commission**

An International Investigation Commission (henceforth called the Commission) of the Tribunal shall be established. The Commission shall determine the persons who are to be tried by the Tribunal, carry out investigation in regard to those persons, draw up the indictment and lodge the material with the Tribunal.

8. Chiefs of Counsel appointed by the Signatories shall be charged with:

(a) determining the persons, groups, and organizations against whom, in their judgment, there exists sufficient proof of criminal violations of International Law set out in Article 5 above to warrant their being brought to trial before the International Military Tribunal;

(b) preparing the charges against such persons and organizations;

(c) determining the proof

Article 12**Members of the International Investigation Commission**

The Commission shall consist of four members. The members of the Commission shall be appointed by the Control Council—one member each from the USSR, USA, Great Britain and France. The Control Council shall have the right to recall the members of the Commission and to replace them by other persons.

VI. [IV.] INSTITUTION AND CONDUCT OF PROCEEDINGS AND INVESTIGATION. INDICTMENT**Article 13****Initiative in the Institution of Proceedings**

The initiative in the institution of proceedings in the cases falling under the jurisdiction of the Governments of each of the four countries, to the Control Council, to the Commission and to the Tribunal. Proceedings shall be instituted by a decision of the Commission.

Article 14**Investigation**

In proceedings instituted by the Commission such investigation shall be carried out as the Com-

mission in their judgment has sufficient probative value to be offered in evidence against any or all such persons, groups and organizations;

(*d*) instituting and conducting before the International Military Tribunal prosecutions of such persons, groups and organizations.

Determination of the matters set out in sub-paragraphs (*a*) through (*d*) above shall be by agreement of the Chiefs of Counsel, provided that any Chief of Counsel may (1) bring to trial before such International Military Tribunal any person in the custody of his Government or of any Government which consents to the trial of such person, and any group or organization, representative members of which are in the custody of his Government, if, in his judgment such person, group, or organization has committed any criminal violation of International Law defined in Article 6 hereof; and (2) introduce any evidence which in his judgment has probative value relevant to the issues raised by the charges being tried.

9. The Chiefs of Counsel shall also be charged with recommending rules of procedure for adoption by the International Military Tribunal.

CONSTITUTING OF TRIBUNAL

10. The International Military Tribunal shall have the power (*a*) after receiving recommendations

mission may find appropriate in the interests of justice. The investigation may be carried out by the whole Commission or at its request by its individual members or by such persons as may be entrusted to do so by the Commission on the territory of any country with the consent of that country.

of the Chiefs of Counsel, to establish its own rules of procedure, which shall not be inconsistent with the provisions of this Agreement; (b) to summon witnesses, including defendants, and to require their attendance and testimony; (c) to require the production of documents and other evidentiary material; (d) to administer oaths; (e) to appoint special masters and other officers to take evidence, and to make findings, except findings of guilt, or certify summaries of evidence to the International Military Tribunal whether before or during the trial, and (f) generally to exercise in a manner not inconsistent with the provisions of this Agreement plenary authority with respect to the trial of charges brought pursuant to this Agreement. Its judgment of guilty or innocence shall be final and not subject to revision.

Article 15

Indictment

At the conclusion of the investigation the Commission shall draw up an indictment which shall be lodged with the Tribunal together with all the evidence pertaining to the same. In the absence of sufficient evidence to warrant the turning of the case over to the Tribunal the Commission shall decide

11. There shall be lodged with the Court prior to the commencement of the trial an indictment, supported by full particulars, specifying in detail the charges against the defendants being brought to trial. No proof shall be lodged with the Court except at the trial, and copies of any mat-

to bring the proceedings to an end. The indictment and the decision to bring proceedings to an end shall be taken by the whole Commission by a simple majority vote. In case the votes are evenly divided the vote of the Presiding Officer shall be decisive.

ters to be introduced in writing shall be furnished the defendants prior to their introduction.

(12. quoted above)

(13. quoted above)

[V.] BRINGING TO TRIAL AND MAKING ARRANGEMENTS FOR TRIAL

Article 16

Bringing to Trial

Having received the charges from the Commission, the Tribunal shall pass a decision to bring the defendants to trial or to bring the proceedings to an end or to return the case to the Commission for further investigation.

Article 17

Making Arrangements for Trial

Simultaneously with the bringing of a case to trial the Tribunal shall furnish the defendant with a copy of the indictment in a language understood by the defendant, decide upon the time and place of a hearing, settle the question of the calling of witnesses, the participation of the prosecutor and the counsel for the defense.

VI. SESSIONS OF THE COURT

Article 18

Place of the Sessions

Sessions of the Tribunal may take place on the territories of dif-

(7. Quoted above as follows:)

7. The parties to this Agreement agree to bring to trial before the International Military Tribunal at _____ or such other place as the parties may

ferent countries in accordance with the decision of the Tribunal and with the consent of the respective country. Preference should, nevertheless, be given to the territory of the country in regard to which the defendant had committed the most serious crimes.

Article 19

Presidency at the Sessions

If a session of the Tribunal is taking place on the territory of one of the four Allied countries the representative of that country on the Tribunal shall preside. In all other cases the representatives of the four Allied countries which have established the Tribunal shall preside in rotation.

Article 20

Language To Be Used

If the sessions of the Tribunal are taking place on the territory of one of the four Allied countries, the proceedings shall be conducted in the language of that country. In all other cases court proceedings shall be conducted in the language chosen by the Tribunal.

unanimously agree in the names of their respective peoples, the major criminals, including groups and organizations, referred to in Article 2.

(Part of 6 quoted above, as follows:)

. . . The presiding officer shall be selected by vote of a majority of the members of the Tribunal, and if they are unable to agree, the respective appointees of each of the Signatories shall preside in rotation on successive days.

13. In the conduct of the trial, questions may be put by each Chief of Counsel, or his representative, or by any member of the Tribunal, and in his own language, and shall be translated and communicated to the witness, the defendants, and each member of the Tribunal in his own language. The witness may answer in his own language, and the answers will be translated in like manner. Written matter introduced in evidence shall be translated into the languages of the defendants and of each of the members of the Tribunal. A record of the trial will be kept in the language of each of the members of the Tribunal and in German, and each such record shall be an official record of the proceedings.

Article 21

Participation of Alternate Members

The alternate members of the Tribunal shall be present at the sessions of the Tribunal. In case of illness or the incapacity of a member of the Tribunal to fulfil his functions for some other reason, his alternate shall [sit] in his place.

6. The alternate, so far as practicable shall be present at the sessions of the Tribunal.

12. In the event of the death or incapacity of any member of the International Military Tribunal, his alternate shall sit in his stead without interruption of the proceedings.

VII. TRIAL

Article 22

Rights of Defendants and Provisions for the Promptness of Trial

The trial while ensuring the rightful interests of the defendants must at the same time be based on principles which will ensure the prompt carrying out of justice. All attempts to use trial for Nazi propaganda and for attacks on the Allied countries should be decisively ruled out.

19. The Tribunal shall (a) confine the trial strictly to an expeditious hearing of the issues raised by the charges, (b) take strict measures to prevent any action which will cause unreasonable delay and rule out irrelevant issues of any kind whatsoever, (c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings but without prejudice to the determination of the charges.

Article 23

Prosecution

A prosecutor shall take part in each trial. The prosecutor shall be a member of the Commission or some other competent person so entrusted by the Commission.

8. Chiefs of Counsel appointed by the Signatories shall be charged with . . . instituting and conducting before the International Military Tribunal prosecutions of such persons, groups and organizations.

Article 24

FAIR TRIAL FOR DEFENDANTS

Defence

The right of the defendant to defence shall be recognized. Duly authorized lawyers or other persons admitted by the Tribunal shall plead for the defendant at his request.

14. In order to insure fair trial for defendants the following procedure is established:

(a) Reasonable notice shall be given to the defendants of the charges against them and of the opportunity to defend. Such notice may be actual or constructive. The Tribunal shall determine what constitutes reasonable notice in any given instance.

(b) The defendants physically present before the Tribunal will (1) be furnished with copies translated into their own language, of any indictment, statement of charges or other document of arraignment upon which they are being tried; (2) be given fair opportunity to be heard in their defence and to have the assistance of counsel. The Tribunal shall determine to what extent and for what reasons proceedings against defendants may be taken without their presence.

Article 25

Procedure at the Trial

Court proceedings shall begin with the reading of the indictment. This shall be followed by the examination of the defendants and witnesses and by the reading of documents in the order established by the Presiding Officer. After the inquest the pleadings of the prosecution and of the counsel for the defence shall take place. After the pleadings the defendant shall be called upon to make his final speech.

11. There shall be lodged with the Court prior to the commencement of the trial an indictment, supported by full particulars, specifying in detail the charges against the defendants being brought to trial. No proof shall be lodged with the Court except at the trial, and copies of any matters to be introduced in writing shall be furnished the defendant prior to their introduction.

[VIII.] EVIDENCE

Article 26

Choice and Judging of Evidence

The Tribunal and the Commission shall not be restricted in the choice and judging of evidence. Well-known facts shall have the same judicial value as the facts established by the Commission.

Article 27

Acts and Documents of the National Investigating Commissions

The acts and documents of the commissions established in various allied countries for the investigation of war crimes shall have the same judicial value as the acts and documents drawn up by the Commission.

[IX.] LIABILITY

Article 28

Official Position

The official position of persons guilty of war crimes, their position as heads of states or as heads of various departments shall not be considered as freeing them from or in mitigation of their responsibility.

10. The International Military Tribunal shall have power (e) to appoint special masters and other officers to take evidence, and to make findings, except findings of guilt, or certify summaries of evidence to the International Military Tribunal, whether before or during the trial

PROVISIONS REGARDING PROOF

18. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedures and shall admit any evidence which it deems to have probative value. It shall employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make written proffers of proof; making extensive use of judicial notice; receiving sworn or unsworn statements of witnesses, depositions, recorded examinations before or findings of military or other tribunals, copies of official reports, publications and documents or other evidentiary materials and all such other evidence as is customarily received by international tribunals.

16. Any defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained.

Article 29**Carrying Out of an Order**

The carrying out by the defendant of an order of his superior or government shall not be considered a reason excluding his responsibility for the crimes set out in Article 2 of this Statute. In certain cases, when the subordinate acted blindly in carrying out the orders of his superior, the Tribunal has a right to mitigate the punishment of the defendant.

Article 30**Liability of Accomplices**

Organizers, instigators and accomplices bear responsibility for the crimes set out in Article 2 of this Statute along with the perpetrators of those crimes.

17. The fact that a defendant acted pursuant to order of a superior or to government sanction shall not constitute a defence per se, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

**SUBSTANTIVE PROVISIONS
FOR LIABILITY AND DEFENCE**

15. In the trial, the Tribunal shall apply the general rule of liability that those who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and responsible for the acts of each other.

**TRIAL OF GROUPS OR
ORGANIZATIONS**

22. Groups or organizations, official or unofficial, may be charged before the Tribunal with criminal acts or with complicity therein by producing before the Tribunal and putting on trial such of their number as the Tribunal may determine to be fairly representative of the group or organization in question. Upon conviction of a group or an organization, the Tribunal shall make written findings and enter written judgment on the charges against such group or organization and the representative members on trial.

23. Upon conviction of any group or organization, any party

to this Agreement may bring charges against any person for participation in its criminal activities pursuant to the provisions of Article 15 hereof before any occupation or other Tribunal established by it. In any such trial, the findings of the International Military Tribunal as to the criminality of the group or organization shall be binding upon the occupation or other Tribunal. Upon proof of membership in such group or organization, such person shall be deemed to have participated in and be guilty of its criminal activities unless he proves the absence of voluntary participation. A person so convicted shall suffer death or such other punishment as the Tribunal may deem just in light of the degree of his culpability.

24. Any party to this agreement may, either in a proceeding described in Paragraph 23 or in an independent proceeding, charge any person, before an occupation or other Tribunal, with any crime other than the crimes referred to in Paragraph 23, and such Tribunal may, upon his conviction, impose upon him for such crime punishment independent of and additional to the punishment imposed for participation in the criminal activities of such group or organization.

X. PUNISHMENT

Article 31

Forms of Punishment

The Tribunal shall have the right to impose the sentence of

PUNISHMENT

20. Defendants brought to trial before the Tribunal shall, upon

death or some other punishment on the defendants—the perpetrator and his accomplices. conviction, suffer death or such other punishment as shall be determined by the Tribunal to be just.

Article 32

Confiscation of Property

In addition to the punishment imposed by it, the Tribunal shall have the right to decide on the confiscation of property of the sentenced person.

Article 33

Trial in the Absence of the Defendant

The Tribunal shall have the right to take proceedings against persons charged with the crimes, set out in Article 2 of this Agreement, in the absence of the defendant, if the defendant should be hiding or if the Tribunal should for other reasons find it necessary to conduct the hearing in the absence of the defendant.

14. . . .
 (b) . . . The Tribunal shall determine to what extent and for what reasons proceedings against defendants may be taken without their presence.

XI. APPEAL AND CARRYING OUT OF SENTENCES

Article 34

Approval, Alteration or Annulment of Sentences

The Control Council may approve, alter or annul a sentence or return the case to the Tribunal for a retrial. The Control Council shall have the right to mitigate the punishment imposed by the Tribunal but not to increase the severity thereof.

21. The sentences shall be carried out in accordance with written orders of the Control Council, and the Control Council may at any time reduce or otherwise alter the sentences but may not increase the severity thereof.

Article 35**Carrying Out of Sentences**

The sentences of the Tribunal shall be carried out by the organs of that state on whose territory the trial had taken place. On German territory the sentences shall be carried out in a manner established by the Control Council.

Article 36**Expenses**

The expenses for the maintenance of the members of the Tribunal and their alternates and of the Commission and all other expenses connected with the organization and activity of the Tribunal and the Commission shall be covered by the funds allotted for this purpose by the Control Council.

XII. JURISDICTION OF THE NATIONAL TRIBUNALS**Article 37**

This Statute of the Tribunal shall not in any way prejudice the jurisdiction and the powers of the national tribunals established on the territory of the Allied countries and on the territory of Germany for the trial of war criminals.

EXPENSES

25. The expenses of the International Military Tribunal shall be charged by the Signatories against the funds allotted for the maintenance of the Control Council, and the expenses of the Chiefs of Counsel shall be borne by the respective Signatories.

RETURN OF OFFENDERS TO THE SCENE OF THEIR CRIMES

26. The Signatories agree that the Control Council for Germany shall establish policies and procedures governing (a) the return of persons in Germany charged with criminal offenses to the scene of their crimes in accordance with the Moscow Declaration and (b) the surrender of persons within Germany in the custody of any of the Signatories who are demanded for prosecution by any party to this Agreement.

XXIV. Report of American Member of Drafting Subcommittee, July 11, 1945

MEMORANDUM FOR MR. JUSTICE JACKSON

11 July 1945

Subject: Final Report of American Representative on the Four-Power Drafting Sub-committee.

1. The undersigned makes this Final Report as the American Representative on the Four-Power Drafting Sub-committee for the drafting of the Executive Agreement and Annex, or Charter, as we now call it.

2. Meetings have been held beginning on Thursday, 5 July, and continuing on successive days thereafter, with the exception of Saturday and Sunday. The final meeting was held and concluded this forenoon. [Mr. Alderman's notes of the meetings are appended hereto.]

3. I attach hereto a copy, and I am distributing to the entire Staff copies, of a mimeographed reproduction of the documents as the Drafting Sub-committee finally revised them this morning [XXV]. Matters within square brackets are reserved especially to be raised before the plenary sessions. In addition, it is understood that all of the work of the Drafting Sub-committee is tentative, in the sense that it is all subject to approval or disapproval of the plenary sessions. However, the drafts as hereto attached, with the exception of the matters in square brackets, represent agreement by the four conferees: for the Russians, Prof. Trainin; for the French, M. Falco; for the British, Sir Thomas Barnes; for the Americans, Mr. Alderman.

4. I am well enough satisfied with these drafts to recommend their substantial adoption, with reservation of the reserved matters.

5. I transmitted to the Drafting Sub-committee your suggestion that a free day be allowed to intervene before the next plenary session, whereupon it was understood that the next plenary session would be held at 10:30 a.m. on Friday, 13 July 1945 at Church House.

SIDNEY S. ALDERMAN

Distribution

Mr. Justice Jackson (2)

The entire Staff

Notes of American Representative on Drafting Subcommittee

5 July 1945

AGREEMENT

After discussion it was agreed to take the preamble from our earlier draft, which quoted exactly the provisions of the Moscow declaration, adding a reference to "other statements that have been made by the United Nations, with reference to the punishment of war criminals".

The Russians agreed to consider my suggestion for writing into their article 1, "including groups and organizations fairly represented by their individual members brought before the Court". They would not commit themselves but reserved the question.

I objected to calling the annex the "statute", on our constitutional grounds. Professor Trainin objected to "annex" because it does not fit in with the idea that the annex is an integral part of the agreement. At the suggestion of Sir Thomas Barnes we compromised on "charter" as the name for the statute or annex.

Russian article 3 was changed so as to make it read, "Each of the Signatories undertakes to make available at the trial all the major war criminals who are under the jurisdiction of the Tribunal."

I presented Mr. Justice Jackson's objections to Russian article 4, arguing that it is beyond our function to commit our governments to diplomatic negotiations with other governments, not parties, regarding handing over of criminals in their possession. That is for regular diplomatic handling. The British suggested that we confine it to "will use their best efforts" and, as so amended, the whole article was reserved for further discussion.

Russian article 5 was amended so as to make it read substantially, "Each of the Signatories will establish policies and procedures governing the return of persons who under the Moscow Declaration are to be returned for trial to the scene of their crimes." Mr. Clyde has the exact wording.

Russian article 6 was amended so as to read substantially, "All Governments of the United Nations may accede to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other parties of each such accession."

The British did not wish to be put under the burden of issuing formal invitations to some 50 governments to accede to the agreement.

Russian article 7 was changed to read, "This agreement becomes valid immediately on the day of signing. It shall run for the term of one year and thereafter, subject to the right of any party to ter-

minate it upon one month's notice." This is substantially the provision agreed on. Mr. Clyde has it exactly.

It was decided that our article 6 of the agreement is unnecessary.

Mr. Clyde will have a complete redraft of the Agreement ready for the meeting at 3 o'clock.

All this is tentative and subject to confirmation in plenary sessions.

CHARTER

We changed Soviet article 1 to read :

"In pursuance of the Agreement dated _____, an International Military Tribunal (henceforth called the Tribunal) shall be established for the just and prompt trial and punishment of the major war criminals of the European Axis Powers."

It was tentatively agreed to omit our articles 1, 2 and 3.

It was decided to follow with a revision of Soviet article 8. We want direct appointment of court members by each Government, instead of appointment by the Control Council. Prof. Trainin said he would consider but could not pass finally on it.

We would not want to consult the Control Council about our appointment to the court; we would consult it about setting up the court. But, once it is set up, our appointment must be our own, subject to no consent or control by the Control Council.

It was tentatively agreed to follow Soviet article 8, as amended, with our article 6, cut down to the following :

"The Tribunal shall consist of four members, each with an alternate, to be appointed as follows: one member and one alternate each by the Soviet Union, the United States, the United Kingdom and France."

Then we followed with Soviet article 9, amended to read as follows :

"The members of the Tribunal cannot be challenged by the defendants, the prosecution or the counsel for the defence. The respective Governments may replace a member or his alternate by other persons, by reasons of health or other good reasons."

We adjourned for lunch to reassemble at 3 p.m.

We next brought up among the general provisions the Soviet article 10, providing for quorum and voting, very substantially rewritten, after full discussion, as follows :

"Article 4. The presence of all four members of the Tribunal or their alternates shall be necessary to constitute the quorum.

"If a session of the Tribunal is taking place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside. In other cases, the members of the Tribunal

shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial; or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed.

“Save as aforesaid the Tribunal shall take decisions by a simple majority vote and in case the votes are evenly divided, the vote of the President shall be decisive; *provided always* that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.”

Articles 2 and 3 as redrafted this morning were again amended as shown by penciled corrections on the Clyde draft.

We will fit into proper place Soviet article 3 (chambers or branches of the Tribunal) amended to read as follows:

“The Tribunal may sit in one or more chambers or divisions, depending on the number of cases to be tried. The establishment, functions and procedure of all the chambers or divisions shall be identical and shall be governed by this Charter.”

We are to bring up Soviet article 21 (alternates) and fit it into its proper place.

We merged the language of Soviet article 6 and our article 13, keeping the substance of both. Mr. Clyde made a redraft.

On Soviet article 4 (“Instructions”, by which they mean rules of procedure) we had a long debate. The Soviets argued that the court ought to fix the rules of procedure and that it would demean the court to have Chiefs of Counsel recommend rules. M. Falco thought that the adoption of rules was distinctly the function of the court, not of the prosecutors. The British and I argued that it was not at all inconsistent to have the Chiefs of Counsel recommend rules but agreed that final fixing of the rules should be for the court unless the four Sovereigns, by this agreement and charter, legislatively fix the rules and impose them upon the court. There was no decision. We shall discuss this further tomorrow and in connection with the provisions regarding duties of Chiefs of Counsel. But tentatively we agreed to adopt among the early, general provisions Soviet article 4, amended so as to read:

“The Tribunal shall draw up rules of procedure which shall not be inconsistent with this Charter.”

The next general provision discussed was Soviet article 8 (Surrender of Criminals). The French, British, and American representatives strongly agreed that it is no part of the function of the Tribunal to select the defendants to be tried and to call upon the signatories to

produce them. That is the function of the Chiefs of Counsel. The only function of the Tribunal is to try those produced before it. It is the representatives of the executive who make the charges; the judiciary tries.

The Soviets asked us to reserve that question and to return to it when we come to the provisions as to the functions of the prosecutors. We agreed and adjourned to 10:30 o'clock tomorrow morning.

9 July 1945

Since France was not a party to the Moscow declaration, Judge Falco suggested a two-line insert, preceding the opening paragraph of the agreement, which would merely refer generally to diverse statements by the United Nations regarding the punishment of war criminals.

I submitted a proposed redraft of the article on the powers and duties of the Chiefs of Counsel, calling them rather "Chief Prosecutors", combining most of the substance of Soviet articles 11 to 14 with the substance of American articles 8 and 9. The file copy of this inadvertently omitted subparagraph (*d*).

Professor Trainin objected to the reservation of the right of individual action by any one Chief Prosecutor. Sir Thomas Barnes suggested majority rule for the Chief Prosecutors as for the Tribunal. Professor Trainin agreed to that. He wanted to divide the provisions into two sections: first, functions as a committee acting by majority vote; second, powers of individual action by Chief Prosecutors. He outlined the suggestion in some detail. Mr. Clyde has the language and will produce the redraft for the afternoon meeting.

Professor Trainin also wanted a majority vote of the committee of prosecutors, with chairmanship to rotate weekly. He admitted that this rotation is not very important. Judge Falco stated that rotation for the Tribunal is one thing, since it holds public sessions, but the prosecutors will hold private sessions and it can well be left to them to agree upon a chairman. It was decided that it is such a detail as may well be left to them and that the four Governments hardly need to deal with it specifically in this charter.

Professor Trainin stated that the American article 11 is acceptable, striking out the words, "No proof shall be lodged with the Court except at the trial", and making the second sentence read, "Copies of the indictment and of all documents submitted therewith to the Tribunal shall be furnished to the defendants." The provisions about the indictment were covered and Mr. Clyde will draft them.

Professor Trainin had no objection in principle to the American article 14 (*a*) and (*b*) (Fair Trial for Defendants). He would like

to take this as a basis and redraft it so as to make it even somewhat broader than the American draft.

In the discussion on the powers of the Tribunal Professor Trainin boggled at the words "witnesses, including defendants". He could not understand calling defendants as witnesses. He says it could not be done under Russian practice. And if they were called and refused to answer, the Tribunal could not force them to answer. Judge Falco said a person is either a witness or a defendant—he can't be both. Under French practice the court could not force a defendant to give evidence. Sir Thomas agreed that that was true under English practice also, and I said the same was true in American practice. I think it is a very grave policy question to be resubmitted to the plenary sessions, whether we do wish to undertake to abolish the privilege against self-incrimination.

Professor Trainin questioned the provision in article 10 of the American draft for special masters. He did not understand it and confused functions of prosecutors and functions of the court. Sir Thomas Barnes and I made elaborate explanations of our use of commissions and special masters to assist the court in taking evidence and making recommended findings. Professor Trainin still did not understand it, and the whole question was reserved.

Professor Trainin agreed to article 19 of the American draft provided we write in the Soviet provision against Nazi propaganda and attacks on the United Nations. I stated that I thought it unwise to spell that out specifically. It is all covered much more broadly by the power to exclude "any irrelevant issues of any kind whatsoever". Sir Thomas doubted the wisdom of mentioning propaganda. General discussions developed the idea that Soviets do not consider all propaganda bad propaganda. To us it is always a derogatory word but not so with them. The question was reserved.

Professor Trainin agreed to the American article 7 on conduct of trial except that he did not want the reference to "groups and organizations" and wanted to put in the Soviet provision for "preference for territory of the country where most serious crimes were committed". The difficulty with that, I mentioned, is that it cannot be known in what country the most serious crimes were committed until the end of the trial, when defendants are convicted. It is an impracticable provision. It was agreed that a simple provision be used: "The Tribunal shall sit at _____, or such other place as the Signatories may agree."

Professor Trainin raised the question of arraignment, and he wanted to know what an arraignment is. I explained it.

An objection to American article 20 (e) as impairing the power of the Tribunal to adopt rules of procedure was entered by Professor

Trainin since it implies that the Tribunal must adopt such rules as are presented to it by the prosecutors. The subparagraph was redrafted to cure this objection and as such was agreed upon.

American article 21 was agreed upon but was put in the next article. American article 22 was renumbered 21 and agreed upon. American article 23, now 22, was agreed upon.

American articles 18 and 19 were discussed in great detail. Professor Trainin had no objection in principle but thought we ought to leave out the heart of it about proffers of proof and judicial notice and wanted to add the Soviet corresponding articles. Sir Thomas asked if they couldn't go along with the way the Americans had drafted it, since they agreed to the principle and this was an attempt to reconcile the different views of the four nations. No conclusion was reached.

Mr. Clyde agreed to have the revisions through article 23 prepared for the 10:30 a.m. meeting tomorrow.

10 July 1945

The American article 18 was taken up and discussed at length. Professor Trainin still objected to our language in the passage, "It shall employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make written proffers of proof; making extensive use of judicial notice . . ." His objection seemed more to language than to ideas. "Proffers of proof" still puzzled him, as did "judicial notice".

Professor Trainin agreed with everyone that the Tribunal would have the power to rule out evidence or testimony of witnesses if it found it irrelevant. I explained that our provision about "proffers of proof" is merely to simplify the exclusion of such irrelevant evidence by the Tribunal. Sir Thomas suggested a provision requiring the defendant to satisfy the Tribunal of the relevance of any evidence before it is offered. Professor Trainin agreed to this in substance and agreed that facts of common knowledge need not be proved. When we explained through Mr. Troyanovsky, the interpreter, that this would be the exact translation into Russian of "use of judicial knowledge", he seemed satisfied but liked his own formula better. Sir Thomas suggested, "The Tribunal will not require proof of facts of common knowledge but will take judicial notice thereof." That was agreed upon with the proviso that Soviet article 27 be added at the end of our article 18, changing the last word "Commission" to "Committee of Prosecutors".

Next we took up the procedure to be followed at the trial, using Soviet article 25 as basis for discussion. Professor Trainin suggested that perhaps it would clarify the situation if the British or Americans

would just state how they visualize the procedure at the trial. Sir Thomas and I agreed on such visualization as follows:

1. Reading of the indictment.
2. Arraignment of defendants by Tribunals, calling on each to plead "guilty" or "not guilty".
3. Opening statements by the Prosecutors.
4. Presentation of the case by Prosecutors, defendants having the right to cross-examine.
5. Opening statements by defendants or their counsel.
6. Defendants' evidence, with cross-examination by Prosecutors.
7. Defendants' final arguments or summations.
8. Prosecutors' final arguments or summations.
9. Judgment.

Professor Trainin said that there was no such thing as an "opening statement" in their procedure. After Sir Thomas and I explained it, Judge Falco stated that they had no such "opening statement" either. Then Professor Trainin said he personally would be in favor of such an opening statement. He thought it would be useful but asked to reserve that question for discussion with his associates. He added, however, that he would not agree for the defendants to have an opening statement after the prosecution's evidence is in and before the defendants' witnesses are called. That would interrupt the taking of evidence right in the middle for such a statement. By the same token then the defendants would have the last argument after all the evidence was in. Judge Falco agreed that the latter remark was true in French practice. I explained that in American practice the defendant has the last argument, the right to close, only if he introduces no evidence, but, if the defendant offers evidence in his defense, then the prosecution has the right to close. But the defendant has a right to make an opening statement before putting his case in if he elects to offer evidence. This puts him in balance of opportunity with the prosecution. Professors Falco and Trainin agreed that defendants should have no right to make an opening statement. Their concept seemed to be that, when the defendant has answered or pleaded to the indictment on the arraignment, he has thereby made the only preliminary statement to which he is entitled.

Professor Trainin set forth the procedure at the trial, as he visualized it, as follows:

1. Indictment read.
2. Arraignment by the Tribunal.
3. Opening statements by Prosecutors.
4. Call upon Prosecutors and defendants by Tribunal to state whether they wish any additional witnesses called.

5. Whole evidence for the prosecution and then whole evidence for the defendants, without any interruption by arguments or statements of counsel.
6. Summation by Prosecutors.
7. Summation by defendants.
8. Last word by individual defendants.
9. Judgment by the Tribunal.

Since they make provisions for final, personal statements by defendants, I asked if they would not agree with us to change the order of their articles 6 and 7 and let the Prosecutors have the final formal argument, followed by the personal statements by the defendants. It was agreed.

Professor Trainin brought up the question of Soviet article 37, and it was agreed upon.

The question of expenses was next considered and Professor Trainin expressed no objection to American article 25 except that he thought that the expenses of the Prosecutors, as well as those of the Tribunal, should be paid by Germany through the Control Council. I suggested the distinction that the Tribunal is set up presumably to act in Germany where the Control Council has the sovereignty, but the Prosecutors and their staffs directly represent their individual governments, which should, it seems, bear their expenses. We have been incurring expenses in America and England and elsewhere since May 2. Professor Trainin stated that they had too but that he thought Germany should pay them. Judge Falco said that they had been skeptical, since 1919, of the formula, "*L'Allemagne paiera*" ["Germany will pay"]. Sir Thomas agreed with the American viewpoint that the Control Council should not bear any expenses except those incurred in Germany. Professor Trainin stated that they would consider that view.

In view of the work necessary to run off fresh redrafts to incorporate this morning's changes, it was decided not to have an afternoon meeting but to meet again tomorrow morning to go over again the complete redraft, so that, if desired, a further plenary session might be held on Thursday to consider the report of the drafting subcommittee.

XXV. Draft of Agreement and Charter,
Reported by Drafting Subcommittee,
July 11, 1945

AGREEMENT by the Governments of the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, of the UNITED STATES OF AMERICA, of the Provisional Government of the FRENCH REPUBLIC and of the UNION OF SOVIET SOCIALIST REPUBLICS for the Prosecution and Punishment of the Major EUROPEAN AXIS WAR CRIMINALS

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October, 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes "will 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 that will be created therein";

AND WHEREAS this Declaration was stated to be "without prejudice to the case of major criminals, whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies";

NOW THEREFORE the Governments of the United Kingdom of Great Britain and Northern Ireland, of the United States of America, of the Provisional Government of the French Republic and of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this following Agreement.

Article 1.

There shall be established after consultation with the Control Council of Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location

whether they be accused individually or as representative members of organisations or groups or in both capacities.

Article 2.

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3.

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories themselves.

Article 4.

Each of the Signatories shall establish procedure governing the return of persons charged with offences who, in accordance with the Moscow Declaration, are to be tried at the scenes of their crimes.

Article 5.

Any Government of the United Nations may accede to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other Signatory and acceding Governments of each such accession.

Article 6.

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or Germany for the trial of war criminals.

Article 7.

This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory or any acceding Government, to give, through the diplomatic channel, one month's notice of intention to terminate it.

IN WITNESS WHEREOF the Undersigned Plenipotentiaries have signed the present agreement [and have affixed thereto their seals].

DONE in quadruplicate in this day of

1945 in English, French and Russian, each text to have equal authenticity.

For the Government of the United Kingdom of Great Britain
and Northern Ireland

For the Government of the United States of America

For the Provisional Government of the French Republic

For the Government of the Union of Soviet Socialist Republics

Charter

CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

1. In pursuance of the Agreement dated _____ there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis Powers.

2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution or by the defendants or their counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons.

4. The presence of all four members of the Tribunal or their alternates shall be necessary to constitute the quorum.

If a session of the Tribunal is taking place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside. In other cases, the members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a president, and the president shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed.

Save as aforesaid the Tribunal shall take decisions by a simple majority vote and in case the votes are evenly divided, the vote of the president shall be decisive; provided always that convictions and

sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

5. The Tribunal may, in case of need and depending on the number of the matters to be tried, sit in one or more Chambers or Divisions, and the establishment, functions, and procedure of each Chamber or Division shall be identical, and shall be governed by this Charter.

JURISDICTION AND GENERAL PRINCIPLES

6. The following acts shall be considered criminal violations of International Law and shall come within the jurisdiction of the Tribunal:

- (a) Violations of the laws, rules or customs of war. Such violations shall include murder and ill-treatment of prisoners of war; atrocities against and violence towards civil populations; the deportation of such populations for the purpose of slave labour; the wanton destruction of towns and villages; and plunder; as well as other violations of the laws, rules and the customs of war.
- (b) Launching a war of aggression.
- (c) [Invasion or threat of invasion of or] initiation of war against other countries in breach of treaties, agreements or assurances between nations or otherwise in violation of International Law.
- (d) [Entering into a common plan or enterprise aimed at domination over other nations, which plan or enterprise involved or was reasonably calculated to involve or in its execution did involve the use of unlawful means for its accomplishment, including any or all of the acts set out in sub-paragraphs (a) to (c) above or the use of a combination of such unlawful means with other means.]
- (e) Atrocities and persecutions and deportations on political, racial or religious grounds [in pursuance of a common plan or enterprise referred to in sub-paragraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated.]

7. The official position of defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

8. The fact that the defendant acted pursuant to order of a superior or to Government sanction shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

9. Organizers, instigators and accomplices who participated in the formulation or execution of a common criminal plan or in the perpetration of individual crimes are equally responsible with other participants in the crimes.

10. At the trial of any individual member of any group or organiza-

tion, the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

11. In cases where a group or organization is declared criminal by the Tribunal, the competent national authorities of any Signatory have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

12. Any person may be charged before a national, military or occupation court, referred to in Article 11, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

13. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence if he should be in hiding or if the Tribunal, for other reasons, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

14. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

15. Each Signatory shall appoint a Chief Prosecutor.

1. The Chief Prosecutors shall act as a committee for the following purposes:

- (a) Co-ordination of the individual work of each of the Chief Prosecutors and his staff.
- (b) The final designation of the defendants to be tried by the Tribunal.
- (c) The approval of the indictment and of the documents to be submitted therewith.
- (d) The lodgement of the indictment and the accompanying documents with the Tribunal.
- (e) The drawing up and recommending to the Tribunal for their approval of draft rules of procedure contemplated by Article 14. The Tribunal shall have power to accept, with or without amendments, or to reject the rules so recommended.

The committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation.

2. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

- (a) Investigation and collection of all necessary evidence.
- (b) The preparation of the indictment for approval by the committee in accordance with paragraph (1) (c) of this Article.
- (c) The preliminary examination of all necessary witnesses and of the defendants.
- (d) To act as prosecutor at the trial.
- (e) To appoint representatives to carry out such duties as may be assigned to them.
- (f) To undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the trial. It is understood that no witness or defendant detained by any Signatory shall be taken out of the possession of the Signatory without its assent.

FAIR TRIAL FOR DEFENDANTS

16. In order to ensure fair trial for the defendants, the following procedure shall be followed:

- (a) The indictment shall include full particulars specifying in detail the charges against the defendants.
A copy of the indictment and of all the documents lodged with the indictment translated into a language which he understands shall be furnished to the defendant at a reasonable time before the trial.
- (b) During any preliminary examination of a defendant, and at the trial, he shall have the right to give any explanation which he may desire with regard to the charges made against him.
- (c) A preliminary examination of a defendant and the trial shall be conducted or translated in a language which the defendant understands.
- (d) A defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.
- (e) A defendant shall have the right through himself or through his Counsel to present evidence at the trial in support of his defence.

POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

17. The Tribunal shall have the power:

- (a) to summon witnesses to the trial and to require their attendance and testimony and to put questions to them;
- [(b) to require any defendant to give testimony];
- (c) to require the production of documents and other evidentiary material;
- (d) to administer oaths;

- [(e) to appoint special officers of the Tribunal to take evidence and to make findings (except findings of guilt) and to certify summaries of evidence to the Tribunal, whether before or during the trial];
- (f) generally to exercise in a manner not inconsistent with the provisions of this Charter, plenary authority with respect to the trial and the charges brought pursuant thereto;
- (g) the Tribunal may appoint interpreters, reporters, clerks, marshals and other officials, either generally or for the trial of a particular case. Persons so appointed shall, before assuming their duties, if required by the Tribunal, take an oath in a form approved by the Tribunal.

18. The Tribunal shall:

- (a) confine the trial strictly to an expeditious hearing of the issues raised by the charges;
- (b) take strict measures to prevent any action which will cause unreasonable delay to rule out irrelevant issues of any kind whatsoever [and to prevent the use of the trial as a means of a dissemination of propaganda];
- (c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.

20. The Tribunal shall require the defendants to satisfy it of the relevance of any evidence before the evidence is offered.

21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

22. The acts and documents of the committees set up in the various Allied countries for the investigation of war crimes shall have the same probative value as the acts and documents drawn up by the committee established pursuant to Article 15 of this Charter.

23. The Tribunal shall sit at _____ or at such other place as the Signatories may agree.

24. The proceedings at the trial shall take the following course:

- (a) The indictment shall be read in court.
- (b) The Tribunal shall ask each defendant whether he pleads "guilty" or "not guilty".
- (c) The prosecution shall make an opening statement.
- (d) The Tribunal shall ask the prosecution and the defence what evi-

dence (if any) they wish to submit to the Tribunal and the Tribunal shall rule upon the admissibility of any such evidence.

- (e) The witnesses for the prosecution and for the defence shall be examined and may be cross-examined in each case by the other side.
- (f) The Tribunal may put any question to any witness or to any defendant.
- (g) The defence shall address the court.
- (h) The prosecution shall address the court.
- (i) Each defendant may make a statement to the Tribunal.
- (j) The Tribunal shall deliver judgment and pronounce sentence.

25. All official documents shall be produced, and all Court proceedings conducted, in English, Russian and French, and in the language of the defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting as the Tribunal considers desirable in the interests of justice and public opinion.

JUDGMENT AND SENTENCE

26. The judgment of the Tribunal as to the guilt or the innocence of any defendant shall be motivated by the reasons supporting its findings and shall be final and not subject to review.

27. The Tribunal shall have the right to impose upon a defendant on conviction death or such other punishment as shall be determined by it to be just.

28. In addition to any punishment imposed by it, the Tribunal shall have the right to decide on the confiscation of property of the [sentenced] [convicted] person.

29. In case of guilt, sentence shall be carried out in accordance with the orders of the Control Council and the Control Council may at any time reduce or otherwise alter the sentences but may not increase the severity thereof. If the Council, after any defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 15 of this Charter, for such action as they may consider proper having regard to the interests of justice.

EXPENSES

30. The expenses of the Tribunal [and] shall be charged by the Signatories against the funds allotted for maintenance of the Control Council [and the expenses of the Chief Prosecutors shall be borne by the respective Signatories].

XXVI. Draft Agreement and Charter, Proposed by British Delegation, July 11, 1945

AGREEMENT by the Governments of the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, of the UNITED STATES OF AMERICA, of the Provisional Government of the FRENCH REPUBLIC and of the UNION OF SOVIET SOCIALIST REPUBLICS for the Prosecution and Punishment of the MAJOR WAR CRIMINALS of the EUROPEAN AXIS POWERS

11th July 1945.

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice

AND WHEREAS the Moscow Declaration of the 30th October, 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will 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 that will be created therein;

AND WHEREAS this Declaration was stated to be "without prejudice to the case of major criminals, whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies";

NOW THEREFORE the Governments of the United Kingdom of Great Britain and Northern Ireland, of the United States of America, of the Provisional Government of the French Republic and of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorised thereto have concluded this following agreement.

Article 1.

There shall be established after consultation with the Control Council of Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical loca-

tion whether they be accused individually or as representative members of organisations or groups or in both capacities.

Article 2.

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this agreement.

Article 3.

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial of the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories themselves.

Article 4.

Each of the Signatories shall establish procedure governing the return of persons charged with offences who, in accordance with the Moscow Declaration, are to be tried at the scenes of their crimes.

Article 5.

Any Government of the United Nations may accede to this agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and acceding Governments of each such accession.

Article 6.

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Article 7.

This agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory or any acceding Government, to give, through the diplomatic channel, one month's notice of intention to terminate it.

IN WITNESS WHEREOF the Undersigned Plenipotentiaries have signed the present agreement [and have affixed thereto their seals]

DONE in quadruplicate in this day of 1945

in English, French and Russian, each text to have equal authenticity.
For the Government of the United Kingdom of Great Britain
and Northern Ireland

For the Government of the United States of America

For the Provisional Government of the French Republic

For the Government of the Union of Soviet Socialist Re-
publics

Charter

CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

1. In pursuance of the Agreement dated there shall be established an International Military Tribunal (herein-after called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis Powers.

2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons.

4. (a) The presence of all four members of the Tribunal or their alternates shall be necessary to constitute the quorum.

(b) If a session of the Tribunal is taking place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside. In other cases, the members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a president, and the president shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed.

(*c*) Save as aforesaid the Tribunal shall take decisions by a simple majority vote and in case the votes are evenly divided, the vote of the president shall be decisive; provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

5. The Tribunal may, in case of need and depending on the number of the matters to be tried, sit in one or more Chambers or Divisions, and the establishment, functions, and procedure of each Chamber or Division shall be identical, and shall be governed by this Charter.

JURISDICTION AND GENERAL PRINCIPLES

6. The following acts shall be considered criminal violations of International Law and shall come within the jurisdiction of the Tribunal.

- (*a*) Violations of the laws, rules or customs of war. Such violations shall include murder and ill-treatment of prisoners of war: atrocities against and violence towards civil populations: the deportation of such populations for the purposes of slave labour: the wanton destruction of towns and villages: and plunder: as well as other violations of the laws, rules and customs of war.
- (*b*) Launching a war of aggression.
- (*c*) [Invasion or threat of invasion of or] initiation of war against other countries in breach of treaties, agreements or assurances between nations or otherwise in violation of International Law.
- (*d*) [Entering into a common plan or enterprise aimed at domination over other nations, which plan or enterprise involved or was reasonably calculated to involve or in its execution did involve the use of unlawful means for its accomplishment, including any or all of the acts set out in subparagraphs (*a*) to (*c*) above or the use of a combination of such unlawful means with other means.]
- (*e*) Atrocities and persecutions and deportations on political, racial or religious grounds in [pursuance of a common plan or enterprise referred to in subparagraph (*d*) hereof, whether or not in violation of the domestic law of the country where perpetrated].

7. The official position of Defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

8. The fact that the Defendant acted pursuant to order of a superior or to Government sanction shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

9. Organisers, instigators, and accomplices who participated in the formulation or execution of a common criminal plan or in the pepe-

tration of individual crimes are equally responsible with other participants in the crimes.

10. At the trial of any individual member of any group or organisation, the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

11. In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

12. Any person may be charged before a national, military or occupation court, referred to in Article 11 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.

13. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence if he should be in hiding or if the Tribunal, for other reasons, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

14. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

15. Each Signatory shall appoint a Chief Prosecutor.

(1) The Chief Prosecutors shall act as a committee for the following purposes:

- (a) Co-ordination of the individual work of each of the Chief Prosecutors and his staff.
- (b) The final designation of the Defendants to be tried by the Tribunal.
- (c) The approval of the Indictment and of the documents to be submitted therewith.
- (d) The lodgement of the Indictment and the accompanying documents with the Tribunal.

- (e) The drawing up and recommending to the Tribunal for their approval draft rules of procedure, contemplated by Article 14 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation.

(2) The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties :

- (a) Investigation and collection of all necessary evidence.
(b) The preparation of the Indictment for approval by the committee in accordance with paragraph (1) (c) of this Article.
(c) The preliminary examination of all necessary witnesses and of the Defendants.
(d) To act as prosecutor at the Trial.
(e) To appoint representatives to carry out such duties as may be assigned to them.
(f) To undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

FAIR TRIAL FOR DEFENDANTS

16. In order to ensure fair trial for the Defendants, the following procedure shall be followed :

- (a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment translated into a language which he understands shall be furnished to the Defendant at a reasonable time before the Trial.
(b) During any preliminary examination of a Defendant, and at the Trial, he shall have the right to give any explanation which he may desire with regard to the charges made against him.
(c) A preliminary examination of a Defendant and the Trial shall be conducted or translated in a language which the Defendant understands.
(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.

- (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence.

POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

17. The Tribunal shall have the power

- (a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them :
- [(b) to require any Defendant to give testimony] :
- (c) to require the production of documents and other evidentiary material :
- (d) to administer oaths :
- [(e) to appoint special officers of the Tribunal to take evidence and to make findings (except findings of guilt) and to certify summaries of evidence to the Tribunal, whether before or during the trial] :
- (f) generally to exercise in a manner not inconsistent with the provisions of this Charter, plenary authority with respect to the Trial and the charges brought pursuant thereto.
- [(g) to appoint interpreters, reporters, clerks, marshals and other officials, either generally or for the trial of a particular case. Persons so appointed shall, before assuming their duties, if required by the Tribunal, take an oath in a form approved by the Tribunal.]

18. The Tribunal shall

- (a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges :
- (b) take strict measures to prevent any action which will cause unreasonable delay and rule out irrelevant issues of any kind whatsoever [and to prevent the use of the Trial as a means of dissemination of propaganda] :
- (c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.

20. The Tribunal shall require the Defendants to satisfy it of the relevance of any evidence before the evidence is offered.

21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

22. The acts and documents of the committees set up in the various Allied countries for the investigation of war crimes shall have the

same probative value as the acts and documents drawn up by the committee established pursuant to Article 15 of this Charter.

23. The Tribunal shall sit at _____ or at such other place as the Signatories may agree.

24. The proceedings at the Trial shall take the following course :

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty."
- (c) The prosecution shall make an opening statement.
- (d) The Tribunal shall ask the prosecution and the defence what evidence (if any) they wish to submit to the Tribunal and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The witnesses for the prosecution and for the defence shall be examined and may be cross-examined in each case by the other side.
- (f) The Tribunal may put any question to any witness, and to any Defendant.
- (g) The defence shall address the court.
- (h) The prosecution shall address the court.
- (i) Each Defendant may make a statement to the Tribunal.
- (j) The Tribunal shall deliver judgment and pronounce sentence.

25. All official documents shall be produced, and all court proceedings conducted, in English, Russian and French, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

JUDGMENT AND SENTENCE

26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall be motivated by the reasons supporting its findings and shall be final and not subject to review.

27. The Tribunal shall have the right to impose upon a Defendant on conviction, death or such other punishment as shall be determined by it to be just.

28. In addition to any punishment imposed by it, the Tribunal shall have the right to decide on the confiscation of property of the convicted person.

29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council which may at any time reduce or otherwise alter the sentences but may not increase the severity thereof. If the Control Council, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion,

would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 15 of this Charter, for such action as they may consider proper, having regard to the interests of justice.

EXPENSES

30. The expenses of the Tribunal [and] shall be charged by the Signatories against the funds allotted for maintenance of the Control Council [and the expenses of the Chief Prosecutors shall be borne by the respective Signatories].

XXVII. Minutes of Conference Session of July 13, 1945

Sir David Maxwell Fyfe called the Conference to order and expressed the appreciation of the Conference for the work done by the drafting committee.

SIR DAVID MAXWELL FYFE. Would it be convenient to take the agreement first or has anyone any preliminary point to raise in general?

MR. JUSTICE JACKSON. I should like to raise a question and perhaps also suggest the answer of our Delegation. Lest there be some misunderstanding about it, I came here not only as a negotiator but also as a prosecutor with a staff prepared to stay here and, as soon as we finish the agreement, to begin preparing the case. I have authority¹ to sign any agreement which is within the general outlines of the document which we submitted at San Francisco and of the report I submitted to the President. I think it is important for our preparation of the case that we know how fast we can proceed. During the time the drafting committee was at work, I went to the Continent. I may report that we are having most satisfactory results from the examination of captured documents. We are getting proof tracing the responsibility for these atrocities and war crimes back to the top authorities better than I ever expected we would get it. I did not think men would ever be so foolish as to put in writing some of the things the Germans did put in writing. The stupidity of it and the brutality of it would simply appall you. We want to go right ahead the day we agree here to start preparing for trial. I was wondering, first, whether the other conferees are authorized to sign as I am authorized to sign, or whether our work must be referred back to their governments; and second, whether they are authorized to proceed immediately with the preparation of the case as I am authorized to proceed with the preparation of the case.

GENERAL NIKITCHENKO. The Soviet Delegation has powers only to carry on discussions with regard to the trial and punishment of war criminals and to sign any agreement which is arrived at as a result of those discussions.

¹ Cablegram from Acting Secretary of State Joseph C. Grew to the United States Ambassador at London, June 30, 1945.

JUDGE FALCO. I expect to have authority to sign, but I do not know who will be named prosecutor.

SIR DAVID MAXWELL FYFE. I am in the position that I shall have power to sign on Monday when we have got the document in its final form, and I am the Chief Prosecutor appointed for the trial.

MR. JUSTICE JACKSON. Do we understand then that the agreement on which we are working will not have to go back to Moscow to be signed? It will be signed here when we conclude negotiations?

GENERAL NIKITCHENKO. No, it will be signed here.

MR. JUSTICE JACKSON. But you will not be the prosecutors? It may be a new group to prosecute?

GENERAL NIKITCHENKO. We're not completely certain. The chief prosecuting counsel and the members of the Tribunal may be other people. It is possible they will be other people.

MR. JUSTICE JACKSON. I think that enters into our timing considerably because we all are very anxious to get this main trial under way and concluded. As a matter of fact, the President appointed me on the theory that I would be back the first of October when our Court resumes sitting. I don't suggest I will succeed in that, but I personally must either abandon this project or get it concluded certainly by the first of the year. Our whole plan contemplates one early inclusive trial after which there will be such minor trials as may be necessary to clean up. But the question of guilt of these top people it is our plan to settle in a single prompt and inclusive trial, after which my functions will be at an end.

SIR DAVID MAXWELL FYFE. I think we are all anxious—we of the British Delegation certainly are anxious—to proceed with all possible speed to deal with the major criminals, and I have, purely for the assistance of whoever will be ultimately the Chiefs of Counsel, prepared my own idea of the list of defendants and the draft of indictment and rules of procedure which are circulated, not for the purpose of being dealt with in detail here but for the purpose of helping everyone along the road for speed.

GENERAL NIKITCHENKO. The fact that the Soviet Government has not appointed—could not appoint—prosecutors for the Tribunal until they had the assurance that the Agreement had been entered into should not and cannot serve as a cause for delay in the procedure in the Tribunal and all the preparatory work in regard to putting the case together. The consultation between the Chiefs of Counsel can be carried on without any interruption pending the actual appointment of the person who is to represent the Soviet Government on the Tribunal and in the preliminary work in preparing the case and preparing evidence. We are just as anxious as all the others to insure that the trial should take place without the slightest possible delay. And if the material for the court is prepared sufficiently well and with suffi-

cient evidence, then the trials can certainly start before the first of October. Our task here is to prepare such an instrument as will insure the efficient operation of the prosecution and the Tribunal when it gets down to work.

MR. JUSTICE JACKSON. Some things that concern us all result from my discussions with General Clay last week on the Continent. We started with the idea, which you will find expressed in my report to the President [VIII], which the President accepted and approved, and which therefore constituted the official policy of the United States, that whether we got an agreement or not we would go ahead and try these people who are in our captivity. So we have been preparing for an international trial, but if we cannot agree on one we are going to dispose of these people on a record made in judicial fashion. Therefore, we have gone right ahead without waiting for an agreement. Now, I went to the Continent to talk with General Clay about physical arrangements for a trial, whether we have to do it alone or whether we do it with others. We shall have very great difficulties about physical arrangements for a trial of this kind. General Clay says we just cannot come at him and expect him to provide a place for a trial quickly. The destruction is so complete that there is hardly a courtroom standing in Germany. We have got to have a place for prisoners. We have got to have a place for witnesses. There are many people who will want to attend—military men from all parts. We have communications to set up. The press are going to want to know about this. The public is interested. There will be at least 200 correspondents for newspapers according to our estimates who will insist on having some place to live and a place to work. That estimate includes a representation of the presses of the different countries. You will have representatives of other nations who will want to observe us. The physical setup for this is a very considerable task, and therefore the plans of the prosecution must soon be in the hands of our military people if the trial is to take place in our zone. We have engineers studying what can be done in Nürnberg right now because we just cannot leave this to the last moment and then go over there and expect to be taken care of.

SIR DAVID MAXWELL FYFE. I think it would fulfil all that has been expressed by all delegations if we took as a tentative target date that the indictment should be ready within a month and the trial, say, within three weeks after the indictment. If we took that as a target date, as a basis on which to work, it would fulfill all our plans.

GENERAL NIKITCHENKO. The Soviet Delegation is of the opinion that it is very difficult at this stage to fix any target date because the Soviet Delegation does not know the state of the evidence and the material for the accusation of these people, how far it is ready, and to what

extent it will need further preparation before it is in a form in which it can actually be used at the trial.

JUDGE FALCO. I agree with the Soviet Delegation. It is difficult to accept a fixed date, but we will take note of that date and communicate with the French Government and try to meet it.

MR. JUSTICE JACKSON. Is it fair to ask how long we can anticipate that it would take the Soviet Delegation to get its prosecutors appointed and the case ready from their point of view? I may say that with the usual reservations that target dates are merely targets and not positive, but we would try to go along with the estimate which has just been made by the Attorney-General, and our case is in such shape that I think we will be able to do it. Much will depend, of course, on the procedure to be adopted, but, if we had to wait long for appointment of our colleagues, it would be pretty difficult. What is your estimate of time, may I ask?

GENERAL NIKITCHENKO. The appointment of the Chiefs of Counsel and the members of the Tribunal is a matter, of course, for the Soviet Government, and there is no question that the Soviet Government will proceed to that point immediately when it receives information that the agreement has been concluded. There should not be any delay on that score. When the Soviet Delegation came here to commence work on this agreement, they were quite certain that an agreement would be reached, and no doubt the preparatory work on our side in that respect is being done. But they did not consider that it was possible for the other delegations to consider any course of independent trial by the various countries. This would be directly opposed to the terms of the Moscow declaration, which laid down that the trial of the war criminals should be a common task of the United Nations, and, therefore, the Soviet Delegation did not contemplate the possibility of the criminals being tried independently by different people. In conclusion, the representatives of the Soviet Delegation state that the Soviet Delegation is just as anxious as all the others to insure that the trials should take place as quickly as possible.

SIR DAVID MAXWELL FYFE. I shall just sum it up in two points: The first is that we are most anxious to have all the help that we can from our Soviet colleagues and our French allies all the time. Personally—I speak for myself—I should be very glad to have the continued assistance of General Nikitchenko and Judge Falco and their colleagues, but the main first point is that we would like to have the continued assistance in the agreement. The second is that we are animated by the same purpose, that is, to secure as speedy a trial as we can, and we might see on that basis whether we cannot reach an agreement on the draft that was left to the drafting committee.

MR. JUSTICE JACKSON. I should like to join in those sentiments. I hope that the representatives here will also be the prosecutors. In fact, I would view any change with a great deal of anxiety. It would mean a long period of getting adjusted to each other, and we think we have accomplished that at this table.

GENERAL NIKITCHENKO. We shall immediately inform our Government at the conclusion of the agreement of the opinions which have been expressed around this table, but the delegations will recognize that the actual appointment of individuals is not a subject that the Delegation may speak about and will have to be decided by the Government.

SIR DAVID MAXWELL FYFE. Could we now take the agreement [XXV] as far as the reservations signified by square brackets are concerned? There does not seem to be anything but the complete formality of the use of a seal, which does not matter at all. On the last page where it says, “. . . and have affixed thereto their seals”.

GENERAL NIKITCHENKO. I refer to article 1 where it states, “There shall be established after consultation with the Control Council of Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or as representative members of organisations or groups or in both capacities.” According to the Russian translation which we have, the text is somewhat altered from the form in which it was originally, and we consider that the present wording does not correspond with what we had in view.

MR. TROYANOVSKY. “Representative” translated in Russian is “typical”.

SIR DAVID MAXWELL FYFE. It is not quite the same really. “Representative” connotes someone who is of sufficient standing to represent the organization rather than a “typical” member. It is not the same idea in our minds. Take a concrete example. Kaltenbrunner is a leading member and, therefore, can be selected as being the sort of person that you would take as a representative if you wanted to put the Gestapo on trial. If you wanted to deal with members of the Gestapo, you would take him as being of sufficient position, weight, and responsibility to be representative in that sense.

GENERAL NIKITCHENKO. The point made by the Soviet Delegation really amounts to this—the definition of how an organization is to be found guilty, and so on, is provided for in the rules, and therefore from the Soviet point of view there is no need to repeat any of the agreement itself. But the main point is that they consider that, if you omit this word “representative”, the methods of finding and trying the organization are already laid out—if you omit this word “representative” and simply take it that they can be tried individually or in groups.

SIR DAVID MAXWELL FYFE. So long as we agree to paragraph 10, that is the main point for me.

MR. JUSTICE JACKSON. That is not meant to exclude trial of organizations as such as set out in paragraph 10.

GENERAL NIKITCHENKO. The Soviet Representatives refer to article 10 and confirm that they are in entire agreement with you. Coming back to remarks on the definition in the agreement—it is simply a question of wording which in the Russian comes out rather awkwardly. It means that, if the word “representative” is omitted, it will be quite satisfactory.

MR. JUSTICE JACKSON. I have difficulties with article 10. No American judge would consider that article 10 is quite adequate, as it stands, to put on trial the organization in a manner that would bind individual members of that organization because there is no provision here for making the organization a party in the sense of giving it a chance to defend organizationally. We would need some consideration of article 10 with reference to its sufficiency to embrace the proposal for trial of organizations.

GENERAL NIKITCHENKO. The Soviet Delegation states that it will have to consider article 10 when we come to it in the consideration of rules, but, dealing simply with article 1 in the Agreement, is there any objection to accepting the suggestion of omitting “representative”?

MR. JUSTICE JACKSON. I think we must have the word “organization” in there if we are going to try organizations. If I were sitting as an American judge, it would not give me authority to try organizations as such. This is a jurisdictional provision. I should suspect that, if we indicted an organization, the indictment would be dismissed on the grounds of no jurisdiction.

I have no objection to the change of the word “representative” to some synonym which would translate into the Russian with less misunderstanding. But I would not find the provision satisfactory without including the word “organizations” so as to authorize trial of organizational groups or so that we may accuse organizations. This is a jurisdictional provision and organizations as such would have to be mentioned so we might indict the Gestapo, the S.S., et cetera, as associations. Otherwise, I consider it inadequate to accomplish the proposal which we submitted.

PROFESSOR GROS. The one word “representative”—if you read it “those accused individually or as members of organizations or both”—Well, if you read it as “members of organizations or groups”, it implies that the only reason for accusation would be membership in the organization. So the organization would be tried.

GENERAL NIKITCHENKO. That is exactly what the Soviet Delegation has in mind, what the French Delegation has said. You are going to

try the organization as a representative body, but you are going to try it really in the person of its members. If a member is found whose guilt consists in being a member, then you have declared that the organization itself is criminal. The actual method by which you are going to secure the trial of organizations is laid down in the charter.

MR. JUSTICE JACKSON. Well, you see we have a fundamentally different concept and that is what I am afraid of. You will understand it as embodying your concept, and a different group of prosecutors who may succeed us will have misunderstanding. I think the only purpose of an agreement is to clear up misunderstandings, not to cover them up. Now, we could not convict an individual for membership in an organization merely because others had been convicted individually without some notice to that individual that his organization is under trial and some chance, in some way, for him to defend it. It would be against our conception of the rights of an individual. You in the Soviet system get at it in a different way and perhaps the better way, but it is different and I want to be sure which we are driving at here. We would have to say in the indictment that the Gestapo and the S.S. is charged with being a criminal organization so that they have notice. I have seen over 4,000 documents in our office in Paris with fingerprints, names, descriptions, et cetera, of members of the S.S. It is an easy matter to go out and get them then, and, if they are in Soviet territory, turn them over to the Soviet Government; if they are in French territory, turn them over to the French Government. But in my concept of procedure, before you go out and pick these people up and subject them to a sentence because they have been members, they have to have notice that they are on trial. I do not know just how our other delegations view that.

SIR DAVID MAXWELL FYFE. May I suggest that I could not agree more fully with Mr. Justice Jackson. The worst service anyone can do is to cover up a difference if there really is one. I don't think there is really a difference in our minds. First, I start with the assistance given by Professor Gros and in this article I omit the words "as representative" and put in "whether they be accused individually or in the capacity of members of organizations", which I think underlines Professor Gros' point and makes it clear that, because they are members of criminal organizations, they are being tried in the capacity of organizations. Now I turn to Mr. Justice Jackson's point on jurisdiction which is that, unless notice is given that the organizations may be held criminal by the trial, there would not be jurisdiction to try. I thought that in article 10 in the charter we might put in after "the Tribunal" in the second line the words "after notice that this will be done", so that it would read, "At the trial of any individual member of any group or organization, the

Tribunal, after notice that this will be done, may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." Then the Tribunal can fix what notice is necessary. I think it would meet the point that is worrying Mr. Justice Jackson that the members of the organization must have notice, and it would also meet the Soviet point as to any ambiguity on the word "representative".

GENERAL NIKITCHENKO. The Soviet representatives accept your suggestion with regard to the words "in the capacity" in place of the word "representative".

MR. JUSTICE JACKSON. Whether it would be acceptable to us will depend a great deal on what is put in the charter, and I may say, while we are on the subject, there is a way we have thought of which is embodied in this language: "At a trial wherein representative individual members of any group or organization are defendants, and notice deemed reasonable by the Tribunal is given to all members of such group or organization of an opportunity to be heard if they submit themselves as defendants in the proceedings, the Tribunal may declare (in connection with any act of which any such representative individuals may be convicted) that the group or organization of which such individual was a member was a criminal organization." But notice and opportunity to defend are indispensable to our reaching a result of conviction.

PROFESSOR TRAININ. The duty of this Conference is to get completely clear ideas about what we intend to include in any particular paragraph, to have no doubts at all as to what a paragraph actually means, and the Soviet Delegation quotes article 10 as being an excellent example of good results from the collective work which has been put in and as an example of an article which sets forth clearly the views of all the delegations taking part. It is a model of what an article should be. The central point about article 10 is that the Soviet Delegation is in complete agreement with the fact that an organization may be declared criminal. We are fully in agreement on that point. And the second point in our view is that the organization shall be declared to be criminal following a trial of individual members of that organization. Both these central facts are quite clearly expressed in article 10 as it is now. On the question of due notice of trial, that is a point which is to be discussed and suitable wording introduced when we come to the question of article 10.

SIR DAVID MAXWELL FYFE. Then on that basis, I think we can proceed. Has General Nikitchenko or anyone else any point on article 2? Article 3?

GENERAL NIKITCHENKO. In article 4, the Soviet Delegation points

out that this question of the return of persons charged is essentially a matter between two countries, the country handing over the man and the country receiving him, and therefore suggest that after the words "shall establish" we include the words "by agreement with the country concerned" or "in agreement with the country concerned".

SIR DAVID MAXWELL FYFE. I have no objection.

MR. JUSTICE JACKSON. I have no objection except that I find this turnover of accused persons is a complicated question and think it would be a good thing to consider this further. I found at Salzburg that half a million people have come into that territory occupied by the American forces. They are being loaded on trucks, taken back to the Hungarian frontier, and turned over without any identification. A number of those people are wanted as common criminals. I am advised that they just load them first and let someone know they are coming. It is just impossible to screen all of them by agreement. On the other hand, you have the situation where there is a demand for Frank by the Czechoslovakian Government, and I think they ought to try him and perhaps we ought to, too. Now I think it is going to be utterly impracticable for my Government to deal with these thousands of cases from Washington through diplomatic channels. I think it must be done by delegation, within the framework of a certain policy to the Control Council to set up their procedures. You have the question of extradition from one control zone to the other; you have the question of extradition of prisoners of war or persons who are in custody; and you have the question of persons who are not in custody and would have to be apprehended by some process or other. You have cases where we have been asked to return people against whom, so far as we can see, no charge of crime is made whatsoever. They are questions to be faced, but a Foreign Office 3,000 miles away is in a very difficult position to pass upon them, and I don't know that we at this Conference want to undertake to set up formal agreements about them. I am willing to accept and pass for the moment the provision but with the explanation that that is something that ought to be, in my judgment, a governmental matter in the sense that the Government at Washington should set up the policy, but it ought to be in the hands of the Control Council to execute.

GENERAL NIKITCHENKO. The Soviet Delegation points out that this article does not treat with the ordinary displaced persons, people taken away for labor, et cetera. It treats exclusively with the war criminals whose guilt is well known, and it is simply a question of arranging the procedure under which they shall be handled by trial in the place where their crimes were committed. It does not touch the ordinary run of criminals at all, and, when we are dealing with these war criminals who are well known to everybody and wanted by several individual countries, we consider it should be a matter of

arrangement or agreement between the two governments, the one who holds him and the one receiving him, and it remains to be arranged between them.

JUDGE FALCO. [*Not translated.*]

GENERAL NIKITCHENKO. The Soviet Union once more points out that this has nothing to do with repatriation and only refers to war criminals. In this article we are not laying down any procedure; we are not deciding whether the procedure shall be established through diplomatic channels or the Control Council or by any other method; and it is quite open to any government which is concerned with war criminals whether the procedure should be done by simply informing their representative on the Control Council to carry it out or whether it should be done diplomatically or otherwise. One important thing is that the man has to be returned to the scene of his crime, and the government to receive him should decide upon the method.

MR. JUSTICE JACKSON. My difficulty is highlighted by what Judge Falco said. If these people are minor criminals to be returned to them, I have nothing to do with them. If they are major people, we are not returning them. We are trying them. Therefore, the article seems to me to be outside of our proper sphere, but I have no doubt that my Government will agree to establish procedures and has established them, and, as I have pointed out, they are in many cases functioning now. But I would like it clear what it is intended to represent. If it is intended to represent minor criminals to be returned to the scene, then I must reiterate it is not within my authority. I am a lawyer, not a diplomat, which is surely apparent to you by this time, if, indeed, I can claim to be the former. Only major criminals who are being tried are my concern. Therefore it seems that negotiations about others here are more likely to produce confusion than to lead to good results.

PROFESSOR TRAININ. This matter is subject to considerable discussion. It has been discussed in preliminary meetings and in the committee. The Soviet Delegation is not going to repeat all the arguments that have been brought forward before, but as a result of those discussions this formula was agreed by the committee representing the general view, and as far as legal ground is concerned that legal ground is provided by the terms of the Moscow declaration. The Soviet Delegation considers that this article does represent the agreed views of the delegations as stated in the committee. It is for that reason that the Soviet Delegation points out that this article quite clearly represents the decision of the delegations. The American draft changes that. The proposal is only a matter of making it slightly more definite than it was. The Soviet Delegation is fully in accord with what Judge Jackson has said about this, and it is not suggested that this shall be a

matter of diplomatic procedure and diplomatic exchange. We consider that in 99 percent of the cases the matter will be dealt with by the Control Council, but it is obvious that in handing over these people some sort of arrangement will have to be fixed—at what point, who is to receive them, and all that sort of detail work—and it is therefore necessary that the two parties, the one handing over and the one receiving, should mutually agree on those points.

PROFESSOR GROS. In the first place article 4, as it stands, is as it has been set down by the subcommittee, and, in the second place, it just repeats a principle which is agreed and it must be read in accordance with paragraph 2 of the Moscow declaration. If you read article 4 and paragraph 2, you see there is no digression. If you take the agreement as it stands, I do not see any argument presented here. If we put in the sentence that is now suggested, we go a step further because we give more precise indication than given in paragraph 2 of the Moscow declaration, and I am afraid we are not actually entitled to do that as it is a matter of governments deciding the exact procedure. We would prefer to leave the question open.

MR. JUSTICE JACKSON. Let me say this to make perfectly clear our position. The work of the drafting committee is purely tentative so far as we are concerned. We expressly made that provision when it was appointed, and we considered that any changes any party wants to suggest to this are open to consideration. We are now considering a change in it, proposed by General Nikitchenko, which is that we add that these procedures are to be established by agreement of the governments involved. If that leads to what I would expect, representatives in Washington will immediately go to the State Department and say, "We want to make an agreement with you about the return of certain prisoners." I have advised that the State Department ought to lay down only general principles and refer specific instances to the Control Council. It has not been decided what will be done, but the Control Council is in frequent sessions, and they are in touch with this problem, and their procedure is likely to be very informal. You want a prisoner and General Kharkov will ask General Clay for the man. General Clay, I expect, will ask us whether we want him for the International Tribunal. If we say, "No, we have no need for him", I expect he will say that he will be in such a train at such a time and you may take him over at such a point. I do not want to obligate my Government to enter into a series of agreements in Washington on that thing. It does not seem necessary. The good faith of the United States is pledged in the Moscow declaration. I am willing to say that the agreement we made once we reiterate, but I don't want to obligate the Government to make a series of treaties, and it is not within my commission to do so. That is my point.

PROFESSOR TRAININ. I fully agree with the statement made by the American Delegation that the work of the committee is of preliminary character, and there is no possible objection to altering it in any way at the meetings of the Conference.

SIR DAVID MAXWELL FYFE. May I suggest for the consideration of the Soviet Delegation Professor Gros' point that it has already been emphasized that this must be subject to the recital of the Moscow declaration, which implies that the other governments will be consulted, and that on that basis of the views expressed and in the reiteration, in which I join, we shall all stand by the Moscow declaration. It is not necessary to press this point.

GENERAL NIKITCHENKO. The Soviet Delegation would like to point out once more that in the article and the suggestion they made there is nothing at all to say that these agreements have to be reached by diplomatic method. The government must decide the method to be adopted, and it may be through the Control Council or may be through law. The statement made by Judge Jackson clearly shows that, in the process of handing over any individual criminal, there is an agreement by the two sides—somebody from the one side or the other does arrange the time and everything else and fixes the procedure of handing over, which has nothing to do with diplomatic agreement or discussion—and therefore it is from their point of view that there must be arrangement by somebody that the Soviet Delegation has proposed this slight clarification of article 4. Would it help if you said "arrangement" instead of "agreement"?

PROFESSOR GROS. Would it help if we say, "put at the disposal of the interested country, to be tried at the scene of the crime" or "the return of a person charged with offenses who in accordance with the Moscow declaration would be put at the disposal of the interested country to be tried at the scene of their crime"?

SIR DAVID MAXWELL FYFE. There is another alternative, it seems to me. The real point of difference is whether to make the agreement before establishing the procedure—which Mr. Justice Jackson has given his reasons against—or to consult the government of the receiving country, which we are all agreed upon. There is no difference between us, if each of the signatories shall establish a procedure providing, after consultation with the country interested, for the return of the persons.

MR. JUSTICE JACKSON. Well, I think in the first place that the article is outside of my authority if it refers to the minor criminals, but I have no hesitation in saying that the United States will conform to the Moscow declaration. But I do want it made clear that we are not undertaking to agree to return persons wanted for trial by the International Military Tribunal. In other words, the International Tribunal

requirements take precedence over this because, if other governments are to be given more or less what appears to be rights under this, we want to make clear they have no right to interfere with the international trials.

GENERAL NIKITCHENKO. The Soviet Delegation expresses agreement with the suggestions put forward by Professor Gros. They now propose a slight change as follows: "Each of the signatories shall establish procedure governing the return to the country concerned by arrangement with that country of persons" et cetera.

MR. JUSTICE JACKSON. Well, I still think it is outside of our business and that it presents difficult problems. What persons are to be returned? We are not going to return persons we want for trial by the International Military Tribunal. That exception should be in. The moment we say that, we in effect say that the rest is outside of our business. The Soviet proposal I shall cable to the State Department, and I shall be governed by instructions because I do not consider that the provision is within my authority. It seems innocuous to say we would comply with the Moscow declaration. That I know to be the policy of my Government, and I saw no difficulty up to that point. But we have many difficulties about specific cases, and I think it must go to the foreign-affairs authorities in my country.

GENERAL NIKITCHENKO. Article 4 does not have any question of handing over the major war criminals.

PROFESSOR GROS. I wonder if I could make a suggestion. When we read the declaration of 5 June 1945 with Germany, we see that there is an article here on surrender of all war criminals who had been designated. There is also an article on the thirteenth which says in paragraph b that complementary requirements would be imposed, and I am under the impression that those requirements are worked out actually and perhaps one of those requirements covers the point which we are actually discussing. All those countries which are represented here also have a delegation in London, and I would suggest that each one of us make contact with the members in each delegation and ask them if such an article has not already been prepared and signed. If it has, it would save us much trouble and discussion here.

GENERAL NIKITCHENKO. The Soviet Delegation points out that article 4 does not cover only those war criminals who are in Germany but also many of them who are at the present time in other countries. The authority of the Control Council extends only to Germany, not to those other countries, and it is intended that the provisions of this article be applied to those people who happen to be in those countries other than Germany. But for some reason they are being moved to Germany, and we are anxious that this be made clear.

MR. JUSTICE JACKSON. Well, I think nothing further is to be accom-

plished by discussing it. I will submit it to the State Department because I do not feel it is within my power to deal with anything but major criminals, and I have already advised the State Department that I declined to take responsibility for the return of minor criminals beyond deciding that they are not needed for the international trials.

SIR DAVID MAXWELL FYFE. I wonder whether we might reserve this for discussion again in the afternoon. As I understand Mr. Justice Jackson's difficulty, it is the question of his authority in dealing with the minor criminals. Would it go as far as we want it in this agreement to meet the point that has been raised by Professor Gros to put it in this way: "Nothing in this agreement shall prejudice the provision of the Moscow declaration concerning the return of war criminals to the countries where they committed their crimes"? That would cover this point, Mr. Justice Jackson, if it were put in that way, would it not?

MR. JUSTICE JACKSON. Yes, that would be entirely acceptable.

GENERAL NIKITCHENKO. Perhaps we will consider it in the text.

SIR DAVID MAXWELL FYFE. I am very anxious that we reach agreement on this and other points.

GENERAL NIKITCHENKO. We have one more last remark on the agreement.

MR. JUSTICE JACKSON. Let us finish on the agreement if we can.

SIR DAVID MAXWELL FYFE. I wonder if I may have a point on article 5. Will you allow me just to mention it? The article provides for any government of the United Nations to accede by notice given to my Government. I am a little worried. I don't raise this as a vital point but a point I should like all of the delegations to consider. I am a little worried whether this leads us very far. Does accession impose any rights? I thought that, if we provided two things: first of all, affording other Allied governments a right to participate, and second, seeking the cooperation of the United Nations, we might be giving some more concrete and specific thing to them when inviting their cooperation on something that would help ourselves. I do not want to press the matter but think it a more practical approach on which I should like my colleagues' views.

GENERAL NIKITCHENKO. The Soviet Delegation, in regard to article 5, consider that the accession of any country, any of the United Nations, to this agreement does not in any way grant rights to that country. The accession does not give it any rights, and, therefore, there is no chance of the question being misunderstood in the sense that by acceding to it they thereby secure some right which they have not at present.

MR. PATRICK DEAN. If anybody feels that "accession" is wrong, we are perfectly happy to change it to "adherence". I merely feel that that is a common formula.

MR. JUSTICE JACKSON. I agree fully with the point that has been made by the Attorney-General. My question goes a little farther than that perhaps. We have felt very keenly that the War Crimes Commission has been doing excellent work and that the War Crimes Commission ought to have some opportunity to present its work if a way could be found. I mention it now, not having brought it up before because I had assumed we were all going to be prosecutors and therefore we could go on with the next step when we settled the agreement. We do not want to get into the problem of trying all of these individual cases, but here is an official commission set up to represent the United Nations, except Soviet Russia, which has her own Extraordinary Commission, and of course I think her Commission should have the same privilege. It has seemed to me a report by this Commission on the Nazi crimes, or reports by separate governments composing it, might properly find some lodgment in this Tribunal in some manner as an official survey of the methods by which these people conducted warfare. It has seemed to us that a great deal of excellent work has been done here by eminent men whose names are back of their indictments, and we value it. Let me say I think my Government has not supported it as adequately as it should have, but, since we have been in this work and in touch with it enough to know what they have done, we feel that some method should be devised by which the occupied countries of the United Nations, through this Commission, can make some proper presentation of their cases in this trial. The method I don't presume at this moment to outline because we have not thought it through, but I feel that purpose should underlie our attitude toward the smaller countries.

SIR DAVID MAXWELL FYFE. The point is, does the Conference feel we ought to have a provision for adherence or simply for consultation as to evidence? That is the point I would like your views on.

GENERAL NIKITCHENKO. The Soviet Delegation considers that the article as set forth now in the agreement fully meets the requirements. It does not provide any rights to any of the other governments which may adhere afterwards, and the fact of adherence of the other United Nations will merely express their wish to cooperate and assist in the work of the Tribunal to punish the war criminals.

SIR DAVID MAXWELL FYFE. I do not want to press it, as I said, but I want to express my agreement with Mr. Justice Jackson that we must find a method of receiving their evidence and recognizing the work they have done when we prepare for the trial. I will not press this any further.

Then we do agree that we could use the word "adhere" instead of "accede".

[It was so agreed.]

GENERAL NIKITCHENKO. The question of an acceding government was not discussed in the committee, and in the opinion of the Soviet Delegation it is entirely wrong that an acceding government should be given the right to participate. It is a question of excluding the word "acceding".

SIR DAVID MAXWELL FYFE. Yes, I agree, as far as I am concerned.

GENERAL NIKITCHENKO. It is simply an oversight and, of course, for reasons already explained.

MR. JUSTICE JACKSON. I think we have one more question on article 7. Shouldn't we make it clear that, while any party may terminate and withdraw from further obligations to proceed, the termination shall not affect the validity of what already has been done, does not affect the substantive law principles involved, and does not invalidate the agreement as between the remaining powers? The remaining ones might want to go ahead. Should we not include those ideas in the termination article?

SIR DAVID MAXWELL FYFE. Would it not be covered by saying, instead of "terminating", "withdraw" from it?

GENERAL NIKITCHENKO. No one would prevent the two or three remaining powers from agreeing to do as they wish. If one withdraws, the remaining could do what they wish. This is an agreement between four governments. If one withdraws, it ceases to be an agreement. There should be some new agreement if they wish to make one.

MR. JUSTICE JACKSON. That is what we should seek to avoid. If one quit, it should be possible for the others to go on without waiting to renegotiate a new agreement. We don't want the withdrawal of one to break up the arrangement.

PROFESSOR GROS. The agreement reads ". . . and shall remain in force for the period of one year. . . ." There is no danger for the first year, and, if some three governments, let us say, want to remain, there is no reason for a new treaty. Just keep this one.

PROFESSOR TRAININ. This agreement is on the part of four parties. In the prosecution committee, for instance, there are four parties. If one disappears, you would have to change the agreement.

MR. JUSTICE JACKSON. Frequently a clause is put in contracts that the withdrawing of one party shall not affect the rights of the other parties.

SIR DAVID MAXWELL FYFE. Would something like this help—"but such withdrawal shall not prejudice anything done under the agreement or its continuing validity among the remaining signatories"?

GENERAL NIKITCHENKO. We will consider that point. This is a technical one. Any agreement normally establishes a period during which it is to remain in force, and perhaps the best way to do it would

be not to fix a definite period of one year here but to say that this agreement shall remain in force for the period necessary for the object of the agreement to be achieved, or until the tasks of the Tribunal shall be completed, or something of that sort.

MR. JUSTICE JACKSON. Well, I am not particular about the draftsmanship of it as long as it works out substantially to avoid breakup of a trial by one nation's action.

SIR DAVID MAXWELL FYFE. General Nikitchenko, will you give us again the wording of that last suggestion?

GENERAL NIKITCHENKO. Something like "shall remain in force for a period of one year and shall continue thereafter for the period necessary to achieve the completion of the task set themselves by the signatories". I cannot say whether that method of fixing a period is an acceptable method.

SIR DAVID MAXWELL FYFE. I am prepared to accept it in that form.

MR. JUSTICE JACKSON. I agree. One thing more. This provides for signature by "plenipotentiaries". I do not know whether I am a "plenipotentiary" or not. Perhaps the British Foreign Office will advise me. The name is so formidable that I would not like to assume it without adequate authority.

MR. PATRICK DEAN. It could be used correctly.

The Conference adjourned until 3 p.m.

SIR DAVID MAXWELL FYFE [*presiding*]. With respect to article 4— can we come to an agreement on that?

GENERAL NIKITCHENKO. The situation is still exactly as it was.

SIR DAVID MAXWELL FYFE. Have you given any consideration to the draft I gave to you?

GENERAL NIKITCHENKO. No, we have not had time.

SIR DAVID MAXWELL FYFE. Perhaps then we might leave that. We must clearly understand I think that this is the position. If it is left in the form of a provision for arranging with the governments of other countries, then Mr. Justice Jackson will have to consult his State Department. That is the position, isn't it?

MR. JUSTICE JACKSON. That would be the position. However, without specific instructions, I would be perfectly willing to have our agreement contain the provision, in substance, that "nothing in this instrument should prejudice the obligation assumed under the Moscow declaration to return persons in certain categories to the scenes of their crimes."

GENERAL NIKITCHENKO. We should like, if possible, that the sug-

gested wording be put forward in writing. It is rather difficult to get it. We will be glad to submit our suggestions in writing.

MR. JUSTICE JACKSON. It could read, "Nothing in this agreement shall prejudice or release the obligation of the parties to the Moscow declaration to return for trial at the scene of their crimes the persons therein described."

GENERAL NIKITCHENKO. Let us return to this point later on.

SIR DAVID MAXWELL FYFE. The other point the Foreign Office has put to me—I am sorry to raise it again—is that it is usual in agreements to provide for a period, and we are rather worried about leaving it without any period in article 7. I think we ought to get the views on that point. I am told that is the correct procedure.

GENERAL NIKITCHENKO. The Soviet Delegation is proposing that we should adopt the suggestion already made, that is, that this agreement shall be for a period of one year and thereafter shall continue subject to the eventual provision of a month's notice of withdrawal or until the task of the Tribunal has been completed—that the agreement shall continue until such time, et cetera, for a period of one year and to place a definite period.

SIR DAVID MAXWELL FYFE. I thought you said one month's notice would apply after the year.

GENERAL NIKITCHENKO. We agree that the one month's notice will apply after the year. Exactly as it is in the agreement. Simply make it "one year and shall continue thereafter, subject to the right of any signatory to give through the diplomatic channel one month's notice"—just as it was, putting "withdraw from" instead of "terminate". What exactly is implied by "withdraw"?

MR. PATRICK DEAN. One party could withdraw at the end of the year, but the agreement would still run on, as I understand it.

PROFESSOR TRAININ. The Soviet Delegation thinks this could not be carried out even if we all agreed to it. There is nothing to prevent the other parties wishing to remain in to conclude another agreement.

SIR DAVID MAXWELL FYFE. That would imply the other parties would have to make a fresh agreement.

GENERAL NIKITCHENKO. They can make the same agreement, of course, but confining it to the three parties remaining.

SIR DAVID MAXWELL FYFE. The only point is not to fix a termination that might prejudice any action taken during the year.

MR. JUSTICE JACKSON. I think we should make it clear that it does not. So far as I am concerned, I would be willing to let any party withdraw during the year if it wanted to, because I think no unwilling partner could work well even for one day. I'm perfectly willing that anyone can withdraw on 30 days' notice or 10 days' notice. I do not favor holding anybody in a cooperative arrangement like this the

moment he does not want to cooperate. The only thing is that we should make it clear that the work already done should stand after a withdrawal and the other three parties may still carry on if they wish. We might have an agreement and, though I hope not, we might have a disagreement when one might wish to withdraw even in the middle of the trial, and we should not be obliged to start over again. But I am not for holding anybody in who wants to be excluded.

SIR DAVID MAXWELL FYFE. If we leave it in the original form, "one month's notice of intention to terminate it", then such termination shall be done prior to any—

GENERAL NIKITCHENKO. The Soviet Delegation considers it superfluous. Supposing we have condemned one of the criminals—it is not effective because one has left the agreement.

MR. JUSTICE JACKSON. But suppose you have pending trials or a trial pending, or suppose you have indicted parties and then there is a withdrawal. It should not invalidate the proceedings taken up to that date, but the remaining parties should be entitled to modify their agreement and proceed. Certainly the party that withdraws has no interest in seeing the parties who remain disabled from proceeding, and it would seem to me that we should make it clear that the defendants under those circumstances would have no right to claim the proceedings had abated.

GENERAL NIKITCHENKO. I fully agree with that. It won't prejudice the action past or pending, but the Soviet Delegation does not see any necessity to include the words to that effect in the agreement itself.

MR. JUSTICE JACKSON. Unfortunately, it might be held in the absence of a provision that a dissolution of the parties has terminated the agreement.

SIR DAVID MAXWELL FYFE. It seems to me the position is that we agree as to what we want, and it is simply the question of wording the new point introduced as to pending proceedings which we all agree should not be affected in any way. I wonder if the Soviet Delegation would consider this: "any proceedings pending prior to the expiration of the notice shall not be affected." It seems to me that is what we want, and it is only a question of finding words to meet it.

GENERAL NIKITCHENKO. If the agreement had terminated, it would not affect anything that was proposed to be done. The remaining parties would have to arrange about that themselves.

SIR DAVID MAXWELL FYFE. Is there any harm in putting in the agreement what we have all agreed on?

GENERAL NIKITCHENKO. The point is that, in so far as anything done in the past is concerned, that cannot be affected by any termination, but in anything that may happen in the future, that is another matter. I cannot see how you can make provision for something that may happen if the agreement has been terminated.

SIR DAVID MAXWELL FYFE. Is there any harm in just saying, "but without prejudice to anything done prior to expiry"?

GENERAL NIKITCHENKO. The formula suggested by the Soviet Delegation is something like this: "shall not invalidate or nullify action taken in accordance with this agreement prior to its termination in accordance with this agreement."

MR. JUSTICE JACKSON. Would a British judge think that sufficient to continue a trial under an agreement that was so terminated? Or is his power terminated unless the governments bring in some new agreement?

SIR DAVID MAXWELL FYFE. It would cover you up to the date of termination.

MR. JUSTICE JACKSON. Is it the basis for further proceedings between the remaining powers?

PROFESSOR GROS. I do not see exactly the situation. Let us suppose one of the Four Powers decides to withdraw. Anyway, that Power will give a month's notice. During that month the three others may exchange notes and by exchange of notes they may maintain the charter. There would be three judges instead of four, and the voting would be two to three. It is easy to do that in a fortnight or less. I think it most important to leave those questions open.

GENERAL NIKITCHENKO. The Soviet Delegation entirely agrees with what Professor Gros says. They cannot see any point in making an addition of this kind. They would agree to such a provision if that would enable them to meet your views, but in their opinion nothing that has been done in the past in accordance with the terms of this agreement can possibly be questioned in any way.

SIR DAVID MAXWELL FYFE. Which would you prefer, Mr. Justice Jackson?

MR. JUSTICE JACKSON. Well, if the Tribunal were applying the Soviet law, I would accept just what Mr. Nikitchenko and Professor Trainin suggest. If I expected a judge to apply American law, I should have doubts whether you could merely continue the proceedings of trial in case a withdrawal terminated the jurisdictional agreement, but I am not going to be fussy about that and will just let it go.

SIR DAVID MAXWELL FYFE. I agree, in view of what Mr. Justice Jackson says. We will leave it as it is.

MR. JUSTICE JACKSON. Then it terminates and we say nothing about its effect.

SIR DAVID MAXWELL FYFE. We leave it as it is.

Article 4 is the only point outstanding on the agreement. Now we come to the charter.

The first point is in paragraph 6, subparagraph (c). Is there any question before that? I have none.

GENERAL NIKITCHENKO. The first point is a point of drafting. In paragraph 1 of the charter there is no statement of the parties to the agreement, and in the opinion of the Soviet Delegation it is essential to name the parties to the agreement. Just recite the names of the parties.

SIR DAVID MAXWELL FYFE. That is purely a matter of drafting. I have no objection. Have you, Mr. Justice Jackson?

MR. JUSTICE JACKSON. None at all.

GENERAL NIKITCHENKO. The next question is in paragraph 5, "sit in one or more Chambers or Divisions" In the opinion of the Soviet Delegation it should be only one—either in one or more Chambers or one or more Divisions—because the use of both words, "Chambers" and "Divisions", implies some doubt in our minds as to what that should be.

SIR DAVID MAXWELL FYFE. I should like to know from the draftsmen what they meant by "Chambers".

SIR THOMAS BARNES. I think they meant "Divisions".

PROFESSOR GROS. A chamber is one division in the French court. The French court is divided into two or three chambers. Let us take an example. In the French court the court in Paris is one court, but it sits in several chambers and it is the chamber which gives judgment. It is only a question of wording.

SIR DAVID MAXWELL FYFE. Here is a court of four. Is it suggested that it might sit two and two?

PROFESSOR GROS. No, not at all.

SIR DAVID MAXWELL FYFE. Does it mean that it would sit in more than one chamber?

PROFESSOR GROS. I suppose we might have more than one trial, and one chamber would sit in Berlin to judge so and so; another chamber would sit in Nürnberg to judge so and so; and a third chamber might go anywhere else. There might be four judges and four chambers.

SIR DAVID MAXWELL FYFE. My feeling is that we had better start with one, and then, if the necessity arises, let us agree to make another. What do you feel, Mr. Justice Jackson?

GENERAL NIKITCHENKO. But it is stated here that "procedure of each Chamber or Division shall be identical, and shall be governed by this Charter."

SIR DAVID MAXWELL FYFE. In case of need. I have no strong feelings on this at all.

MR. JUSTICE JACKSON. Well, I think it is a situation in which we ought to clarify our feeling or thinking a little bit. If we are setting up three or four tribunals here, the United States is not prepared to do its part. We are thinking of preparing one case. We will have only one prosecuting staff. We would not be prepared to furnish

prosecutors or judges for a whole group of tribunals. Now, I can see no advantage in having different chambers of the same international tribunal unless we are not able to work out a procedure by which we can all prosecute together. If you have several chambers of an international tribunal, they might proceed according to different procedures. I am not wedded to my procedure. I just don't understand any other. If you say that these four chambers must function but by identical procedure, then we would have to have four prosecuting staffs. I think we could get into endless complications. Now, really, gentlemen, we will have an awful job to try one case in four languages as we are undertaking here to do, and I do not want to spread so thin as to take on several international trials at once. We from our side of the water are not notoriously modest, but there are limitations on what we can get accomplished. I think we would be undertaking too much here in one bite, if you will let me put it that way.

GENERAL NIKITCHENKO. The Soviet Delegation is referring back to article 5 of the original American draft where it is stated that one or more tribunals will be set up by the Control Council.

MR. JUSTICE JACKSON. We thought it was possible that after the first trial others would be discovered or captured, in which case other tribunals might be necessary, and we tried to provide for this in the draft so that we would not need to negotiate a new agreement; but we did not make several tribunals a normal procedure, and that is the difference in our drafts.

SIR DAVID MAXWELL FYFE. I think it says "in case of need". Isn't it simply a question of wording? If I understand it, this is something to be used in case of extraordinary necessity. Just a matter of getting the language that is understood by the four countries.

GENERAL NIKITCHENKO. The Soviet Delegation proposes this: "In case of need and depending on the number of the matters to be tried, one or more tribunals may be set up and the establishment, functions, and procedure . . ." et cetera.

SIR DAVID MAXWELL FYFE. That follows the American draft, don't you think, Mr. Justice Jackson?

MR. JUSTICE JACKSON. I should like to reserve it for future consideration, depending upon how well we agree on procedural matters, whether we should set up more than one tribunal, one to proceed along the lines of Soviet procedure and one along our own lines, and we can proceed with an official language and not four.

SIR DAVID MAXWELL FYFE. You are suggesting that we see how we get on with the agreement.

MR. JUSTICE JACKSON. Yes, I just reserve that question. May we go back, please, to number 3? The "replacement of judges" provision I assume means that no replacement can take place during any trial.

GENERAL NIKITCHENKO. The Soviet Delegation agrees there can be no replacement during the trial. It would not apply unless the judge and the alternate were both absent at the same time.

MR. TROYANOVSKY. Because ordinarily the place of the judge would be taken by his alternate.

GENERAL NIKITCHENKO. That is to say, the case goes on. If one of the judges falls ill, then his place is taken by the alternate, and the case goes on. That is provided for in the last sentence of number 2.

MR. JUSTICE JACKSON. I agree, but the point I make is, as I explained before, that we could not agree to a court which would be subject to reconstitution because its rulings were not satisfactory, or anything of that kind, and could not consent to recall of a judge during the trial.

SIR DAVID MAXWELL FYFE. I think that is agreed.

SIR THOMAS BARNES. Are we going to alter the text?

MR. JUSTICE JACKSON. We could simply add, "No replacement could take place during the trial except by the alternate."

SIR DAVID MAXWELL FYFE. We suggest that "no replacement shall take place during the trial except by his alternate."

MR. JUSTICE JACKSON. May I raise one more question—the provision about the selection of a president? I think there is difficulty here. We may as well face it. We do not contemplate any trial on the territory of the United States. We do not, I assume, contemplate any trial in Britain, and probably not on the territory of France, which means that at least three of the countries are automatically excluded from the presidency. You are not in the territory of any of these countries when you are in Germany even if it is occupied territory. Berlin is, partly at least, neutral territory, and it seems to me we have got here a provision that has in it the seeds of confusion, and we ought to say what we mean a little more definitely with reference to the practicalities of this situation. We shall be sitting in territory occupied, but it is not territory of ours. We certainly do not make any claims to the territory.

SIR THOMAS BARNES. That is covered in the second paragraph, isn't it, where it says, "In other cases, the members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a president . . .", et cetera.

MR. JUSTICE JACKSON. Well, that is all right if that is so understood.

SIR DAVID MAXWELL FYFE. Is there anything else, Mr. Justice Jackson?

MR. JUSTICE JACKSON. I don't think so.

GENERAL NIKITCHENKO. I have a suggestion to make on the discussion of number 6. The point is that the committee was unable to agree on the drafting of points (c), (d), and (e). We objected to (d) because we considered it already covered, but it seems now that

article 6 is the one which raises most problems on which there has been least agreement so far. I think we should leave article 6 out, proceed to other articles, and come back to it, as it is the most controversial article.

MR. JUSTICE JACKSON. May I mention before we leave number 4 the question as to four members of the Tribunal or their alternates being necessary to constitute a quorum? I would have a little question as to whether all four must be present every moment of the time and don't think it is quite clear here whether, in the absence of a member, his alternate could sit in his place. I would be inclined to make it three because sometimes you have temporary absence—a man is late or absent due to illness—and the others could go ahead. I think it is just a matter of draftsmanship—the meaning is clear.

PROFESSOR TRAININ. The Soviet Delegation is quite prepared to accept that with definite wording.

MR. JUSTICE JACKSON. Do you think four is necessary at all times for the hearing? I think four should be present at any vote, but, if a man is just temporarily delayed, or something of that kind, would you want to stop the proceedings on account of the absence?

PROFESSOR TRAININ. For a hearing the Soviet Delegation considers you must have four present, that the court is not constituted if the four are not present, and would not be empowered to hear the case if the four or their alternates were not sitting.

JUDGE FALCO. [*Not translated.*]

SIR DAVID MAXWELL FYFE. I don't think it is a very important point, Mr. Justice Jackson. We'll just have to see that the four of them are on time.

I am anxious myself to meet any suggestion. Shall we see how far we get on with the others and then turn back to number 6? Shall we proceed to 7, 8, and 9? If there are no questions, we are down to 10. In number 10, Mr. Justice Jackson, you did intimate this morning that you had a point there.

MR. JUSTICE JACKSON. Our point really is not so much with number 10, providing it is understood that the organization may be tried as such and provided there is put in the agreement a proviso for some manner of notice, constructive as we would call it, or actual, which the Tribunal would think sufficient so that the members are likely to be reached. Unfortunately, in one of our own redrafts, the provision about notice seems to have been dropped out. But somewhere along the line we must give notice to these members that this issue is up. We can give it by constructive notice. It may not have much practical meaning, because I doubt that anyone would come forward and identify himself as a member of an organization, the leaders of which are in jail, but I cannot satisfy American legal opinion with any

procedure in which there is not some attempt in good faith to give notice to a man that there are legal proceedings going on which affect him and give him a chance in some manner to be represented and heard.

SIR DAVID MAXWELL FYFE. Is this what you have in mind, Mr. Justice Jackson, that it would be constructive notice, for the actual notice is rather difficult, as we would not know the number? Notice would be given on the radio and through the press, whatever press is functioning in Germany, that at the trial of, say, Kaltenbrunner, the court will be asked to pronounce the organization known as the Gestapo to be a criminal organization. If he wishes to attend and dispute this point, he may attend before the court. That is about what you have in mind?

MR. JUSTICE JACKSON. Yes. He might come in and submit to the jurisdiction of the court, which might make conditions rather onerous, but I think we must give him some fair chance. I do not think he can be bound by the decision when he has not had an opportunity to be heard.

GENERAL NIKITCHENKO. The Soviet Delegation is not quite clear. In practice probably the whole point is quite an unimportant one, but, theoretically, take the trial of Kaltenbrunner. A notice will be issued that at the trial the court will be asked to pronounce that the Gestapo is a criminal organization and anybody who wants to dispute this or defend his case must come forward. Well, supposing some hundreds of the members of the Gestapo did choose to come forward to defend the case of the organization. What would happen in the court and particularly what would happen on the trial of Kaltenbrunner if a hundred or two came forward to join in?

PROFESSOR GROS. Representative members of those organizations would be put on trial, but, if they are present, other members of the organization have no claim to say that the organization has not been charged in full knowledge of its functions, and there is the possibility that, if others come in, we shall have to refuse them because we are not going to charge minor criminals. The Tribunal must say we do not want to hear them. I would say I picture this in quite another way. There are very good lawyers in Germany and in the Nazi Party who probably would come to the bar and discuss questions some smaller member of the Gestapo would not be in a position to discuss. But we would be very glad to have more criminals, as I said, and we may misunderstand the point.

MR. JUSTICE JACKSON. I must say this is a problem of real difficulty. My own view of it is that the practical side of it is not serious, but I may be wrong. We shall have, locked up and on trial for their lives, the chiefs of these organizations. I find it difficult to believe that

many men will step forward and say, "I am one with him and want to be heard." But if a man does, he must submit himself to the jurisdiction of the court and be locked up. And if there are 200, I would let them choose a lawyer and be heard. There would be 200 of them to be condemned, if we were successful in our case and ready for sentence. I do not think it is necessary that all be present in court, particularly if they appear by representatives. We will have masters. The court can act through them to take testimony as need be, but they will already have identified themselves as parties and parties who knew what the Gestapo was. The only thing I would think might induce their appearing would be that in jail they would be better fed than if at large. If they don't come forward, you have no trouble, and if they do, you have the trouble of letting them be represented. The difficulty is—and I don't know whether it is a difficulty because it is one of the things I should fight for—we don't condemn persons who have not had a chance to be heard on the issues. We have to give them some chance to be heard when picked up and identified. It seems to us that the risks of dealing with them in the main trial are much less than the risks of leaving it open to them to raise those questions in later individual trials. If anybody has a better plan for reaching these groups, we are open to suggestion, for among ourselves these points have given us trouble and caused endless debate, but we cannot say to American opinion that any man has had a fair trial who has not, at some point, had a chance to be heard on all issues involved in his conviction. We rather thought we followed the British ideals in that.

SIR DAVID MAXWELL FYFE. In that case, they would be given the chance of presenting to the court anything they had to say by a German lawyer. But it is not likely anyone would put his head into the noose.

GENERAL NIKITCHENKO. The Soviet Delegation does not quite see the point. We are not establishing a tribunal to try all members of these organizations. The whole purpose of the Tribunal is to try the chief criminals only, and in the course of that trial the court may give a verdict that the organization to which those criminals were parties is a criminal organization. As a result of that decision the individual small members become liable to penalties as members, but they will be tried by a whole series of courts, one kind or another, occupational courts or national courts, and at those trials they will have every opportunity to put forward anything they care to make in their defense. But the point we are setting up here is one to try the chief war criminals. It seemed to us that in our discussions here, fairly considerable discussions, we had achieved unanimous understanding with reference to the organization. The organizations will not be tried as legal en-

tities, and, arising out of the verdict in the case of the individual, a verdict can be pronounced that the organization to which he belongs is criminal. Therefore, our suggestion is that number 10 should be accepted in that wording in which it has been agreed between us, and the Soviet Delegation points out that 11 goes on to talk of the consequences of what happens in 10.

MR. JUSTICE JACKSON. But we have not agreed to number 10. I pointed this out at every meeting, I think, at which the subject has been up, because it is a very difficult point for us. It arises from the fact that in our jurisprudence nothing is more fundamental than that the decision binds no one who is not before that court. If I were a member of an association and if one member were tried and convicted and I were later apprehended, I would have the right to raise every question in my defense, and they couldn't even use the former judgment against me. It may be a very wrong concept, but that is our tradition, that is our conception of what American legal opinion believes constitutes fair play. What we try to do in our proposed application of this principle of fair play is this: we try to reach all the different organized elements that have brought this terrible thing on Europe, and we adapt our principles so that, with what we think is fair play, we can practically get at these vicious organizations. If you cannot do it through that procedure, you have to go through literally thousands of trials. As I said, we have complete identifications of 4,000 Gestapo people, but you just can't count on us for 4,000 trials. We are trying our level best to figure out a system which will be best to do what we want to do, to get these people, and at the same time get what we feel are methods people will consider fair and just and not a violation of our principles and traditions. Now this is a point that, as I can very readily see, seems trivial to those of you who are accustomed to a different system, but it is a point that will affect the acceptance of the result of these trials as fair in the United States.

GENERAL NIKITCHENKO. May I ask a question as to what Mr. Justice Jackson has just said? Taking this point of notice—what would be the consequence for those 4,000 persons that he has mentioned? Supposing this notice is given—are they all to respond to it and are they all to be allowed to defend themselves at the trial, or is it that they will be considered guilty as a consequence of the decision of the International Tribunal, and that in respect to each individual one of them it is simply a matter for the court, the subordinate court, to hear whatever he may have to say in his own defense and to mitigate punishment in accordance with its findings in each individual case?

The further point is that, supposing this announcement is made—these 4,000 people are presumably locked up at the present time, and it is certainly not suggested that the whole of these 4,000 persons will

appear before the court and offer a defense. The Soviet Delegation does not know what the effect of that might be on the American public opinion, but the effect on Soviet public opinion would certainly be that the mere fact of having given notice and then proceeding to deal with these people is not affording anything in the nature of a fair trial, and it would react very negatively in a position of that sort.

MR. TROYANOVSKY. If the organization is deemed criminal, that is, if these persons would be convicted on the basis of having belonged to that organization without having an individual hearing, that in itself would be a grave injustice.

MR. JUSTICE JACKSON. It is not planned to change number 11 at all. We are now merely trying to get a finding or decision that they are criminal organizations. The individual, when he is picked up, would have the chance to make the defenses which Mr. Nikitchenko outlined here. I thought he stated it much better than we had it in our draft—the right to claim he was forced into the organization, the right to claim he did not understand its principles, the right to give new evidence in mitigation, he would have that right before sentence. But our problem is, can you limit him to that? We want a finding under section 10 which would limit him to giving that personal and individual kind of defense when picked up and brought before the occupational or military courts, or whatever courts they may be, in order to foreclose him and prevent him from raising the whole question whether the organization was criminal and going through that 4,000 times. Under our ideas we would have to give a man a chance to be heard. That does not mean each of the 4,000 would actually be heard. If 4,000 came in, they would be locked up and allowed to choose someone to represent them. You would not be obliged to listen to each of 4,000 people but would have a master hear their evidence. I think it is highly unlikely that any substantial number would appear. Perhaps a few fanatics. Already they are accusing each other. They say, "We never knew the organization was doing anything of this kind." The whole effort of every German we have interrogated is to get away from this thing as far as he can. We haven't any fear they would come forward and say they were Gestapo people and knew what it was doing. But if they did, we would have to deal with it. It is a possibility.

GENERAL NIKITCHENKO. If the organization is declared to be criminal, does the punishment ordinarily extend to all its members, and, if it does not extend to all the members, who is going to apply it?

SIR DAVID MAXWELL FYFE. May I give my understanding of that? The punishment would not automatically extend, because every member would be given the chance, before some court, of putting forward the defenses which General Nikitchenko mentioned—that is, that he

was forced into it, or did not understand it, or was the wrong person, or something of that kind. As I understand the present proposal, notice would be given of the issue to be brought before the court carrying the criminality of these organizations and that the member may be heard on that issue, simply on the criminality. In a manner the court would be entitled to say, "We shall hear you on that issue but only if counsel present your case and to the evidence that is relevant on that case." My point is that the important distinction would be limited to the criminality of the organization. The responsibility of the individual would be dealt with later by another court and then he would be able to raise his individual pleas.

PROFESSOR TRAININ. Numbers 10 and 11 represent a maximum effort to provide for the American and the British points of view. Soviet law does not provide for the trial of anybody who is not a physical person. Now in the drafting of 10 and 11, we have gone a very long way indeed to meet the desire of the American draft to provide for the trial of organizations which are not physical persons, and the resulting draft as laid down in these two paragraphs represents a very great advance toward meeting the views of the American Delegation. The point is that it is already laid down that the individual cannot dispute the finding that the organization is a criminal organization. Now, if an individual does appear before the court to defend the position of the organization, the Tribunal cannot hear him. The Tribunal is specifically constituted under its charter for the trial of the major criminals only, and there is no provision made for any method by which a casual member of the criminal organization could place his case before the court, because the court would simply refuse to hear it. That, of course, does not apply to the case where they appear as witnesses as long as they are not appearing as accused persons. If called as witnesses, they may appear as witnesses and in their capacity they can express their views, but they cannot be under a charge of criminal conspiracy.

MR. JUSTICE JACKSON. We appreciate that the Soviet Delegation has gone a long way in departing from the usual Soviet law trying to accommodate our views, and we want to emphasize we have gone a long way from traditional American practice trying to get a procedure here by which you can really get these thousands upon thousands of Gestapo and S.S. members. We have no desire to modify 10 or 11. The sole difficulty with it is that in our procedure, before you can make judgment effective against anybody or a finding effective against anybody, he has to be in some manner a party to the proceeding, or otherwise he is not affected by it. I might write a judgment in a case in which 100 people were involved and 99 of them had been arrested and before the court, and I said the whole hundred ought to hang, but

the man not in the case may come in and laugh at me. Therefore, our necessity is not to change 10 or 11, but to get these many people under it so that it will be effective. If you don't do that, if you don't take some step of that kind, notwithstanding the fact that the court may say that the Gestapo or S.S. is criminal, and you bring a member into an American occupation court presided over by an American officer, I should be surprised if that officer should not take the position that the member was not a party to the cause and not bound by the pronouncement that the organization is a criminal one. Our whole desire is to make this effective by making these people parties in some way to the procedure. I do not know whether you have that requirement, in so technical a fashion as we do, but there is our problem.

I hope in the light of this explanation we can work out something that will make it possible to go ahead, for without such a procedure the decision of the court would reach only those persons specifically indicted.

JUDGE FALCO. The French do have a system of putting persons on trial as an association of evildoers and proceeding accordingly.

SIR DAVID MAXWELL FYFE. I feel that here we are dealing with a new problem, and I am not afraid of making new law that goes beyond the British legal conceptions so long as it is fair and in accordance with the generally accepted necessities of natural justice or fairness. I should have thought that that would be met here if the other members of the organizations were given a right to be heard on this issue without prejudice to their future trial on their individual issues. Would not it meet the requirements, which I think I share in basically, of most of Mr. Justice Jackson's views and also meet the practical difficulties advanced by the Soviet Delegation if the Tribunal were given the power of hearing any members of the organization on the issue as to whether the organization is criminal in such a manner and in such conditions as the Tribunal thinks? Wouldn't that meet the points of view? I don't think any member of the Gestapo could complain as to this issue being barred to him in the future if he were given the chance, that is, if notice were given to him of coming forward or through his advocate pressing his point at this trial.

PROFESSOR TRAININ. In what capacity would these other members appear before the court, as defendants or witnesses?

MR. JUSTICE JACKSON. They could only appear and defend in the name and by virtue of membership in the organization. The organization would be on trial and individual members would have a right later, before they were to be sentenced in any court, to present their individual reasons, but as a group they would be required to put forward their argument as to the criminal plans of the group in this main proceeding.

PROFESSOR TRAININ. People appear before the court only in quite definite capacity, either witnesses, accused, or experts, or persons having some definite standing in the court. I do not see in what particular role these persons appear.

SIR DAVID MAXWELL FYFE. I should say that the nearest approach is this: The issue having been raised whether this organization is criminal, as a member of it he would have a right to be heard on that issue. It is a procedure which is used occasionally in court that an issue having been raised that affects a person the court gives that person the right to be heard on that issue.

GENERAL NIKITCHENKO. In a trial like this you have the defense, the accused. If they are members of the Gestapo who appear to be in a position to raise some kind of defense in regard to the criminality of the organization, then surely the defense or the accused himself will call them as witnesses and they will appear in the court in the capacity of witnesses for the defense.

SIR DAVID MAXWELL FYFE. Mr. Justice Jackson's difficulty is that, unless all members of the organization are given notice, they would not know the issue had been raised. That is why he wants some notice to all members that they could appear, that is, as witnesses for Kaltenbrunner or in some other way.

PROFESSOR TRAININ. One more question about the trial. Will it be followed by the trials of individual members of the organization? They will certainly not all be present at the main trial. When the trial takes place, they will try to prove that either they were not members of the criminal organization, or else, being members, that they have done nothing as members which could lead them to be punished, or they may state the organization was not a criminal organization. In the opinion of the Soviet Delegation it would be far better that this question of criminality of the organization should be raised at the trial rather than the procedure generally suggested. The question of what the Gestapo really is is perfectly well known to all countries.

MR. JUSTICE JACKSON. I don't want to prolong the discussion, but you don't want to depend on American judges to know all about the Gestapo. You must remember your people are much nearer to this scene than we have been. Information comes through radio, which we sometimes doubt, and newspapers, which we sometimes suspect of exaggeration. This experience is not so well known in the United States that you can depend on a judge to assume it. The evidence we have found since I came here the first time has utterly astonished me, and I followed the Nazi regime fairly closely because I had something to do with the effects of the war on us under President Roosevelt's administration. These organizations are criminal beyond anything that I can dream. I think proof of their acts really means more to

understanding by the United States of the problem you have had to deal with, and are going to have to deal with on this Continent, than you think.

PROFESSOR TRAININ. It is because of that consideration that we have accepted the American view that the verdict must apply to the whole of the organization.

SIR DAVID MAXWELL FYFE. It seems to me there are two methods of approach which we ought to explore. This is a point of great difficulty on which there is a great difference, but I am still hopeful that it may be solved. On the one side, I should ask that we consider what is the irreducible minimum of notice that would satisfy the American and British conception that a person can only be subject to a judgment if he is given the chance of questioning; that is, let us try to consider what is the smallest amount of notice. On the other side, there is the suggestion put forward, or at least implied in what Professor Trainin has said; that is, you could have judgment under article 10 which would pronounce for the benefit of humanity and posterity the enormities of the Gestapo and S.S. but would not be binding on the occupation courts who have dealt with the subsequent members.

MR. JUSTICE JACKSON. Our alternative seems as bad as the plan. I am not saying this is an easy plan. It certainly is not. The alternative is thousands of trials. There are hundreds of thousands of members of these two organizations. The thought that each one might delay the proceedings by raising the issue of the nature of the organization is appalling to me and makes it a task that I think never can be accomplished. We shall run some risks of dealing with persons who will want to defend if they have notice. If we recess until Monday, I will try to prepare the kind of notice that I think would suffice. If we are to do any translating, we would probably have to have until Tuesday. We shall try to have it late Monday.

SIR DAVID MAXWELL FYFE. If Monday afternoon would give you time, shall we adjourn until three o'clock Monday afternoon?

The Conference adjourned until Monday, July 16, 1945, at 3 p.m.

XXVIII. Illustrative Notice of Trial to
Members of Accused Organizations, Submitted
by American Delegation, July 16, 1945

A SUGGESTED EXAMPLE OF NOTICE TO MEM-
BERS OF GESTAPO AND S.S. AS TO TRIAL OF
THEIR ASSOCIATION OR ORGANIZATION

BEFORE INTERNATIONAL MILITARY TRIBUNAL FOR
TRIAL OF WAR CRIMES

The Union of Soviet Socialist Republics, the United Kingdom, the
Provisional Government of France, and the United States of America

-vs-

Goering, Ribbentrop, and others, and the Gestapo and the S.S. as
organizations, groups, or associations.

Notice is hereby given:

That the above named organizations, to wit—the Gestapo and the
S.S.—stand before the above tribunal charged with being criminal
organizations, membership in which will subject the members to
punishment upon conviction of the organization;

That any person who acknowledges membership in either of said
organizations, and submits himself to the jurisdiction of said tribunal,
and surrenders himself to the custody of the forces of the four nations
at ----- on or before the ----- day of -----
1945 will be entitled to representation at said tribunal, and through
representatives of the group, organization, or association will be en-
titled to submit evidence or argument to controvert said charge;

And that in default of appearance as above provided, any member
of said organization shall be precluded from questioning in any court
or commission such findings as the above named tribunal shall make.

XXIX. Amendments Proposed by American Delegation, July 16, 1945

MEMORANDUM to Conference of Representatives of the UNION OF SOVIET SOCIALIST REPUBLICS, the UNITED KINGDOM, the UNITED STATES OF AMERICA and the Provisional Government of FRANCE, Submitted by the UNITED STATES To Accompany Suggested AMENDMENTS to the Draft of the CHARTER Prepared by the DRAFTING COMMITTEE

1. It is suggested that there be added at the end of Article 10 a proviso reading as follows:

“provided notice deemed reasonable by the Tribunal is given all members of the organization and any such members desiring to be heard as witnesses regarding the criminal character of such organization are afforded an opportunity to be heard in such manner as the Tribunal deems fair and just.”

2. It is suggested that there be added as a parenthesis after subparagraph (b) of Article 6 the following:

“(An invasion of another country in the absence of an attack upon, invasion of, or declaration of war against such country shall for purposes of this Agreement constitute the launching of a war of aggression).”

3. It is suggested that there be added as subparagraph 3 of Article 15 the following:

“Any Chief Prosecutor may (1) bring to trial before such International Military Tribunal any person in the custody of his Government or of any Government which consents to the trial of such person, and any group or organization, representative members of which are in the custody of his Government, if, in his judgment such person, group, or organization has committed any criminal violation of International Law defined in Article 12 hereof; and (2) introduce any evidence which in his judgment has probative value relevant to the issues raised by the charges being tried.”

4. It is suggested that Article 22 be amended to read as follows :

“The Tribunal shall receive in evidence sworn or unsworn statements of witnesses, depositions, recorded examinations before or findings of military or other tribunals; the acts or documents of the Committees set up in the various Allied countries for the investigation of war crimes; copies of any official reports, publications and documents or other evidentiary materials and all such other evidence as is customarily received by international tribunals.”

5. It is suggested that the matter in brackets in subparagraph (b) of Paragraph 18 be stricken. This matter reads as follows :

“And to prevent the use of the trial as a means of a dissemination of propaganda.”

ROBERT H. JACKSON

Chief of Counsel for the United States of America

16 July 1945.

XXX. Minutes of Conference Session of July 16, 1945

SIR DAVID MAXWELL FYFE [*presiding*]. When we adjourned on Friday, we were dealing with paragraph 10 of the subcommittee's draft of the charter [XXV], and we were in a certain difficulty with the conception of "notice".¹ It was suggested to me afterwards that it might be a helpful approach if we would provide that the Tribunal give notice, and I have a draft of an addition to article 10 for us to consider. I wonder whether this would carry out our wishes. I feel that there is no real difference among us, and I hope that something like this may help. Would it be convenient for me to go through it bit by bit so as to translate it and explain what each bit is?

"After receipt of the Indictment, the Tribunal shall give notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration"

That relates back to paragraph 10 as it stands unaltered. The Tribunal may declare in connection with any act of which the individual may be convicted that the group or organization of which the defendant is a member is a criminal organization and that any member of the organization may defend it who submits himself to the jurisdiction of the Tribunal. That is, in order to be heard at all, he must admit that the Tribunal is entitled to inquire into these charges; otherwise he would not be heard. And "through the defendants charged in their capacity of members of the organization"—that relates back to the discussion that we had on the agreement when, you remember, we put in these words that "whether they may be accused individually in the capacity of members of the organization," "be entitled to submit evidence or argument to controvert the allegation that the organization was a criminal organization." Those who come forward will be attached to them and through Kaltenbrunner's case they can either give evidence or produce arguments. The final words "that the organization is a criminal organization" then limit the extent to which he can be heard. He can be heard only on the question of whether the organization is a criminal organization. Number 10 would read:

"After receipt of the Indictment, the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make

¹ *Ante*, p. 234 ff.

such declaration and that any member of the organization who submits himself to the jurisdiction of the Tribunal will be entitled to appear before the Tribunal and through the Defendants charged in their capacity of members of the organization be entitled to submit evidence or argument to controvert the allegation that the organization was a criminal organization."

Then 11 and 12 follow on from that, dealing with the subsequent trial of any member to be dealt with by the other courts.

GENERAL NIKITCHENKO. Is it proposed to retain the wording of 10 as it was adopted by the committee and then add this, or is it intended that this be substituted?

SIR DAVID MAXWELL FYFE. It is an addition. Retain 10 and put this at the end.

GENERAL NIKITCHENKO. I think this can certainly be accepted as a basis on which the delegations can work, and after they have had the opportunity of studying it at a later meeting it would be possible to look forward to definite views on the details. It is a basis to work on.

SIR DAVID MAXWELL FYFE. What do you feel, Mr. Justice Jackson?

MR. JUSTICE JACKSON. I feel the same way.

SIR DAVID MAXWELL FYFE. Then perhaps that would be the best thing, to leave 10 with that accepted as a basis, and I should be most pleased to get assistance from anyone on the details.

Now, paragraph 11, or should we leave 11 and 12 to fit in with the amendment to 10?

GENERAL NIKITCHENKO. There is a small point of drafting.

SIR DAVID MAXWELL FYFE. Then we will deal with number 12.

GENERAL NIKITCHENKO. It may be that the drafting is not too good or it may be that the translation is at fault, but in the opinion of the Soviet Delegation it should read, "Any person condemned by the International Military Tribunal may be charged . . .", just to make it clear.

SIR DAVID MAXWELL FYFE. I do not think it is sufficiently clear. That is intended to cover any minor criminal, and the only point in it is that he may be charged with other crimes in addition to membership in the organization and punishment would be imposed accordingly.

GENERAL NIKITCHENKO. Your explanations have made it perfectly clear what was intended.

SIR DAVID MAXWELL FYFE. I should have liked to hear what the committee had in mind for the Tribunal in the last line.

MR. ALDERMAN. I think the word "Tribunal" in the next to the last line makes it clear, just as Sir David says. First he would be condemned by the Tribunal and pass then, if there was no charge of any additional crime, to another court. This is to condemn him for

separate crimes in addition to the crime of membership in the organization. It would apply to a member of an organization which had been convicted in the Military Tribunal.

MR. JUSTICE JACKSON. I suppose the whole thing arises because of a complication in our law that does not obtain in all systems of law. Under our Constitution a person cannot twice be placed in jeopardy for the same offense, and the purpose here, as I read it, is to make clear that conviction of membership in the organization does not preclude subsequent punishment for other offenses. It is really a problem raised by the British and American law and perhaps not by the other systems of law.

GENERAL NIKITCHENKO. But it is said here "the punishment imposed by the Tribunal". Would that mean that the person had been before the Tribunal and had been convicted by it?

SIR DAVID MAXWELL FYFE. I thought it referred to minor criminals who had not been before it. It was not clear to me what was in the minds of the drafting committee. Perhaps Mr. Alderman would explain.

MR. ALDERMAN. In the previous articles we have provided, in the case of the main Tribunal, that, if an organization is accused as criminal, notice will be given for members to come in. This article assumes one or more of such members have come in and subjected themselves to the jurisdiction of the court and have therefore been convicted of membership before the Tribunal. But later an occupation court finds one of them is guilty of murder. This provision would allow him to be convicted for the murder, in addition to having been convicted in the main Tribunal for his membership in the organization.

GENERAL NIKITCHENKO. Any person condemned by the Tribunal.

SIR DAVID MAXWELL FYFE. Certainly on that basis I agree.

PROFESSOR GROS. Would it mean major war criminals?

SIR DAVID MAXWELL FYFE. It might be people who had responded to notice given them to come in. It might be major or minor criminals.

MR. JUSTICE JACKSON. We might have a case like Frank, who is claimed to be both. We might try him and convict him before the International Military Tribunal, and he would still be triable by the Czechoslovakian authorities. The purpose of it, as I see it, is to save that kind of situation where one might be guilty of both kinds of crimes.

SIR DAVID MAXWELL FYFE. Then we accept the Russian suggestion.

GENERAL NIKITCHENKO. Perhaps we can re-examine the wording and put it as we think it ought to be and come back to that.

SIR DAVID MAXWELL FYFE. Now 13.

MR. JUSTICE JACKSON. On 13, I wonder whether it should be "in

hiding", a term that might make us some trouble. I do not know how we could prove that some person is in hiding. I should prefer "if for any reason", unless there is some reason for putting it in that way.

GENERAL NIKITCHENKO. It is better as it stands. The wording should be "in hiding" as the article goes on to say that in the other courts for any other reason he could be tried in his absence; therefore this question of hiding does not really confine the meaning of the paragraph, and the paragraph is quite wide enough to carry any case that may arise.

MR. ALDERMAN. Wouldn't it be better draftsmanship to say, "if he has not been found", and then you need not have any debate as to what "hiding" consists of?

GENERAL NIKITCHENKO. The Soviet Delegation considers that the present wording is better because it gives a definite example of the conditions in which the man may be tried in his absence if he is in hiding deliberately. If you use something like "if he has not been found", you may create an impression that they had not tried to find him and had simply condemned him unheard without taking the trouble to search him out.

MR. JUSTICE JACKSON. Under our rule of construction an American judge might very well say "for other reasons" means only reasons similar in character to "hiding", and you are taking the risk of limitation, as we see it.

GENERAL NIKITCHENKO. The judges who will be trying the case will be special judges, and they will not be bound by the ordinary rules and principles of the British, American, French, or Soviet judges. They will certainly be able to draw conclusions. Although a national judge might not, the international judge should find his way through this.

SIR DAVID MAXWELL FYFE. If we put "for any other reason" instead of "for other reasons", that may help to exclude the difficulty.

Number 15.

GENERAL NIKITCHENKO. After the words, "Each Signatory shall appoint a Chief Prosecutor", the Soviet Delegation would like to add, "to investigate the cases of the charges against the chief defendants and to prepare the cases against them".

SIR DAVID MAXWELL FYFE. Which really is to put the heading into the body of the agreement.

GENERAL NIKITCHENKO. Instead of having the statement, "Each Signatory shall appoint a Chief Prosecutor", by embodying the heading in the body.

SIR DAVID MAXWELL FYFE. I have no objection to that. Then is there anything on (a), (b), (c), (d), or (e)?

GENERAL NIKITCHENKO. There is a point about (e). Is it necessary

to have (e) in at all? Would not 15 be sufficient without having this?

SIR DAVID MAXWELL FYFE. The main point is, first, to help the Tribunal by giving them something to work on, and second, to save time because we don't want to have the Tribunal when we get close to the period of the trial spend a lot of time in the rules if we can agree now on something that would be helpful to them.

GENERAL NIKITCHENKO. In principle there is no objection.

MR. JUSTICE JACKSON. Well, I repeat the point which was made before: as against our own prisoners, we would not want the provision if prosecutors were bound by a majority vote. What is the situation practically about this? We have gone ahead trying to get our evidence and to prepare our case. Many decisions have to be made in the course of it. Yet no decision will have validity under this provision unless a third nation joins in it. We don't want to interfere with anyone else's case against his prisoners, but we do want to be free to use evidence we have been getting against prisoners in our captivity whether others wish to or not. This is a very broad limitation on each prosecutor, as it stands. It is so broad that it may mean a great deal of misunderstanding. As we have pointed out, it does not seem acceptable to us without the reservation which we made in our memorandum [XXIX].

SIR DAVID MAXWELL FYFE. Is it a real matter of envisaging the possibility of disagreement in the final designation of the defendants? It does not seem to me that the other (a), (b), (c), and (d) are likely to cause much trouble by this agreement.

MR. JUSTICE JACKSON. My first difficulty is with (a) because I do not know what it comprehends, and I am always afraid of terms I cannot understand. By majority vote all prosecutors are to coordinate the work of individual prosecutors. Well, we have our way of doing our work, and it may be difficult to coordinate. I find it difficult at times to coordinate my own staff without trying to coordinate four countries. I don't think that (c) is particularly troublesome, nor (d), and I doubt that you will have any trouble about (b), but I don't know what the situation is as to defendants. I know in a pretty general way what prisoners are in the hands of the British and in the hands of the Americans. I don't know what prisoners are in the hands of the French nor of the Russians. I don't know what personalities they will ask us to deal with. But we have a considerable group of people who we think come under this classification as major war criminals. I think we have various listings running as high as 350 which the Judge Advocate General's office has classified as such. Our list runs into quite a number of people. I don't want them left on our hands. We have tried to group them to avoid more than one trial. The complication is in trying to reach in a single trial a very large

number of people, but we do not want to go through a large number of trials if we can avoid it.

SIR DAVID MAXWELL FYFE. What is your suggestion, Mr. Justice Jackson, as to the qualification of this?

MR. JUSTICE JACKSON. I would restore the language of the former draft. If you get into a situation where there is a tie among prosecutors and nobody has a majority, the case is stalled under this draft. I cannot envisage leaving this in a position where we could be stalled.

SIR DAVID MAXWELL FYFE. On this point I feel that I agree that it is a theoretical possibility. I don't think there is much reason for disagreement in practice. That is my approach to the matter. I cannot imagine myself fighting very hard for the exclusion of any of the people I have had to consider so far, and, personally, I should be prepared to agree to a majority vote, but I am very anxious that we should not break down on this. I do not know whether the other delegations have the proviso of the original American draft in front of them.

PROFESSOR GROS. I should like to support your views. We think also that there might be some disagreement but cannot see why that should happen. On the other side, we take the constitution of the Tribunal as a combined operation, and we would like to add complete cooperation between the four prosecuting officials to make it stronger. The solution which is presented by the American draft would be only in exceptional cases, and also, I might say, it would not be too good to have two categories of persons on trial, one where unanimity would appear and the other where there was dissent between the Allied nations. It would also help the Germans in criticism of the work of the Tribunal. They would say we were divided, and I should be in favor of keeping the necessary staff cooperation because, if one or two prosecutors are not ready, I think it would be better to wait for them than to have one. It would be dangerous to have such a clause.

PROFESSOR TRAININ. We do not foresee any practical difficulty any more than the French member. He is quite convinced that in the majority of cases all steps will be taken unanimously, but I do foresee considerable difficulty if it is possible for only one of the prosecuting officers to take charge of a case. The constitution of an international tribunal is really composed of two parts, the investigation of the case and the trial itself. Both the investigation and the trial are on an international basis. Now, if it is permitted that the prosecutor representing one country could carry a case through himself, that completely destroys the international character of the whole case.

SIR DAVID MAXWELL FYFE. I was not quite clear on this. Did you mean in the vote by which the Chief of Counsel should be able to bring forward defendants?

PROFESSOR GROS. I am afraid to put it in the statute that one prosecutor could bring a person to trial because the trials in the main are by the United Nations. We are pooling the war criminals and charging them in the name of the whole United Nations. I would like to find some phrases to meet the American delegate's idea, but I am convinced that it shall not be something that can be used immediately because one or two prosecuting officers are not ready. If two agree, after discussion by all, to include a defendant, he should be put on trial.

SIR DAVID MAXWELL FYFE. I gather Professor Gros' suggestion is that, in the event of equality of vote after discussion on the part of four Chiefs of Counsel, then the American provision would apply.

MR. JUSTICE JACKSON. That would be satisfactory. I would not want to do anything three of my associates are against, but I have been worrying along preparing a case for several weeks now and do not want to have to be delayed here too long.

GENERAL NIKITCHENKO. There is another way out of it. The point here is in regard to majority of votes, and the trouble would arise in the case of equal split of that vote. We have accepted the principle that in case of equal division of votes the chairman should be the casting one. Would it be possible to introduce that conception into this by arranging that the chairman of the prosecutors be the casting vote in case of a disagreement?

MR. JUSTICE JACKSON. I think Professor Gros' suggestion is a more practical one because you might have a division over the choice of a chairman. It seems to me his suggestion better meets all the requirements.

SIR DAVID MAXWELL FYFE. I only regard this as a safety valve. I should be most worried if I thought there were any real prospect of disagreement, but I don't think there is. But if we are having the need for a safety valve, I would ask everyone to try to find one.

PROFESSOR TRAININ. I follow any of the views expressed here. I agree with the chairman's view that any disagreement is quite unlikely to happen, but there is this danger, that, if we accept the suggestion of anything other than the majority vote, we would have in our charter a clause which would have the effect of converting an international tribunal into a national court, and the Soviet Delegation cannot understand how we can possibly agree to allow the International Tribunal to be turned into a national court in that way. It is for that reason that I feel the solution would be to accept this proposal of giving the chairman of prosecutors a casting vote.

JUDGE FALCO. [*Not translated.*]

MR. JUSTICE JACKSON. I should not think its character as an international tribunal would be affected so long as the opposition to going ahead could only prevail if concurred in by two, as Professor Gros

has suggested. That fear might be justified if one were to go alone. It seems to me that the proposition of having a chairman in an informal body such as this cast a deciding vote is likely to be impractical, and I don't know how you are going to rotate. The suggestion of Professor Gros seems a practical way out of a situation that I hope will not arise. But wise draftsmanship anticipates the improbable as well as the probable.

SIR DAVID MAXWELL FYFE. I wonder whether we could try to find a solution on the lines of the Soviet suggestion of a chairman's casting vote. The real issue, as I see it here, is this: Suppose three people are against prosecuting a defendant and one person wants to go on prosecuting him. In that position it would be almost unthinkable that only a general charge would lie and that it would be possible to deal with it by a national court.

MR. JUSTICE JACKSON. I don't know that that would quite meet the difficulty if it ever arises.

PROFESSOR GROS. It would be a change in the status of the war criminals. Those people are still major war criminals. Some business people should be included in the list of major war criminals, and the French prosecutor would present a list of bankers, et cetera, in Germany. If the three others refuse, your solution would imply that those bankers or industrialists would be sent to France to be charged there. That changes their status as major war criminals.

SIR DAVID MAXWELL FYFE. As the agreement reads at the moment, each signatory shall appoint a Chief Prosecutor for the investigation of charges and the prosecution of the major war criminals. Then, (b), one of the purposes of the committee would be the designation of the defendants by the Tribunal, that is, a selection before you go to the Tribunal. Then, assuming that you have, for instance, a three to one majority against the selection of your banker, for example, a majority of the prosecutors decide he is not worthy of trial as a major war criminal. The suggestion was that, if you put something at the end of the agreement that would be without prejudice, you would be carrying out the view of the majority, wouldn't you?

PROFESSOR GROS. I do not think that in such a problem you can leave the casting vote to the chairman to say the man is a major war criminal or is not. It is very difficult to comment on that. Your suggestion gives us a practical solution of three against one, but I wonder whether it gives a solution of two against two.

SIR DAVID MAXWELL FYFE. I am reminded that article 6 of the agreement already provides that "Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals." It is already covered.

MR. JUSTICE JACKSON. The difficulty of that is that, if you take the banker as an example—for instance, Schacht, who is our prisoner at the moment—he is either a big war criminal or nothing. If you take him out from under this agreement, you have nothing to try him on at all. Nothing except the common-plan or conspiracy theory will reach that type of man, and, therefore, if you by a deadlock shove him out of this Tribunal, you have shoved him out of the possibility of being tried anywhere because you have no law to try him except under this agreement.

GENERAL NIKITCHENKO. Referring to the example by Mr. Justice Jackson in reply to Professor Gros, the example of Schacht—we are of the opinion that whether we have this clause or not, the point is that we have a provision for dealing with persons who organized or incited or otherwise caused all these war crimes, who were the instigators of the wars of aggression, and who are, in fact, much greater criminals than the minor people who carried out murders, ill-treatment of prisoners, et cetera. Whether this provision is in this paragraph or not, the agreement, as it is, provides for the punishment of these people, of whom Schacht is a good example, and they would not escape because of the wording of this particular paragraph.

To provide for the right of one or, in the case of equal division, of two prosecutors to act on their own initiative, is to adopt a principle which is contrary to the whole charter of the International Tribunal, and it would follow from the contradictions of that principle that we would have to introduce a whole set of rules, all of which would be in direct contradiction of the principles on which the international body is based. The whole agreement and the charter are based on combined action, on cooperation between the Four Powers. Now, if we introduce at one point in one paragraph a principle which departs from this and allows the action of only one power independently, then we are going completely contrary to the whole idea on which the charter is based, and the introduction of that one exception would mean that a whole series of regulations would have to be provided as to what would be done when that happens. It is quite contrary to the whole spirit of the charter.

If we take the practical case, the unlikely practical case, where no agreement is arrived at, article 6 of the agreement provides for the trial by national courts, and in the unlikely case of your having three of the prosecutors against the trial of one individual and a single prosecutor in favor of it, article 6 would give that one prosecutor the power to transfer the case to his national court for trial. It would not automatically absolve a defendant in that case from being tried, and the proposal that the Soviet Delegation now puts forward would

in our opinion provide that in all cases an agreement will be reached by the casting vote.

SIR DAVID MAXWELL FYFE. I feel that we have exhausted the use of immediate discussion of it, and it would be a good point to consider, as we may be able to find a solution. Therefore, I suggest we leave this as a reserved point to come back to. Now, shall we take the second part of 15—"The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties. . . ." Is there any question on 15, paragraph 2?

GENERAL NIKITCHENKO. The first point is this: we consider it better as a matter of convenience to make the second part of this article into a separate article. Number it as 16. As it stands now, the whole of 15 becomes lengthy and clumsy, and it would be easier if it were divided.

SIR DAVID MAXWELL FYFE. I see no objection to that.

GENERAL NIKITCHENKO. Coming to the very last paragraph of 15 as it stands, "It is understood that no witness or defendant detained by any Signatory shall be taken out of the possession of the Signatory without its assent." The Soviet Delegation does not understand what that is meant to cover.

SIR THOMAS BARNES. Consider paragraph (a) above, "Investigation and collection of all necessary evidence" and (c), "The preliminary examination of all necessary witnesses and of the defendants." Under this paragraph each of the prosecutors may act individually, and that last paragraph was put in to prevent one of the signatories from demanding the attendance or testimony of defendants in the custody of another and obtaining their attendance without the consent of the detaining country.

GENERAL NIKITCHENKO. Does not that limit the application of article 3 of the Agreement, "Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal"?

SIR DAVID MAXWELL FYFE. It only means that both signatories must agree. One signatory asks and the other agrees. It is difficult to mention a case where one signatory would want to examine a witness beforehand without the consent of another.

GENERAL NIKITCHENKO. That is quite right. We agree. Does this refer to the preliminary investigation or actual presentation at court?

SIR DAVID MAXWELL FYFE. The preliminary investigation. There would be no objection as far as I can see. Suppose the Soviet Delegation wanted to send someone to ask a prisoner of ours some questions. We would arrange for questioning to take place at a convenient spot. It would only be a matter of arrangement.

GENERAL NIKITCHENKO. It is purely a question of drafting. The words which are not clear are "taken out of the possession of". It might be better to provide no investigation or the questioning of the man without the consent of the holding signatory.

SIR DAVID MAXWELL FYFE. I can see the difficulty. Of course, "custody" means "being held in the custody of one power". They would remain in the custody of the holding power, but all the facilities would be offered.

GENERAL NIKITCHENKO. Yes, it is quite clear.

SIR DAVID MAXWELL FYFE. We shall keep the whole, then, and alter the numbers at the ending. Now number 16.

PROFESSOR TRAININ. It is simply a question of more exactitude in 16 (b). It says, "to give any explanation which he may desire with regard to the charges made against him." "With regard to the charges"—in the Russian translation apparently he can talk about anything he likes.

SIR DAVID MAXWELL FYFE. Instead of "which he may desire with regard to the charges made" we could say "which is relevant".

MR. JUSTICE JACKSON. Should he be allowed an explanation? "Explanation" would not have any legal meaning to me that you could apply in confining it. He could make almost any sort of speech he wanted to. It seems to me he should be limited to testimony as to the facts rather than an explanation.

MR. ALDERMAN. "Statement" would be better than "explanation".

GENERAL NIKITCHENKO. "Give testimony" instead of "give explanation".

SIR DAVID MAXWELL FYFE. That is covered by (e), isn't it?—"through himself or through his counsel".

PROFESSOR TRAININ. Apparently in point (e) the word "evidence" would not apply to verbal testimony.

SIR DAVID MAXWELL FYFE. No, it would not.

GENERAL NIKITCHENKO. What does point (b) mean?

SIR DAVID MAXWELL FYFE. I should have thought it would be best to confine (b) to the preliminary examination and to put "any preliminary examination . . . he shall have the right to give any explanation . . ." And in (e) the defendant shall have the right through himself or his counsel to present his own or any evidence.

Now, number 17. I think this requires a certain amount of explanation, because I notice it is bracketed. We shall deal with it point by point. "The Tribunal shall have the power: (a) to summon witnesses to the trial and to require their attendance and testimony and to put questions to them . . ." That is the equivalent of the International Tribunal's making witnesses attend. "[(b) to require any defendant to give testimony] . . ." I think there is a difference

in our systems. In England no defendant need give evidence in a criminal charge. It is up to him. On the Continent he can make a statement without being cross-examined. I understand that under this code he must answer questions.

JUDGE FALCO. He is interrogated like a witness. He can say what he wants.

SIR DAVID MAXWELL FYFE. It is not really adding a great deal. It would actually be contrary to our ideas that a person should be forced to give evidence if he did not want to, and, in addition, he could stand mute if he liked. I would like to hear others' views on that.

MR. JUSTICE JACKSON. Our system, like yours, would not permit us to force a defendant to testify against himself. The constitutional provision against compulsory self-incrimination would protect him. That privilege is not known to the German law, as I understand it, and not to some other systems we are using here. We would be willing to adopt the Continental practice of making them testify, but, like you, I do not think it would accomplish a great deal and would not insist upon it if the others disagree.

PROFESSOR TRAININ. The right of the prosecution and the court to ask questions of the accused must be provided for, but there is nothing at all to compel him to answer. I do not know of any law by which it is possible to compel the defendant to answer questions, but the court should be allowed the right to ask. They have the right to question.

JUDGE FALCO. We have the same view.

MR. JUSTICE JACKSON. I feel that the possibility of a two to two division is greater than we anticipated. Here we are now divided two to two on a question of procedure.

SIR DAVID MAXWELL FYFE. The Soviet would cover the Continental point. The defendant may be asked questions by the prosecution, the defense, or the court, but he is not bound to answer them.

MR. TROYANOVSKY. But that is provided for in number 24.

MR. ALDERMAN. The solution is to strike this clause out.

SIR DAVID MAXWELL FYFE. I believe 24(f) covers the right to question them, and we could strike this out here.

MR. ROBERTS. That would suit me if we left it to the court.

PROFESSOR TRAININ. In article 24 it says that defendants and witnesses may be questioned by the Tribunal, but it does not say anything about the prosecutor questioning.

SIR DAVID MAXWELL FYFE. If he does not give evidence, then the court can answer the question.

PROFESSOR TRAININ. The point is that the duties of the prosecutor under the Tribunal are of such a nature that they differ entirely from the Continental system. The prosecutor has much greater powers and, therefore, the Soviet Delegation considers that the prosecutor

and the defense should have the right to question a defendant, but the defendant would not be compelled to answer.

MR. ALDERMAN. Why the defense? The defense could not represent him unless the defense does what he asks him to.

SIR DAVID MAXWELL FYFE. I feel there is no real difference between us, but it is rather difficult to explain.

MR. JUSTICE JACKSON. The question remains whether the defendant is prejudiced by his refusal to answer. That is the real underlying question—is silence like a confession?

The Conference adjourned until Tuesday, July 17, 1945, at 2 p.m.

**XXXI. Illustrative Draft of Indictment,
Submitted by British Delegation, July 17, 1945**

**DRAFT LIST OF DEFENDANTS AND
INDICTMENT**

GÖRING, HESS, RIBBENTROP, LEY, KEITEL, KALTENBRUNNER, ROSENBERG, HANS FRANK, FRICK AND STREICHER.

[For consideration: Von Schirach, Sauckel.]

1. That between the 30th day of January, 1933 and the 8th day of May, 1945 the defendants unlawfully conspired together and with other persons to devise and carry out a common plan aimed at the establishment of complete German domination of Europe and other countries, which plan included and was intended to include and was reasonably calculated to involve the use of unlawful means for its accomplishment: *to wit*

2. For the purpose and in pursuance of the common plan the defendants organised in Germany large forces for the terrorisation and elimination of dissent from or disagreement with the carrying out of the plan, and for the suppression of the Jews and in particular, the defendants established and maintained the Schutz Staffel, the Gestapo, the Hitler Youth Organisation and the system of concentration camps.

3. The defendants repudiated and broke Clause of the Treaty of Versailles by the establishment of a Luftwaffe of which establishment they gave official notice to foreign governments on the 9th March, 1935.

4. The defendants broke Clauses and of the said Treaty by reintroducing conscription in Germany and fixing the peacetime strength of the German Army at some 550,000 men by Reich Decree dated the 16th March, 1935.

5. That the defendants broke Clauses 42 to 44 of the said Treaty by sending Armed Forces marching into the demilitarised Rhineland zone of which notice was given to foreign Governments (namely, Belgium, France, Great Britain and Italy) on the said date.

6. That having entered into treaties, pacts and agreements and having given assurances in purported pursuance of the maintenance

of peace with neighboring countries the defendants broke such treaties, pacts, agreements and assurances as hereinafter set out.

*Treaty etc.**Breach*

- | | |
|--|---|
| (a) Agreement with Schuschnigg, 11th July, 1936. | Invasion of Austria, 11/12th March, 1938. |
| (b) Four Power Agreement concluded at Munich on the 8th September, 1938. | Invasion of Czechoslovakia, 15th March, 1939. |
| (c) Non-aggression pact with Denmark, 31st May, 1939. | Invasion of Denmark, 9th April, 1940. |
| (d) Non-aggression pact with Russia, 23rd August, 1939. | Attack on Russia, 22nd June, 1941. |
| (e) Assurance of neutrality given to Yugoslavia. | Attack on Yugoslavia, 6th April, 1941. |
| (f) The Locarno Agreement of 1925 and assurances given to Belgium on the 30th January 1937 and 26th August 1939. | Invasion of Belgium, 10th May, 1940. |
| (g) Assurance given to Luxembourg on 26th August, 1939. | Invasion of Luxembourg, 10th May, 1940. |
| (h) Assurances given to Holland on 26th August and 6th October, 1939. | Invasion of Holland, 10th May, 1940. |

[(i) Poland]

7. In breach of Article 1 of Hague Convention No. III of 1907, , in pursuance of the common plan and otherwise in breach of International Law, the defendants launched a war of aggression against and invaded the countries mentioned in paragraph 5 of this indictment on the dates set out in the column headed "Breach".

8. In the course of the wars commenced by the invasions mentioned in the two preceding paragraphs hereof, the defendants committed violations of the laws and usages of war contrary to article

and

of the Land

Warfare Regulations attached to Hague Convention No. IV of 190 , and further carried on such wars in a manner which was necessarily calculated to involve wholesale and atrocious breaches of the said laws and usages of war by performing and doing acts of which the following are typical examples:

- (a) The defendants imprisoned nationals of occupied countries in concentration camps and prisons and there used them for forced labour, ill-treated them and annihilated them: and in particular,

at the establishments set up at Belsen, [Ravensbruck] Buchenwald, Maidanek, Auschwitz [Wught] [G in Norway] and Natzweiler.

- (b) The defendants used torture and in particular, at the establishments mentioned in the last preceding paragraph, and at Breen-donck and at in Paris.
- (c) The defendants deported civilian nationals from every occupied country for the purpose of forced labour and for other illegal purposes.
- (d) The defendants ill-treated and murdered the civilian populations of occupied countries.
- (e) The defendants inflicted general penalties on the nationals of occupied countries, including the destruction of civilian communities, towns and villages: and in particular, Lidice, Oradour-sur-Glane and Kraguevac.
- (f) The defendants adopted a policy of murder and ill-treatment of prisoners of war.
- (g) The defendants adopted a policy of wholesale plunder of occupied countries.

XXXII. Minutes of Conference Session of July 17, 1945

SIR DAVID MAXWELL FYFE [*presiding.*] We were discussing paragraph (b) of number 17—“[to require any defendant to give testimony]. . . .” [XXVI]

GENERAL NIKITCHENKO. One point is not quite clear. If the defendant does not want to answer, then neither his own counsel nor the prosecution can examine him. It is only the Tribunal, and it does not appear how the Tribunal will enter into the interrogation.

SIR DAVID MAXWELL FYFE. If he does not give evidence, does not want to answer, then, as I understood 24 (f), the Tribunal may put any question to any defendant—the Tribunal would simply make the defendant, say Göring, stand up in the dock and ask him any questions. He cannot be forced to answer.

GENERAL NIKITCHENKO. The second point concerns the order of interrogation. It would seem better if the Tribunal should be the first to interrogate and should be followed by the prosecution and the defendant's counsel.

SIR DAVID MAXWELL FYFE. If you will look at 24 (d), after the prosecution have made their opening statement, the Tribunal “shall ask the prosecution and the defence what evidence (if any) they wish to submit to the Tribunal and the Tribunal shall rule upon the admissibility of any such evidence.” And (e): “The witnesses for the prosecution and for the defence shall be examined and may be cross-examined in each case by the other side.” Now, we envisage that both the prosecution and the defence would first of all explain the purpose of their witness, and at that point the counsel would know as to all his evidence—what it is going to be. Then we thought the other side could test the evidence, after which the Tribunal, having had it placed before them by both sides, would have the right to ask any questions and clear up points for itself. That is the system as we thought of it. It was difficult to do it otherwise with all evidence because the Tribunal would not know what any witness was going to say.

GENERAL NIKITCHENKO. It is assumed that it will be a question of asking for permission to call additional witnesses. The original witnesses will be interrogated beforehand and before the Tribunal will know what they are going to say. But if additional witnesses were called at the request of both sides or either, it would be necessary for the

two sides for counsel to interrogate first so as to know what those additional witnesses have to say.

SIR DAVID MAXWELL FYFE. Of course, it would not be necessary to call a witness to put in the result of his interrogation, the statement he made on the interrogation. I think we would have to discuss how it should be done. But in the ordinary way we would call the officer who had interrogated the witness, and he would say, "This is the statement made on the interrogation."

PROFESSOR TRAININ. In essence, we are quite in agreement with this proposal. We quite agree that the defendant must be interrogated by the two sides and by the Tribunal. The only difference is that the order, we think, should be on the line of authority, and in this the Tribunal has the highest authority and should be the first to interrogate.

JUDGE FALCO. That is also my thought.

SIR DAVID MAXWELL FYFE. That does not apply to witnesses whose testimony is not before the Tribunal.

GENERAL NIKITCHENKO. As far as additional witnesses are concerned, they should be first of all interrogated by the side that asked that they be called. If called at the request of counsel, then counsel interrogate first, then the prosecution, and ultimately the Tribunal. If called by the prosecution, then he should be interrogated first by the prosecution, to be followed by counsel and then the Tribunal.

SIR DAVID MAXWELL FYFE. I think it still puzzles us a little because the Tribunal in Britain rather rely on counsel to bring testimony out, but the Tribunal is in command all the time. When counsel is asking questions, the Tribunal can interrupt and ask questions on its own. Now the Tribunal can ask questions all the time. They can stop us at any moment and ask us to clear up any point. That is our system.

PROFESSOR TRAININ. We share your point of view, but our suggestion is that we believe the Tribunal should interrogate and ask questions whenever it likes. It can always interrupt to ask questions.

SIR DAVID MAXWELL FYFE. It seems to me that that is a point that we could settle as we go along, as we all recognize the Tribunal is complete master of the situation. But I would like, if we could, to get back to the point that we were discussing yesterday. Would the Russian and French Delegations be prepared to do without questions being asked at the trial by the prosecution of a defendant who did not give evidence?

GENERAL NIKITCHENKO. It would not be necessary to write down in the charter anything about the rights of the defendant not giving answer, because, if he refuses to give answer to the prosecution and to the counsel and to the Tribunal, nothing is to be done, and therefore we do not think it would be necessary to point it out in the charter.

But as regards the rights of the prosecutor to interrogate, that is very important. If we do write anything about the defendant's right not to answer, then it would look as if we were preparing the ground for him to do so, and, if he knows about it, he will take advantage of it and refuse to answer. Therefore it is not necessary to mention it.

SIR DAVID MAXWELL FYFE. I am suggesting we cut out 17 (b).

GENERAL NIKITCHENKO. It is suggested to put 17 (b) in this form: "to interrogate any defendant".

MR. JUSTICE JACKSON. I suppose the real question is what happens if he declines to answer. No inference in our courts would be drawn against him for refusal. I assume this means, however, that, if he fails to answer, it would be harmful to his case.

GENERAL NIKITCHENKO. No, it is not so. Actual refusal to answer would not be against him.

SIR DAVID MAXWELL FYFE. So much the better.

GENERAL NIKITCHENKO. If he refuses to answer, it is not against him. It is estimated the Tribunal might consider that his refusal to answer means he does not want to give an answer, and eventually silence means consent. It may be considered by the Tribunal one way or the other.

SIR DAVID MAXWELL FYFE. You can draw an inference from his refusal?

GENERAL NIKITCHENKO. It is up to the Tribunal as to whether the Tribunal will consider the refusal.

SIR DAVID MAXWELL FYFE. I am disposed to accept that for the reason that, as Mr. Justice Jackson mentioned yesterday, under the German law it is a recognized procedure, and we adopted it at SHAEF [Supreme Headquarters Allied Expeditionary Forces] with a slight modification when we were getting our occupation courts set up. Speaking for myself entirely, I accept the suggestion proposed by the Soviet Delegation.

Now (c), "to require the production of documents and other evidentiary material". That is a power that is given to all municipal courts, and we suggest the Tribunal shall have it.

Now (d) "to administer oaths".

GENERAL NIKITCHENKO.—who has to give the oath, because here there are witnesses mentioned and the defendants, and the defendant does not take an oath. Therefore, it is necessary to make it clear by saying that it refers only to the witnesses.

SIR DAVID MAXWELL FYFE. I agree—only to witnesses.

(e), "to appoint special officers of the Tribunal to take evidence and to make findings", et cetera. The main purpose is that, if certain evidence had to be obtained from distances during the trial, the Tribunal could send an officer who could take evidence at a distant place

and report to the Tribunal. That officer could report on the truthfulness of the witness, et cetera.

PROFESSOR TRAININ. It seems to me this paragraph is not very clear. It seems the Tribunal is delegating its supreme powers to somebody else, which is not permissible at all. Therefore, my position is that this should be transferred from the charter to the rules of procedure, because there it would be simply a technical matter while, if it is in the charter, it might sound like a question of principle.

SIR DAVID MAXWELL FYFE. The only thing worrying me is the question of whether the Tribunal would consider it has power to send an examiner unless we give the power in the charter.

PROFESSOR TRAININ. The rules of procedure do not contain anything that might contradict the contents of the charter, and in the charter there is nothing to mean that the Tribunal has no right to give such instructions.

MR. JUSTICE JACKSON. I do not think a trial would be workable, or easily might not be, if the court did not have power to send a master or special officer to take evidence. Such a situation is entirely conceivable under our type of trial; it could not arise undoubtedly under the Soviet type of trial, where the case is largely made before the trial starts. But in our procedure, unless you can send out a master who could obtain evidence on some issue, it might become unworkable. We are dealing with unprecedented issues here.

SIR DAVID MAXWELL FYFE. I don't think Professor Trainin is objecting to the power. As I understand it, it would be inherent under the rules of procedure.

MR. JUSTICE JACKSON. It is not inherent because this court has no inherent power; all must be conferred upon it. It cannot acquire power by its own rules.

PROFESSOR TRAININ. It seems to me that a certain way out of the difficulty could be found. Taking fully into consideration the views expressed by the British and United States Delegations that something should be said in the charter on this point, perhaps it would be possible to combine 17 (e) with 17 (a) and simply say in subparagraph (a) "to some witnesses in the trial", and that in separate cases for technical reasons the Tribunal may instruct special officers to go out to investigate and interrogate, et cetera.

SIR DAVID MAXWELL FYFE. Yes, I think something on these lines would meet the situation.

JUDGE FALCO. I think it is only during the trial that they would have the power. Before the trial the investigator makes the investigation.

MR. JUSTICE JACKSON. You see that points up a fundamental difference between your system of procedure and ours. The evidence, in order to be evidence in our system, would have to be produced before

the Tribunal itself or some master representing the Tribunal. The fact that the prosecutors get and examine the evidence would not be sufficient to bring it to the attention of the court. Therefore, under our system, unless the evidence were taken before a master representing the court, it might not be admissible. Now the importance of this, as I see it, in a case as widespread as this is that we might have an incident in France, another one in the Netherlands, another in Belgium, that needed to be proved in order to make a point. The court cannot attend at all those places, but the master could be sent to get that material, and it would be admissible. I should hate to see the power confined to the period of the trial.

JUDGE FALCO. Before the indictment is lodged, the Tribunal would not know what it is all about; so how could it, before the trial begins, send its officers to be present at interrogations?

MR. JUSTICE JACKSON. They do not have to in our system. If we were preparing a civil case in one of our courts and certain evidence needed to be taken in a distant land or where the court had no jurisdiction or witnesses could not be moved because of illness or something, we would simply go to court on notice and make a showing that we had relevant evidence in such a place and needed a master to go before the trial, to go and take the testimony of the man who is ill and—as there may be danger of his dying—in order to perpetuate that testimony. Masters are used in a variety of situations under our system, but it all goes back to the fact that our trial requires the production of all documents and oral testimony before the court. It does not matter if you have bales of evidence in your files, it is not before the court until it is produced in open session. Without that you haven't a trial that will be recognized in the United States, or, I dare say, in Britain. That is our difference here. We are used to pursuing different systems.

SIR DAVID MAXWELL FYFE. We all desire to rely on the Tribunal as being the governing body, and I suggest we might meet the point if we put in (e) "to order evidence to be taken by special officers . . . in cases where the Tribunal think fit to adopt the course."

MR. JUSTICE JACKSON. Mr. Alderman suggests that perhaps it is not clear that in such a case the examining of the witness is not done by the master himself but the two counsel for both sides go and the master receives the evidence and reports it. He does not have to conduct the investigation as under your system he would.

PROFESSOR TRAININ. This proposal introduces certain complications in the whole construction of the Tribunal. The construction of the Tribunal would be this, that the prosecution prepares the case fully and then the case is heard by the Tribunal. This proposal introduces an intermediary stage, that is to say, that the prosecution prepares the case, and then, before it is heard in the Tribunal, the Tribunal acts

as such before actually hearing the case. It seems to me that when we are dealing with war criminals such a complication, such an intermediary, should not be advisable.

MR. JUSTICE JACKSON. Is it contemplated that the procedure set up in this agreement, as it now stands, adopts for the purposes of this trial the practice that the case shall be completely made by the prosecution and not be entirely heard by the court in open court?

GENERAL NIKITCHENKO. The indictment, of course, would be heard by the Tribunal and all the evidence checked in the Tribunal session, but it is the Tribunal that would check the evidence and not persons empowered by the Tribunal.

The Tribunal would have the right to interrogate the witnesses once more. It would be left with the Tribunal either to believe the evidence given before the prosecution or not to believe it and to interrogate the same witness once more in order to check his first evidence, then to call additional witnesses, to consider all the documents and so on, generally to go into all the details of all the material which is before the Tribunal in order to decide whether the accused has committed a crime or not.

MR. JUSTICE JACKSON. Is it contemplated that all the prosecution's evidence must be submitted with the indictment?

GENERAL NIKITCHENKO. I think we have all come to the conclusion that the indictment, all the evidence, all the documents, everything concerning this case, should be passed on to the Tribunal. It is in subparagraph (d) of article 15.

MR. JUSTICE JACKSON. Well, I was afraid that was the interpretation that was arrived at by the different delegations on the instrument, and I must say we could not accept that system as carrying out our idea of a trial. I think that, when the indictment is submitted, with it can be and should be submitted as much important documentary material as possible, but the calling of witnesses in open court is absolutely essential to the rules of a trial. Our people in the United States would not understand anything less than that as a trial.

GENERAL NIKITCHENKO. There is no question about witnesses being interrogated.

MR. JUSTICE JACKSON. Well then, how does it work if all the evidence must be submitted with the indictment, what do you call them for? I do not understand. What I had supposed we had agreed by this language was that we would put such documents as it is convenient to put in with the indictment, but that we would in open court prove our case.

GENERAL NIKITCHENKO. If you will allow me, I shall have to take about five minutes of your time to explain to you how we visualize the two stages—the preliminary work of the prosecution and the ac-

tual hearing of the case in the Tribunal. If there are any questions after that, then we might discuss it.

First, the prosecution interrogates the accused and the witnesses and collects all the documents which testify that such and such acts have been committed. When the prosecution has carefully examined and checked those documents and when the prosecution considers that the whole of evidence and of the documents is of sufficient importance to prepare an indictment, that indictment is made and presented to the Tribunal. The accused are informed of all documents with which they are to be served so that they can consider the documents and prepare their defense.

After the indictment has been properly prepared and confirmed by the Chiefs of Counsel, that indictment is passed on to the Tribunal together with all the material confirming it, the material on which it is based—that is to say, all the documents referring to the case, all the protocols, all examination of witnesses referring to the indictment. All that is handed over to the Tribunal. After that the case is heard in open court in the presence of the accused, if he is present, or in his absence if the court decides the court can decide in his absence. In the presence of all the witnesses and then during the hearing, the accused and the witnesses are examined again. Perhaps additional witnesses would be called and be examined as well, and all the documents are announced and made known and considered from the point of their reliability. Then the Tribunal in open court hears what the witnesses and accused can say in favor of and against the accused. Only after everything has been heard, examined, and made known—after that only—the Tribunal can arrive at its judgment.

Let us admit the possibility of a case when the accused first admits his crime, and then in open court denies and says he never committed the crime and was not even on the spot when it was committed. At first the Tribunal will again interrogate the accused by reminding him of his own admission of the crime, then call witnesses who will prove he was at the particular spot and had committed the crime, and also present all available documents. It is quite possible that after that the accused will be compelled to admit his crime.

I wanted to emphasize that there should be an open court, open to the public as well, and during the hearing everything that would be said by the accused or witnesses would be heard by those present, by the public and the newspaper correspondents, so that they could follow in all details all the proceedings.

MR. JUSTICE JACKSON. The trial that is contemplated here would be the same kind of proceeding then that the Kharkov trials were.

GENERAL NIKITCHENKO. Not exactly the same because in the charter we are preparing there are certain points which make the procedures

somewhat different from those adopted in Kharkov. According to Soviet law, the prosecutor is the first to interrogate, while here it appears the counsel calling the witness is the first. Secondly, the opening statement of the prosecutor is not known in the Soviet law at all. So there are certain differences.

MR. JUSTICE JACKSON. But essentially it is the same procedure—the same method of proceeding except for those small variations.

PROFESSOR TRAININ. The differences are not so small as they seem to be. For instance, according to the Soviet procedure, the prosecution and counsel are exactly on equal footing in the case while, according to the charter, the prosecution has definitely the predominant part to play during the case; and although that is contrary to the Soviet legislation on this subject, we decided to accept it simply because that is the usual procedure in England and the United States and therefore it is more widely known.

SIR DAVID MAXWELL FYFE. I wonder whether General Nikitchenko would look at paragraph 24, as I think it would be the easiest way. Is that accepted?

GENERAL NIKITCHENKO. It should be added here that the prosecution can interrogate both the defendant and the witnesses as in the proposal. Otherwise, it is quite acceptable.

MR. JUSTICE JACKSON. I think it is very important that we do not come out of here with a document which some construe one way and some another. If we adopt a system that we both understand, I do not think it is so important what it is. I by no means insist that ours is better than anyone's else, but it is important we understand so that there is no future disagreement causing us to spend a lot of trial time in controversy. I would like to refer to the draft of indictment which was presented by the British conferees [XXXI], which is the thing in our procedure which would initiate the case. That would be filed with the court and is all that the court would know about the case until the day of the trial. Now this, of course, is a rough proposal. It might have a great deal more than this in it. I speak with very poor knowledge of British criminal law and somewhat imperfect knowledge of our own, but, generally speaking, we are not supposed to plead our evidence. The purpose of the indictment in our system is to inform the defendant, not what evidence is against him, but what ultimate charge he must meet. I would be quite happy to see a good deal more evidence put in an indictment than is suggested here, but if we are to bind ourselves to the proposition that all evidence must be put into the indictment, it is an entirely new concept for us to operate on, and I must say I do not understand how it would work in a case like this where we will not have our evidence fully in hand at the time of indictment.

PROFESSOR GROS. Add to that the adoption of article 15, paragraph (*d*), where it is said, "The lodgement of the indictment and the accompanying documents with the Tribunal." That was a sort of compromise between the American conception as it has been explained by Mr. Justice Jackson and the French and Soviet conception, which is different. We would be shocked by the idea that the prosecutor would come out of the blue with evidences which are completely unknown until the moment of the trial. I do not see such a difference in principle in what has been said.

SIR DAVID MAXWELL FYFE. Along the same lines, in our system—I do not know whether this is the same in the United States—we have a preliminary hearing before a magistrate, and at that hearing the prosecution call all their witnesses and put in all their documents. It is obvious that the court, the judge who is going to try the case, knows what the case will be, knows the evidence, and sees the documents, and so do the defendants. But, if the defendant pleads "not guilty", the whole of that evidence has to be heard again by the court, and you can supplement it by calling further witnesses.

PROFESSOR TRAININ. I am very grateful for this reminder, but what we mean is this: there cannot be any intermediary hearing of the case. That is to say, first of all, the whole case is investigated and then must be tried by the Tribunal as such, and, if any intermediary stage were had, that would complicate the whole thing and bring about undesirable results.

SIR DAVID MAXWELL FYFE. I was only explaining our brief, which does lead us to say that the Tribunal and the accused should see a number of documents beforehand as explained in 15 (*d*). I do not know whether Mr. Justice Jackson would explain any difference, but I should have thought the adaptation for this purpose would be that we should lodge with the indictment as many documents as possible—for example, treaties and official examinations by various countries—that these should be passed on to the defense, but then we should call all the evidence at the trial, call all the witnesses we wanted or any people who had to explain the documents. I should like Mr. Justice Jackson's idea, as I do not know whether you have the same system.

MR. JUSTICE JACKSON. Well first, of course, before I discuss the American usage, let me say I am not insisting upon any American system. One purpose of having a military tribunal was to be able to adopt the best from all systems. Secondly, I supposed this provision represented a compromise between the common-law system and the Continental system so that the indictment would embody a large part of the case but not necessarily all of the case. Our practice is difficult to explain because we have 48 States and some of them proceed under the common-law system and some by code systems, but, in general,

after a prisoner has been arrested, he is to go before a magistrate, at which point the prosecution must make a *prima facie* case for holding him for the grand jury. Then in most States we have a grand jury which is drawn by lot and is a secret body, and that inquires into the case. No man can be put to trial for a major crime unless he is indicted by a grand jury of his neighbors—at least 16 present to make a quorum in most States—and 12 must concur in the indictment. Then this indictment is presented by the grand jury in much the form of the British indictment. It may be in somewhat more detail. The first the court really knows about the evidence in the case is when the whole case must be presented to the court as if you never heard it before. I think the observation that Professor Gros has made to us at times—that ours is perhaps a more combative and sporting system—is probably true. I am not arguing for its merits. I think there is great merit in your system, and in ours, and ours is abused sometimes by prosecution and sometimes by defendants. But we must find some middle ground here. I had hoped that we had done it by the language used by the drafting committee. It seems to be quite appropriate in this kind of case that we use much of the Continental procedure. Certainly it is appropriate to use with the Germans, for that is their system as I understand it, and we are quite willing to go a long way toward the adoption of it. But we could not agree that the taking of evidence virtually ended with the indictment, so far as our presentation of proof is concerned.

SIR DAVID MAXWELL FYFE. It seems to me there are two points, and I think we are agreed, but we ought to make them quite clear. On the one hand, Mr. Justice Jackson accepts that in this case the indictment will be accompanied by all possible documents such as treaties, public reports of atrocities, and the like—that these will be passed to the Tribunal. That is what the Americans are conceding toward the compromise of the system. On the other hand, the French Delegation agree that at the trial all evidence will be called, but, as suggested in paragraph 24, the prosecution can put in additional documents if any have come to hand or seem desirable at that time. It seems to me that with these two compromises we have married the two systems. Isn't that the reality, Mr. Justice Jackson?

MR. JUSTICE JACKSON. Yes, I think it is. I would like to ask whether in the Continental system during preparation of documents accompanying the indictment the defendant has any representation, that is to say, in examinations of witnesses. Is the defendant represented in preparing that case or is it just the prosecution?

SIR DAVID MAXWELL FYFE. I should have thought the defendant was not represented at the preliminary. That is for the prosecution, but the prosecutor should supply the defendant with a copy of the examination.

It seems to me, gentlemen, that on that basis we are in fact in agreement and that this is a matter of words. Perhaps the drafting committee could make our words clearer. I wonder whether on that we could return to a very minor point on 17 (*g*), which is simply the appointment of court officials. "Marshals" is a particularly British thing. When our country was more disturbed, the judge on circuit used to have a bodyguard and the marshal was captain of his bodyguard, but in ordinary times he is more or less a secretary. I take it we may use some other term.

PROFESSOR TRAININ. In substance there is no difference at all, but perhaps it would be better to combine (*g*) in (*a*).

MR. TROYANOVSKY. (*e*) with (*g*), not (*a*).

MR. JUSTICE JACKSON. May I ask, is it the sense of the other delegates that we should abandon (*e*)?

SIR DAVID MAXWELL FYFE. No, (*e*) and (*g*) combined.

GENERAL NIKITCHENKO. The Soviet Delegation does not think this would quite fit in.

MR. JUSTICE JACKSON. Are we going to appoint and use masters in this, or can't we use them? It makes a great deal of difference in the scope of our case. If we cannot use masters in the assembling of this proof, I think it makes a good deal of difference with the line of preparation we have thought of using and whether we come out of here with a workable plan or not.

SIR DAVID MAXWELL FYFE. I thought we had agreed that we could use masters. The point Professor Trainin makes is that the technical nature should be stretched. It should not appear to be delegation of the powers of the court. I just wanted to find words to indicate that.

Is there anything on number 18? There is a question in (*b*), "take strict measures to prevent any action which will cause unreasonable delay. . . .", et cetera. What I gather was in the minds of the drafting committee was that you do not want these trials to become a platform for Nazi speeches. That is what we want to rule out. On the other hand, we don't want to use words which would seem to prevent the Nazis making their defense. I should have thought that, if we put in "to rule out irrelevant issues and matter of any kind whatsoever", that would meet the point. Cut out the words in brackets.

MR. TROYANOVSKY. The last part would be deleted.

SIR DAVID MAXWELL FYFE. I agree.

GENERAL NIKITCHENKO. When the charter was considered in the committee and in discussions that took place here before the committee took over the matter, the Soviet Delegation were always stressing the necessity of preventing the accused having the possibility of using the trial for propaganda because it is quite possible that the accused would like to become the accusers in the course of the trial. Therefore, the

Soviet Delegation thought it right to alter this particular sentence dealing with measures to prevent such action and attached considerable importance to the point. To make it impossible for the accused to use the trial for a platform for propaganda and accusation but in order to arrive at a unanimous decision as soon as possible, the Soviet Delegation are prepared to accept the suggestion and omit the last sentence, seeing that the other delegations think that sentence might diminish the authority of the Tribunal.

SIR DAVID MAXWELL FYFE. We are grateful for the omission.

MR. JUSTICE JACKSON. I want to say I am entirely in sympathy with the purpose of the Soviet Delegation in suggesting this sentence, although I could not be happy at the use of the sentence as it is. I think we should give a little thought to whether this purpose can be accomplished by some other means. There is a very real danger of this trial being used, or of an attempt being made to use it, for propaganda purposes, and I should like to make a suggestion as to what seems to me a weakness in the original American proposal that would help overcome this difficulty. It seems to me that the chief way in which the Germans can use this forum as a means for disseminating propaganda is by accusing other countries of various acts which they will say led them to make war defensively. That would be ruled out of this case if we could find and adopt proper language which would define what we mean when we charge a war of aggression. Language has been used in a number of treaties which defines aggression and limits it in such a way that it would prevent their making these counteraccusations which would take lots of time and cause lots of trouble. It seems to me that, if we make a study of treaties which have defined "war of aggression", we can confine our charge against them to a physical act of attack—and that is the crime, the attack. We might consider one or two definitions used heretofore.

SIR DAVID MAXWELL FYFE. In preparation for paragraph 6.

MR. JUSTICE JACKSON. Yes, I think it should go in paragraph 6, but it limits the possibility of propaganda. For example, here is a definition used in the treaty signed at London on July 3, 1933, by Afghanistan, Estonia, Latvia, Persia, Poland, Rumania, Turkey and the U.S.S.R., which was apparently worked out with great care:

"ARTICLE II. Accordingly, the aggressor in an international conflict shall, subject to the agreements in force between the Parties to the dispute, be considered to be that State which is the first to commit any of the following actions:

- "1. Declaration of war upon another State;
- "2. Invasion by its armed forces, with or without a declaration of war, of the territory of another State;

"3. Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;

"4. Naval blockade of the coasts or ports of another State;

"5. Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

"ARTICLE III. No political, military, economic or other consideration may serve as an excuse or justification for the aggression referred to in Article II. (For examples, see Annex.)"

These definitions would foreclose what they are apt to attempt because they are going to say for propaganda purposes, "It is true we made an attack, but there are political and economic situations which were our justifications." And that may have to be litigated. There are other treaties which we could consult for perhaps other definitions. We will try to get them all together and think it would be helpful.

SIR DAVID MAXWELL FYFE. I am very grateful to Mr. Justice Jackson and am sure it will be helpful to have them to consider.

Has anyone anything on 18 (c)? Then 19 or 20.

GENERAL NIKITCHENKO. Perhaps the Russian translation of 20 is not correct, but as it reads it appears as if the Tribunal should require the defendants to convince the Tribunal of relevance of evidence. That is a rather tricky thing and the defendants may not succeed in doing so, and therefore it seems that the wording should be altered somehow to make it clear as to what is meant.

MR. TROYANOVSKY. Perhaps to say "to prove to the Tribunal".

GENERAL NIKITCHENKO. It is suggested that it should be the Tribunal which requires the defendants to state convincing arguments in favor of relevance of any evidence.

We agree with the idea of this paragraph; that is to say, the defendant should not be allowed simply to ask for presentation of such and such documents or witnesses. He must present sufficient arguments to support his request. It is suggested that the Tribunal shall be required to be informed of the nature of the evidence before it is offered so that they may rule upon its relevance. Perhaps a new draft should be presented at the next meeting.

SIR DAVID MAXWELL FYFE. There is no difference between us in essence, merely a question of finding the words. Shall we pass to 21? 22?

Number 22, I think, is important because that would allow the smaller Allies to present us with official reports which might be useful.

MR. JUSTICE JACKSON. But how do we stand about the indictment

as to probative value? As I understand it, this recognizes the probative value of the indictment, which under our system, of course, has no probative value. In other words, it is an adoption of the Continental system as to the probative value of the report of the prosecutors, and I really think that, if we are going to adopt it, we ought to adopt the Continental system candidly so I can say to my people, "We are trying Continentals and trying them by the Continental system."

PROFESSOR TRAININ. The indictment has no actual probative value. It is only one of the elements to prove a case.

PROFESSOR GROS. There are two things not clear in 22. One is evidence used by whom? By the prosecution commission or the Tribunal? It should be said.

PROFESSOR TRAININ. Perhaps not only prosecutors but counsel for the defense.

PROFESSOR GROS. We must ask the commissions to send their reports.

PROFESSOR TRAININ. It is to point out to whom the national committees shall send their documents. The whole purpose of this paragraph is simply to show that the documents received from the national commission will have exactly as much value as evidence as the documents prepared by the prosecution. That is the whole point, simply to say the Tribunal itself will consider their value on receipt of them just as they will value any evidence introduced or entered in the prosecution.

SIR DAVID MAXWELL FYFE. Could we have that suggestion again?

MR. TROYANOVSKY. ". . . shall be received in evidence by the Tribunal and given such probative value as the Tribunal shall decide."

PROFESSOR TRAININ. The chairman pointed out in the beginning that this article is important. Therefore why change it? As it stands, it is quite clear.

SIR DAVID MAXWELL FYFE. I thought it was not clear and we were trying to clarify it.

PROFESSOR TRAININ. Of course, what value would the documents have if they have no value? And therefore every document which is presented to the Tribunal has sufficient value to be considered. Then the Tribunal would consider what the value is, to say whether they are of sufficient evidence or not.

SIR DAVID MAXWELL FYFE. That was what my words were trying to make clear—that they will be received in evidence and then the Tribunal will attach the value. Or they would have the same probative value as the acts of the committee.

MR. ALDERMAN. We never decided what probative value those acts would have.

GENERAL NIKITCHENKO. Just as indefinite, but equal with the documents.

MR. JUSTICE JACKSON. The difficulty with this provision, as I see it, is that after all we must have words here that mean something before us. To me this is like making a promise that is bound to be broken. We cannot say it has the same value as something having no value, without leaving ourselves open to suspicion. We all agree that an indictment has no probative value and to say that the War Crimes Commission's report shall have the same probative value, or the same value as something that has no probative value, is a use of English that I don't know how we could ever explain to our profession. I couldn't. What we need here is a provision that the documents prepared by the War Crimes Commission and the Extraordinary Commission of Russia—and I think we should also include other tribunal records of other trials—should be admissible as evidence in this case and that their weight is to be determined by the Tribunal.

MR. TROYANOVSKY. The Russian term here is "judicial value".

MR. JUSTICE JACKSON. Once anything is accepted in evidence the weight then becomes a question for the Tribunal. These things should be admitted in evidence, and we should make provision for other documents which were included in our other draft. For instance, we have reason to believe that Frank will be tried, and a great deal of evidence will be brought out in that trial that will be of value. I think that record should be admissible before the International Tribunal.

SIR DAVID MAXWELL FYFE. It seems to me there are two points—first, to see that they will be received in evidence by the Tribunal, which implies the Tribunal will attach the value; and secondly, we should include, as Mr. Justice Jackson suggests, the records of trials that have already taken place. Is there any objection to the second, regarding the inclusion of records of trials which have taken place?

GENERAL NIKITCHENKO. No objection.

MR. JUSTICE JACKSON. And the other documents mentioned in our list—we want to make it as broad as possible in getting documents in.

SIR DAVID MAXWELL FYFE. I think we ought to see a redraft and see it tomorrow morning. Should we?

PROFESSOR GROS. Could I suggest it could be included in article 21?

MR. ALDERMAN. It belongs to "judicial notice" really.

SIR DAVID MAXWELL FYFE. Now we come to the question of where the trial is to take place. I understand Mr. Justice Jackson has just made a tour in Germany. Perhaps he could tell us about the results of it.

MR. JUSTICE JACKSON. There is not much to report. There are very few courthouses standing large enough to assemble very many people in. General Clay suggested that the most suitable place for a trial is Nürnberg. We went there and looked at the premises. The courtroom is not as large as it ought to be, perhaps, but it is larger than any

other courtroom standing in that part of the country, or any other part that we can find out about, and the jail facilities are very adequate; in fact, 1,200 people could be jailed there. There is a tunnel from the jail to the courthouse. The whole is enclosed by a 20-foot wall, which means that from a security point of view it would be an excellent setup. There is adequate office space for everybody and that in the building in which the courtroom is located. Adequate communication systems can be set up. Adequate billeting for witnesses, for all of the counsel and their staffs, and all of those things can be provided for. Of course they will be if that is the place chosen. That is by far the most suitable place we could find, and that would be our suggestion.

GENERAL NIKITCHENKO. I think it is hardly possible for us to decide now where the sittings of the Tribunal will take place permanently. The cases may be heard in various places, and I do not think that it enters into our task either. The idea of this article 23 is simply to establish the principle of the places that would be selected for the Tribunal, and it is said here, "such other place as the Signatories may agree." What is important is what will be the center of the Tribunal where all the documents of which we have been speaking, documents of the national commissions and so on, should be directed, and it is our view that that place where the actual center of the Tribunal should exist must be Berlin. As far as the sittings are concerned, it would be quite sufficient to say that the Tribunal should sit at such a place as the signatories may agree.

SIR DAVID MAXWELL FYFE. It seems to me that, if we are going to stick to our hopes that we shall get a trial in September—I think we all agreed that was worth trying to do—we must fix a place for the first trial almost right away. The arrangements will be very considerable. We have to find accommodations not only for the judges, counsel, and defendants, but also for the press. That will mean all the communications, arranging for airplanes, motor cars, and the like, and I should have thought we ought to agree for the first trial. How extensive that will be will, of course, depend upon the agreement of those ultimately appointed prosecutors. Certainly as far as accommodations are concerned, Nürnberg seems very suitable, and it could be almost immediately used as a center for collecting the evidence. I should very much like to impress on the delegations the suitability of Nürnberg for the first trial and then leave the wording we have here "such other place as the Signatories may agree." After we agree on a place, I am told by General Bridgeman, who advised me on the matter, it will take six weeks or two months to arrange. If we don't agree, we are really stultified about the trial coming on before October.

GENERAL NIKITCHENKO. Does it mean that, if the first sitting of the Tribunal takes place at Nürnberg, the center of operation of the

Tribunal, which will be of vast importance, will remain permanently in Nürnberg?

SIR DAVID MAXWELL FYFE. I should think that for the moment it will be necessary to decide only for the first trial. After that, it would be for the prosecutors to arrange it.

GENERAL NIKITCHENKO. I think the question should be divided into two parts; namely, one is the question of where the Tribunal shall sit, and the second question is of the place of its permanent seat. And as to the second, the official seat, the Soviet Delegation are in favor of Berlin. Geographically, we think it much more central than Nürnberg. Second, Berlin is much more convenient as that is the seat of the Allied Control Council and the Allied Control Council have all the arrangements and personnel at their disposal and can be very helpful to the Tribunal in many ways in various facilities which will be required by the Tribunal.

MR. JUSTICE JACKSON. I have never thought of this as a permanent tribunal. I have never given thought to a permanent seat for it, and we do not contemplate it. The whole American plan which was proposed here was designed to reach a very large number of people at a single trial or at most, perhaps, a very few trials. That is the reason we have tried to reach people through organizations. We have not thought of it as a trial of 15 or 30 people, but we have thought of it as a trial the result of which would affect thousands of people at least. I must say that if you contemplate reaching any such number of people by any other method, if you contemplate a court going on circuit, as we would say, and sitting for an indefinite period of time, that has not been the way we have thought of this at all. Therefore, we contemplate cleaning up most of this in a single trial. That is the heart of the American plan. That is the only thing that I know of that commends it, that it does have reach and scope by which to reach many people through few trials and to reject it is to reject the entire heart of the American plan. I do not insist it be adopted, but, if it is not, we must reconstruct our entire plan of handling this matter.

GENERAL NIKITCHENKO. I don't quite understand what is meant by that. Is it meant that the Tribunal will actually be able to condemn thousands and thousands of people, not really to condemn but simply to reach their guilt? I thought that the Tribunal would deal with the cases only of the principal criminals. As far as I understand, there are about 350 principal war criminals in the hands of the United States alone and then the other countries have large numbers of them as well, and therefore, it seems to be quite impossible to try them all. There may be 500 or more at once. I thought that principal criminals would be divided into groups, say, for instance, a separate case for the leaders of the Nazi Party and a separate case for members of the Gestapo, and

so on, and each of those big groups may be subdivided into smaller groups which are linked with each other. It seems to me that in this we are faced with a number of separate cases and not with one or two.

The agreement is supposed to be concluded for a year. It may be that the actual trying of all those trials will take less than a year, but anyway it will take considerable time—enough time to necessitate having a seat for the Tribunal, but the actual hearings of the cases may take place in other places as well.

MR. JUSTICE JACKSON. What would be at the central seat? A court in my conception of it has no organization except a clerk to keep its records and a little staff of officers. These prisoners are in the hands of our military authorities, who would be responsible for their custody and protection. The court would have no permanent organization that I would know of beyond its records, which should be lodged with each of the governments involved. I don't know just what is contemplated by "seat of the court" as distinguished from the place where it would conduct the trial.

SIR DAVID MAXWELL FYFE. We have been sitting for three hours and have got to a very knotty point. It seems it might be worth our adjourning and considering this before our next meeting.

The Conference adjourned until Wednesday, July 18, 1945, at 10:30 a.m.

XXXIII. Minutes of Conference Session of July 18, 1945

Sir David Maxwell Fyfe called the meeting to order.

MR. JUSTICE JACKSON. Before we get into a discussion of abstract things, I should like to suggest something very concrete. The matter of a place for trial, as I have said before, is very important to settle, at least as to the first trial, because a great deal has to be done by way of providing facilities wherever it occurs. Whoever is to be responsible for it wants to begin preparation. I have examined the facilities at Nürnberg, and, while I do not think they are perfect, I think they do meet our needs better than anything that is available in Germany from a survey that our officers have made. It is very important that we get these prisoners in one place, and that we get them where they will be accessible to our people for interrogation. They are not now in any one place, and it is very important that we get selected the ones we want to interrogate. It takes some provision of facilities to do that. If we use Nürnberg, the courthouse heating plant must be put in shape as it was knocked out by bombing. Communications must be arranged. Proper billeting and proper mess must be arranged. We all want to be adequately fed. Creature comforts are something I do not despise. So I make this suggestion about it.

We have available a plane assigned to our work. I should be very glad to invite the representatives of the three collaborating countries to go with us to Nürnberg. It is not a long trip. I should like you to inspect the jail facilities, the courtroom, and the billeting places, and generally help contribute ideas as to what should be done if that is to be used. And if we find that it does not meet the requirements, then we will know it. But I think it is very important that we get some place selected. I would suggest, if it is agreeable, that we can be prepared to leave early on Saturday morning. We can get back here on Sunday afternoon or Monday morning. Suitable accommodations can be provided meanwhile. There is no difficulty about arranging the physical facilities for the trip, and I should be glad to extend the invitation in the interest of getting this thing expedited as much as possible.

SIR DAVID MAXWELL FYFE. I am very grateful to you for the invita-

tion. I shall be very pleased to accept and have a look at the physical conditions in Nürnberg to see whether they are satisfactory. There are really two points that Mr. Justice Jackson's proposal deals with, the physical requirements of the trial and the ability of Nürnberg to seat them. That point should obviously be satisfied, and I should be very pleased to go and help to decide that point. The second aspect, of course, is whether the delegations can accept in principle the subject of the physical capabilities of Nürnberg, the question of a first trial there of the outstanding and well-known war criminals. Yesterday the Soviet Delegation said that the condition of that, which they were anxious to see, was that there would be what was called a secretariat of the Tribunal in Berlin. I think we might clarify that to this extent: that there would be a secretariat and administrative office of the Tribunal in Berlin, that the indictment would be delivered there, and that at that time there would be a conference for Chiefs of Counsel in Berlin. Then if that were put on the other side of the ledger, so to speak, it might be that the Soviet Delegation would accept, subject to the physical capabilities, the idea of the first trial of the outstanding war criminals at Nürnberg.

GENERAL NIKITCHENKO. The arguments advanced by Mr. Justice Jackson yesterday regarding the seat of the first trial to be held in Nürnberg seem to be convincing, and there would be no objection from the Soviet Delegation to that first trial being in Nürnberg. They will be prepared to recommend to their Government to take part in the near future in the preparation of that first trial. The permanent headquarters thereof—where the court and the secretariat and administrative offices should be settled—is another matter, and they still consider it would be better to have the permanent seat of the court at Berlin. That would be the place where the signatories to the agreement would be convened, and preparation for later trials would be organized and staged. Summing up the views, Berlin would be a more suitable place for the permanent headquarters, but we would be agreeable to staging the first trial in Nürnberg, later trials to be at the permanent seat or to be decided later.

SIR DAVID MAXWELL FYFE. Do any of the delegations care to take a look at the Nürnberg site over the week-end?

GENERAL NIKITCHENKO. We would be glad to take advantage of the kind invitation extended by Mr. Justice Jackson.

JUDGE FALCO. We accept and will go.

Mr. JUSTICE JACKSON. That will enable us to see what is needed to be done in order to make it adequate so that work can be started because the heating plant and things like that must be fixed and the plants are out of commission now. It would take some time in order to get them equipped.

GENERAL NIKITCHENKO. The cold weather will hardly set in before the time for the first trial comes.

MR. JUSTICE JACKSON. I hope General Nikitchenko is right, but I think we may like a little heat in the mornings. I shall let you know about the details of time and place, but subject to weather we can set it up for Saturday morning early so that we can reach Nürnberg at a convenient time for lunch.

SIR DAVID MAXWELL FYFE. Perhaps the best thing would be to leave number 23 for a redraft to carry out what we agree and proceed to the rest of the agreement. Have the Soviet Delegation had a chance to consider Mr. Alderman's redraft of 21 and 22, or shall we leave that for later in the day?

GENERAL NIKITCHENKO. No, we have just received it.

SIR DAVID MAXWELL FYFE. Then we shall leave that until later when you have had a chance to consider it.

Now, number 24. I think, Mr. Troyanovsky, that General Nikitchenko said that he accepted 24 subject to a point.

GENERAL NIKITCHENKO. The basic principle of 24 is acceptable to the Soviet Delegation, but we propose for subparagraph (e) "The court, the prosecution, and the defense shall interrogate the accused and the witnesses. The Tribunal may at any time put any question to the defendants and the witnesses."

MR. ALDERMAN. That is in (f) now as it stands.

GENERAL NIKITCHENKO. Just add in (f) "at any time".

SIR DAVID MAXWELL FYFE. It seems to me that the difference between us is on the production of the witness. The court is in supreme control as to what will happen when a witness is called, but our conception is that, when the witness is called, the party calling him will ask him questions to bring out the purpose for which he is called, which will be explained to the Tribunal.

GENERAL NIKITCHENKO. We agree that any witnesses who are summoned or called up for questioning by a particular side shall on the first case be questioned by that party.

MR. ALDERMAN. May I suggest that that formula leaves out entirely the idea of cross-examination?

GENERAL NIKITCHENKO. That is, to leave the second part of subparagraph (e) intact. The amendment really affects the first part. Leave (e) as it stands, but add the introductory phrase.

SIR DAVID MAXWELL FYFE. As I understood from yesterday, the Soviet Delegation do not mean to insist that the defendant must answer the question. If he does not want to answer, the position is as we discussed it yesterday.

GENERAL NIKITCHENKO. Yes.

SIR DAVID MAXWELL FYFE. I think that on that basis it does not conflict with our ideas that the defendant may be interrogated.

PROFESSOR GROS. I am not quite clear on the point of when the defendant pleads "guilty" or "not guilty" as nothing appears in the agreement. Did we decide on the rules, or should it be discussed here?

SIR DAVID MAXWELL FYFE. It is a question of the rules, Professor Gros, because it varies from case to case. Sometimes, in sitting as a judge, one is quite content with the statement from the prosecutor when the defendant has pleaded "not guilty". I should think it is a matter for the Tribunal.

MR. ALDERMAN. I might say that with this there is only one possible consequence of a plea of "guilty" and that is that a man is convicted on his own plea regardless of evidence.

SIR DAVID MAXWELL FYFE. Hasn't the judge the right to ask the prosecution to call any witnesses in order to explain on the question of punishment?

MR. ALDERMAN. On the question of punishment, yes.

SIR DAVID MAXWELL FYFE. Then number 25, the question of languages. Has anyone any point on that? Number 26?

PROFESSOR TRAININ. In regard to rights of the defense and the prosecution—no article says they take any part. Therefore, I propose to submit two articles, one regarding the prosecution and one regarding the defense. Nothing has been said so far regarding the prosecution, defining the functions of prosecution. The first sentence in this proposed article reads, "One or several prosecutors shall take part in each trial. This function may be fulfilled by the Chief Prosecutors or by other persons authorized by them." Now for the defense: "The defense may act at the request of the defendant. Function of counsel for the defense may be discharged at the request of the defendants by persons who are members of the bar, or by other persons authorized thereto by the Tribunal." Those two articles are regarded as necessary to make the statute complete.

SIR DAVID MAXWELL FYFE. I have no objection to the contents. Perhaps we could just have a look at the drafting and bring it up with the other reserved matters, but I see no objection.

MR. ALDERMAN. It seems to me the first one is covered already by article 15 (2) (d) and (e).

PROFESSOR TRAININ. That rather stipulates or defines the right of the prosecution, but we think there should be a definite article defining the rights of the prosecution and who is entitled to act for the defense.

MR. ALDERMAN. The other seems to be covered completely under "Fair Trials", (b) and (e).

SIR DAVID MAXWELL FYFE. I agree and support Professor Trainin as to the inclusion of the first sentence. I think that ought to be made clear, that either one or several of the prosecutors should take part, but think it should be made clear that each of the four will be entitled to put forward whatever part of the case is decided.

PROFESSOR TRAININ. There is, of course, a certain amount of repetition in the additions suggested, but article 16 merely stipulates guaranties offered to the accused persons, whereas I would like to see two articles setting out the exact functions.

SIR DAVID MAXWELL FYFE. Perhaps we could leave that. We all want these points made clear. That would come in at the end of 25, or at the end of 21 or 23. Now shall we go to "Judgment and Sentence", number 26? Numbers 27? 28?

MR. ALDERMAN. Will we use "sentenced" or "convicted"? I do not know why the brackets were around that.

MR. JUSTICE JACKSON. We would not want to use the words "confiscation of property". We have no such penalty, and for historical reasons that would be extremely unacceptable to the American people. I don't know whether there is any point in arguing the merit of our position; it may be entirely wrong. Our view is that a fixed money penalty may be assessed but to confiscate a defendant's property, along with a death sentence, would be to punish his family, not him, and we just don't do it. It would be somewhat obsolete as a penalty—like drawing and quartering. It is the kind of penalty we don't impose. I don't suspect these people will have very much left to confiscate anyway. I think it is a provision that is not very practicable. I do not want to include the term but am quite willing that a penalty payable in money, a fixed penalty, be assessed; but the words "confiscation of property" would set pretty badly with Americans.

SIR DAVID MAXWELL FYFE. We take it in two stages. The courts have a complete right to impose a qualified money penalty, but that can be levied on the goods and property of the defendant.

MR. JUSTICE JACKSON. That is right.

SIR DAVID MAXWELL FYFE. There doesn't seem to be a great deal of difference in effect.

PROFESSOR TRAININ. In the case of the death penalty, can a money fine be imposed?

SIR DAVID MAXWELL FYFE. It is possible. It has not been done in my experience, but I do not think there is anything to prevent it.

PROFESSOR TRAININ. I would like to take that into consideration but find it difficult to conceive it alongside a penalty of death. It is a question after all of drafting. Perhaps we could find a more suitable word. The word "fine" does not appeal to us very much but we would consider another term instead of "confiscation".

SIR DAVID MAXWELL FYFE. The principle is that the Tribunal shall have the right to impose a qualified money penalty which will be leviable on the goods, property, or estate of the defendants.

PROFESSOR GROS. There is a difference between the question of "fine", which is quite easy to understand, and the question of confisca-

tion". We would not see any objection to confiscation of property which had been stolen.

SIR DAVID MAXWELL FYFE. We have a procedure whereby restitution may be ordered of stolen property, and I should be pleased to have a suggestion to cover restitution.

PROFESSOR TRAININ. That would be quite all right—deprivation of looted property.

SIR DAVID MAXWELL FYFE. Well, we would include that in the redraft. Now, number 29? Number 30? What is the difficulty here, Mr. Alderman?

MR. ALDERMAN. Our views are that the expenses of the Tribunal and of the trial ought to be charged against the funds allotted for the maintenance of the Control Council but that the expenses of individual prosecutors of the four countries, like the money spent in America and London, ought to be borne by each signatory rather than by the Control Council.

SIR DAVID MAXWELL FYFE. Does anyone want to press for the inclusion of the expenses of the Chiefs of Prosecutors—for the alteration of this text?

The position is that the following points are still outstanding, and I ask your help on this. On paragraph 10 there is a British draft which has been accepted in principle subject to consideration. Paragraph 15, the resolution of differences between Chief Prosecutors, and the redraft of 21 and 22 which Mr. Alderman has provided this morning. There will be a redraft of 23 to meet what we decided this morning, two additions by Professor Trainin, and a redraft of number 28. Now it seems to me that the best course would be to use this morning on paragraph 6 and then try to provide redrafts which would be circulated tomorrow of the various outstanding points.

MR. JUSTICE JACKSON. It seems to me the time has arrived when the heads of the delegations will have to sit down and reconcile language where there are minor changes, since language is so important. The exact language will have to be settled, and I don't know whether it can be done expeditiously except to sit down as heads of delegations and bind our people for better or worse to something.

SIR THOMAS BARNES. It would be better to redraft these things and then the heads of the delegations settle upon it.

GENERAL NIKITCHENKO. Perhaps it would be better to entrust to a drafting subcommittee the task of working out the texts of those articles which are no longer doubtful, and by the time that that task was completed perhaps the heads of delegations could get together and submit agreed proposals for the texts of the disputed articles, particularly article 6.

SIR DAVID MAXWELL FYFE. I am not quite clear. Would the draft-

ing committee cover these outstanding ones that I mentioned this morning?

GENERAL NIKITCHENKO. Yes—those where differences in drafting lie—because in principle we have agreed, except for article 6, which could be discussed by the heads of delegations.

SIR DAVID MAXWELL FYFE. Well, I think there was, on paragraph 15, a question of the majority vote.

GENERAL NIKITCHENKO. In 15 it would be necessary to lay down the principle that, if there is a difference, the chairman should have the deciding vote.

SIR DAVID MAXWELL FYFE. Well, I think that is a matter we could profitably discuss between the heads of the delegations. We reserve that for them.

PROFESSOR GROS. I am afraid I must point out some difficulties on article 6; so I shall ask the Conference to discuss it or have it discussed by the heads of the delegations.

SIR DAVID MAXWELL FYFE. Would it be useful if we occupied the next hour by a preliminary discussion on article 6 so that we would know what the general views are?

GENERAL NIKITCHENKO. I hardly think it would be possible in the course of an hour to decide the various points still under dispute in article 6, particularly (c) and (d). Perhaps it would be better to leave it until tomorrow.

SIR DAVID MAXWELL FYFE. Would it be possible for the delegations who have alterations to let us have a note of the alterations before we start discussing?

MR. JUSTICE JACKSON. Could we not get each other's views here? I am sure I am not informed as to what the objection is. I have the French draft of objections.

PROFESSOR GROS. We agree completely with the intent, but we would like it formulated in a more careful way to avoid any discussion by international lawyers in the next months or years to come.

SIR DAVID MAXWELL FYFE. I am very anxious to meet everyone's views, but on the other hand we are all anxious to get on with the matter and I gather that the Soviet Delegation would like to submit a draft of their views. Is that so?

GENERAL NIKITCHENKO. No, there will be observations on the existing draft.

SIR DAVID MAXWELL FYFE. But will they be in writing?

GENERAL NIKITCHENKO. There is no intention of submitting a new draft.

SIR DAVID MAXWELL FYFE. It is only a third writing, and we would like to have it submitted in writing.

GENERAL NIKITCHENKO. We will submit it in writing tomorrow morning.

SIR DAVID MAXWELL FYFE. Could we meet tomorrow afternoon? If General Nikitchenko, Mr. Justice Jackson, Professor Gros, and I meet to consider article 6 tomorrow, could Professor Trainin, Mr. Alderman, Mr. Barnes, and Judge Falco meet to consider the cleaning up of the draft?

PROFESSOR TRAININ. Perhaps it would be quicker if the drafting committee met in the morning.

PROFESSOR GROS. Let the heads of the delegations discuss 15 (b).

SIR DAVID MAXWELL FYFE. Shall we use the time by discussing 15?

GENERAL NIKITCHENKO. The only doubtful part of 15 is the last paragraph.

SIR DAVID MAXWELL FYFE. In my view there are two points outstanding on 15 (b) after our discussion. The first is the question of the final designation of the defendants under (b). Our discussion rather went on the line, on that point, that one delegation might want to prosecute a defendant and that, on its being put to the prosecutors, there might be an equal division. That was the problem that was raised. I am in favor of bringing in the defendants, that is, in case of doubt. Quite generally, I think I would rather see a defendant in than see him out. And I myself on that point would be prepared to commit the British Delegation to this: that once our defendant was proposed by a Chief Prosecutor, he should not be excluded from trial unless there were a majority of three to one in favor of exclusion. That seems to me to encourage the trial. Now on the other points, that is, coordination of individual work, approval of the indictment, and the lodgment of the indictment and rules of procedure, I should have thought that the draft would be satisfactory, that in these matters the positive would have to have the majority. I draw a distinction myself between it and the exclusion of a defendant. I want that to be made as difficult as possible, but on the other matters I am prepared to accept the draft. There would not be a casting vote. There would be a vote of three to one.

GENERAL NIKITCHENKO. If there is a division of votes two to two, the person would be prosecuted.

SIR DAVID MAXWELL FYFE. That is just my suggestion in case of doubt about prosecuting. But apart from that, I prefer to leave that as it is.

JUDGE FALCO. We agree.

MR. JUSTICE JACKSON. Well, I don't like to be alone, but I have always found that the safest thing to do when you do not understand is to say "No", and I do not understand what I am committing myself to in 15 (1) (a). There are literally thousands of decisions which will have to be made from hour to hour and day to day and which are not minor matters. It is not at all unlikely we shall have a two to two

division. We have seen it here at this table. I would not want to insist on going ahead with something that no one of my colleagues would agree to. But we have basic differences of viewpoint with regard to certain points in this case. For instance, I personally am much more concerned about the possible disagreements over the documents to be submitted, in view of the views expressed here, than I am about the particular defendants to be prosecuted. I think we would have little difficulty on that. But in the coordination of work of the chiefs of prosecution and their staffs, if that must be submitted to a majority vote, we cannot have a majority for anything, at least for some weeks, because we haven't the other prosecutors. I think we are in a state of stall that makes this plan unworkable. I do not think giving the vote to a rotating chairman, so that adoption of a proposal might depend on which day you brought it up, would be a workable plan. I don't know how you intend to rotate—I've never understood it—but I am wondering what result you would get. It seems to me that the only suggestion that meets our needs would be that the same arrangement that the Attorney-General suggests as to the determination of defendants applies to the determination of policies on which they shall be prosecuted. In other words, if there is an equal division, the side which has the possession of the prisoner may go ahead. I would not see any workable plan other than that, and I think we must provide it. It does not derogate at all from the international character of this agreement. It must provide what will occur in case of an equal division in prosecutors if we are going to have things determined by formal vote of the prosecutors.

GENERAL NIKITCHENKO. Regarding the problem of coordination, the Soviet Delegation imagines that there is no real necessity for every single step of each single prosecutor to be coordinated. Coordination should occur, but coordination to the general plan of prosecution, and in execution of the plan each should be entitled to independent action. When all the Chief Prosecutors have been appointed, they should get together and decide and advise one another who is going to deal with a particular case and who is going to investigate a particular accusation. That is considered essential. Each could then have freedom to deal with that particular case. Until the other countries have appointed prosecutors, the Chief Prosecutors appointed and who are ready should be entitled to carry on their work. Perhaps it would satisfy Mr. Justice Jackson if a single word or two were added to subparagraph (a), “. . . in coordination with the general plan and with the work of each of the Chief Prosecutors and his staff.”

SIR DAVID MAXWELL FYFE. What I would suggest is that we redraft this more fully, including what General Nikitchenko suggests. The drafting committee could elaborate on this.

MR. JUSTICE JACKSON. Well, I think General Nikitchenko's suggestion meets my problem as to (a), and I agree with him fully that in those things there must be a common plan. My problem is this—and I think it is a very real one and very fundamental—what happens when two of us favor one plan and two of us another, as for example, what should go into the indictment and what should go in at the trial? We approach this from different systems of law and practice and different traditions. Now, my view is, if it is an American prisoner and I want to charge him and one of my associates agrees, I should be entitled to do so. I would not want to do it unless one of my associates did agree. In other words, the absence of an agreement should not stall our case. I think every agreement which is intended to function by majority rule where an equal division is possible should make provision as to what happens in case of a tie vote. My difficulty in the question of applying the principle that the chairman shall cast two votes in case of a tie is that we have settled nothing as to who shall be the chairman. Does rotation mean by the week, by the day, or by the trial? You have the possibility of equal division as to choice of a chairman, and, if the selection of a chairman is revolving, other questions arise. I think it would be most unfortunate if the way a thing was decided depended upon when it was brought up and who happened to be in the chair at the moment. Where we chiefly use the casting vote is in the case of a person who has no vote in bringing about the tie, like the Vice President, who votes in the Senate if there is a tie, but who does not vote in producing a tie. He has no vote other than a deciding one. So I don't think it is workable in this situation, and I would not be able to agree to an arrangement that I think might not work.

SIR DAVID MAXWELL FYFE. I still feel that the only way of dealing with this is to get out a compromise on paper to try to make the different points and discuss that with the heads of delegations tomorrow. If I may assume the task myself, I will try to get out what I consider a fair compromise, and then we could deal with it tomorrow afternoon. I firmly believe that four reasonable men, animated by the same keen desire, could break down and find a way. Then shall we adjourn now on the understanding that the drafting committee meets tomorrow morning at 10:30 to clean up the draft and the heads of delegations meet at 2:30?

MR. JUSTICE JACKSON. One other thing is suggested on this. I think there should be an arrangement whereby a nation may appoint a successor to its Chief Prosecutor because, candidly, it is suggested by my personal situation. The American plan contemplated cleaning this thing up in one trial or, at the very most, a very few trials. I shall not be able to remain for the life of this agreement and shall not be

able to go through a number of trials. I shall submit to the President the question of whether he should choose my successor before a trial or after one. But I would want no misunderstanding—if we desire to change prosecutors, it is not a question of my own or my country's bad faith or receding from the agreement.

The Conference adjourned.

XXXIV. Report of American Member of Drafting Subcommittee, July 19, 1945

MEMORANDUM TO MR. JUSTICE JACKSON

19 July 1945

Subject: Report of Drafting Subcommittee Session of Thursday,
19 July 1945.

1. The Drafting Subcommittee spent the morning of Thursday 19 July 1945, working on the redraft of the agreement and of the charter. There was no trouble about the agreement; only a few slight verbal and punctuation changes were made.

2. In revising the charter we, of course, skipped over Article 6 and Article 15, which were to be dealt with by the heads of the delegations in the afternoon meeting of Thursday, 19 July. We made a number of verbal changes without particular difficulty until we reached Article 17 in which we were to merge subparagraphs (*e*) and (*g*). Sir Thomas Barnes and I had redrafted this merger of the two subparagraphs as follows:

“(f). to appoint interpreters, reporters, clerks and other officials, either generally or for a particular case. In particular, if at any time during the Trial it shall be established by the Tribunal that (for a reason which the Tribunal finds sufficient) a witness cannot be brought to the place of trial, then the Tribunal shall have power to appoint a special officer to take the evidence of such witness and to report to the Tribunal. Persons so appointed shall, before assuming their duties, if required by the Tribunal take an oath in a form provided by the Tribunal.”

3. Professor Trainin objected to this and proposed a much more general formula to the following effect:

“The Tribunal shall have the power to appoint officers (secretaries, interpreters, etc.) for the carrying out of tasks of a subsidiary nature. The functions and duties of these officers shall be set forth by the Tribunal in the Rules of Procedure.”

4. Sir Thomas Barnes and I argued that the Tribunal has no inherent powers and will only have such powers as the signatories confer on it, and insisted that we put in expressly the power to appoint examiners or to issue letters rogatory. Professor Trainin thereupon

agreed that the Tribunal would have the power to appoint officers and to decide what functions it would give them. After much discussion I smoked him out on whether he would agree now to insert the word "examiners" in his formula. He refused to do this and it finally became quite clear that he did not intend or wish the Tribunal to have the power to appoint examiners.

5. In our argument on this point Sir Thomas and I were fully seconded by M. Falco, in spite of the fact that the French procedure does not provide for special masters or examiners. We were entirely unable to bring Professor Trainin around, and the whole question had to be reserved for discussion at the plenary sessions.

SIDNEY S. ALDERMAN

XXXV. Draft Article on Definition of
“Crimes”, Submitted by French Delegation,
July 19, 1945

Note: On July 19, 1945, the French Delegation submitted a draft of article 6 on the definition of “crimes”, together with their own translation of it into English, as follows:

[Translation]

DRAFT ARTICLE ON THE DEFINITION
OF CRIMES

The Tribunal will have jurisdiction to try any person who has, in any capacity whatsoever, directed the preparation and conduct of:

- i) the policy of aggression against, and of domination over, other nations, carried out by the European Axis Powers in breach of treaties and in violation of international law;
- ii) the policy of atrocities and persecutions against civilian populations;
- iii) the war, launched and waged contrary to the laws and customs of international law;

and who is responsible for the violations of international law, the laws of humanity and the dictates of the public conscience, committed by the armed forces and civilian authorities in the service of those enemy Powers.

XXXVI. Definition of "Aggression," Suggested
by American Delegation as Basis of Discussion,
July 19, 1945

DEFINITION OF AGGRESSION SUGGESTED
FOR CONSIDERATION WITH ARTICLE 6

An aggressor, for the purposes of this Article, is that state which is the first to commit any of the following actions:

- (1) Declaration of war upon another state;
- (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another state;
- (3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another state;
- (4) Naval blockade of the coasts or ports of another state;
- (5) Provision of support to armed bands formed in its territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

No political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression.

XXXVII. Minutes of Conference Session of July 19, 1945

Sir David Maxwell Fyfe called the Conference to order and called attention to a draft article on the definition of crimes proposed by the French Delegation [XXXV], and a definition of aggression suggested by the American Delegation for consideration in connection with the definition of crimes [XXXVI].

SIR DAVID MAXWELL FYFE. Perhaps the French Delegation will be good enough to explain their suggestion of definitions.

PROFESSOR GROS. It is hard to add anything to the actual draft. The intention is the same as those of others who have proposed drafts of article 6. Our objections to the definitions so far proposed are that the statute of the International Tribunal will stand as a landmark which will be examined for many years to come, and we want to try to avoid any criticisms.

We do not consider as a criminal violation the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law. We think that in the next years any state which will launch a war of aggression will bear criminal responsibility morally and politically; but on the basis of international law as it stands today, we do not believe these conclusions are right. Where a state would launch a war of aggression and not conduct that war according to rules of international law, it would be desirable to punish them as criminals, but it would not be criminal for only launching a war of aggression.

We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression. The judges would be in a very difficult position if we insist on that fact. The subject was often up for discussion in the League of Nations. It is said very often that a war of aggression is an international crime, as a consequence of which it is the obligation of the aggressor to repair the damages caused by his actions. But there is no criminal sanction. It implies only an obligation to repair damage. We think it will turn out that nobody can say that launching a war of aggression is an international crime—you are actually inventing the sanction. The subject was studied by Professor Trainin in his book. He tries to construct the idea of an international crime. He recognized that international

law, as it now stands, does not make it punishable. The effort to make war of aggression an international crime is still tentative.

If, instead of making a declaration of international law which is not certain, we use our draft, we will avoid that difficulty and get the same results. We are not declaring a new principle of international law. We are just declaring we are going to punish those responsible for criminal acts. We do not go beyond what is traditional with most lawyers as to acts that were crimes even before the effort to make a war of aggression a war crime. The judges that will sit on the Tribunal will be lawyers, and they will be watched by all countries and will try to judge fairly and impartially. We attempt to avoid any discussion between the judges on the subject that we are trying to put in the draft.

SIR DAVID MAXWELL FYFE. Do we gather that what you are saying is objectionable is the words in the draft "shall be considered criminal violations of International Law"?

PROFESSOR GROS. Yes. We start from something that is not in doubt—that the conduct of a war in violation of international law is a crime—and from that we build a case. The responsibility goes up to the perpetrator and instigator.

SIR DAVID MAXWELL FYFE. Just one other point. Is your number i), referring to "policy of aggression against, and of domination over", intended to be the equivalent of the common plan to wage a war of aggression in violation of international law? Had you in mind the common plan or great design?

PROFESSOR GROS. We tried to cover exactly the same ideas but to build from a different basis. The previous drafts of article 6 start from the top and say what will be a criminal violation of international law. On the contrary, we start from the bottom, say that there have been indisputable crimes and go up the line of responsibility to the instigator of the war. It is difficult for me to discuss this very delicate point in another language. It seems to me that the previous drafts amount only to a declaration by four people, while in our definition you have a reminder that this policy is criminal because it is carried out in violation of treaties and of international law.

SIR DAVID MAXWELL FYFE. We have a conception of conspiracy in our law and would like to know whether you have it too. Take arson, for which there is no criminal sanction and which has its only remedy in reparations, as you mention. But the conspiracy to commit such arson in English law is a criminal act.

PROFESSOR GROS. No, we do not have that conception of conspiracy. We would have to make new law.

SIR DAVID MAXWELL FYFE. For you in America, a conspiracy to commit a tort is a crime?

MR. JUSTICE JACKSON. Sometimes, but by virtue of statutes. Except

in a very few States we do not have common-law crimes, but only statutory ones.

SIR DAVID MAXWELL FYFE. The question comes to this: whether it is right or desirable to accept the position that a war of aggression is a crime. It seems to be agreed that it is. The fundamental difficulty is the lack of sanction. More strictly it may be said that it is accepted as a crime without declared punishment or any declared sanction against it.

PROFESSOR GROS. It may be a crime to launch a war of aggression on the part of a state that does so, but that does not imply the commission of criminal acts by individual people who have launched a war. When you say that a state which launches a war has committed a crime, you do not imply that the members of that state are criminals.

SIR DAVID MAXWELL FYFE. Don't you imply that the people who have actually been personally responsible for launching the war have committed a crime?

PROFESSOR GROS. We think that would be morally and politically desirable but that it is not international law.

SIR DAVID MAXWELL FYFE. You see the distinction in my mind. To look at it as a crime of the state only may include people who have very little real responsibility for it. But, if you can show that the war has been the result of the actions of 15 or 20 people, it is a difficult conception that those people are not responsible for their own acts when it is admitted that they result in an international crime.

PROFESSOR GROS. That certainly is what we would wish. But I would like you to note one thing that is important because it will be used as a precedent. I refer to the report to the Peace Conference in 1919. It certainly was the state of the law in 1919 that the acts which brought about a war would not be charged against officers or made the subject of procedure before a tribunal. And the Germans will take for a precedent what is still worse for our object—the report of James Brown Scott and Robert Lansing to show that we have no legal basis to say that launching a war of aggression shows criminal responsibility of the people who launched that war.

But, if you define their crimes according to their practical results, if you show that the Germans have been breaking treaties and as a result of that have annexed populations, run concentration camps, and violated international law by criminal acts against people, what you will condemn are those acts which in fact are criminal in all legislation, and you will condemn them for having directed those acts. I would not object at all to those same words in the charter if they were designed as a precedent for any government for the future. My difficulty is that this charter is not made to declare new international law; it is made to punish war criminals and the basis must be a safe one. Naturally, we would be open to modifications of our draft.

GENERAL NIKITCHENKO. The definition of "war criminals" was set forth in the Moscow and Crimea declarations, and it is our opinion we should act on those declarations. If we turn once again to the terms of the Moscow declaration, we see that apparently the conception of what is a war criminal is quite clear. But the difficulty is in trying to confine this definition to a legal formula which would form the basis of a trial of these war criminals. In my opinion we should not try to draw up this definition for the future. The critics will try to find any inconsistencies and any points that are not clear and to turn these points against those who draw up the definition in the charter. In my opinion our task should be to form the basis for the trial not of any criminals who may commit international crimes in the future but of those who have already done so. I refer to the beginning of the Moscow declaration in which it is stated that Great Britain, the United States, and the Soviet Union have received from various sources evidences of atrocities, murders, cold-blooded mass executions which are being committed by Hitler's armed forces in many countries captured by them. For these crimes the Nazis should be punished. By our formula we should not give those who committed criminal acts the possibility of considering themselves political criminals. If we were to try to set forth in detail the various crimes committed by the Nazis, we might very well make a mistake. It is quite impossible to give an exhaustive list of the crimes. If, on the other hand, we should confine ourselves to a few matters, that too would not be right. Therefore we should work out a formula which would make it possible to bring to trial and punish those who have committed all the various atrocities. At the same time we should not, of course, confine ourselves to persons who have actually committed the crimes but should also especially reach those who organized or conspired them. From our point of view the form of article 6, as it has been formulated by the direction of the committee, is not agreeable thus. It gives a very wide field of interpretation to acts which in one case might be an international crime and in another case might not be so. That is why from our point of view the formula proposed by the French Delegation is better—first of all, because it provides not for the responsibility of states or any social organisms but for the responsibility of persons; secondly, because the crimes are set forth in such a manner that they are turned only against those who have committed the crimes.

We did not submit a text of our own, not only not to provoke a fresh discussion, but in order to be able to come to an agreement quickly. We are ready to support the formula submitted by the French Delegation, that is, we would be in a position to recommend it to our Government.

MR. JUSTICE JACKSON. Well, I am in agreement with a great deal that Professor Gros and General Nikitchenko have said. This is a most difficult subject and a most important one, not only for today but for time to come. However, if we look only to the past with our action, it will be of little importance to the future. We have no interest in any particular formula so long as it accomplishes the purpose of giving some real moral meaning to the principles that underlie any prosecution. I agree entirely that the formula should look, as General Nikitchenko says, to the responsibility of persons, rather than of states, and think the formula as stated is defective in that respect.

We have given a great deal of thought—not only the men of my staff but other eminent American scholars—to this subject of the crime of making war. I must say that sentiment in the United States and the better world opinion have greatly changed since Mr. James Brown Scott and Secretary Lansing announced their views as to criminal responsibility for the first World War. I have no expectation that any rule we could formulate would avoid the criticism of some scholars of international law, for a good many of them since 1918—in language that was used about others—have learned nothing and have forgotten nothing. But I don't think we can take the 1918 view on matters of war and peace. At least in the United States we have moved far from it with such measures as lend-lease and neutrality. As I have understood Professor Trainin's book, which I have read carefully in the effort to understand the Soviet views, I gather that his view comes very close to the view which we entertain in the United States. Our attitude as a nation, in a number of transactions, was based on the proposition that this was an illegal war from the moment that it was started, and that therefore, without losing our rights as neutrals or nonbelligerents, it was our right to extend aid to the nations under illegal attack, and the lend-lease program, the exchange of bases for destroyers, and much of American policy was based squarely on the proposition that a war of aggression is outlawed.

I was obliged to pass on a good deal of American activity in the period just preceding the war, as Attorney General, and I stated the position quite clearly that our view was that this was an illegal war of aggression in violation of the Briand-Kellogg pact and other applicable treaties. And I notice that the latest issue of Oppenheim on International Law, just out, says that my Havana speech, which some of you have read, was a sound view of international law, although it was criticized in my own country at the time. Therefore, our view is that this isn't merely a case of showing that these Nazi Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on the international peace, which to our mind is a criminal offense by common-law tests, at least, and the other atrocities were all preparatory to it or done in execution of it.

Now the difficulty, as I see it, is that there is no prescribed sanction, no criminal penalty, provided for that kind of what we may call "common law" crime of violation of international law. Neither is there a criminal sanction or penalty prescribed for the other violations of international law which the French draft considers to be punishable. In other words, we have no statute which states any penalties or individual responsibilities for any offenses under whatever formula we attempt to arraign them.

To be specific: The language of the French draft, I am fearful, does not cover just the same things that our draft covers. If it did, I should be quite happy to accept the formula. In subparagraph (1) for example, to be punishable the policy of aggression must be carried out, as I read the statement, both in breach of treaties and in violation of international law. That we think would leave open to argument before the court whether this policy of aggression is in violation of present international law, and brings up at the trial all of the questions that our statute ought to settle. If that read "in breach of treaties *or* violation" of international law, we would have much less difficulty with it.

PROFESSOR GROS. If you will read the French text, which I am afraid was somewhat difficult to translate into English, that covers your point. We say in violation of international law and treaties, but international law is composed of treaties. To violate a treaty is to violate international law. So if you want to say "or" instead of "and", we do not object at all. Aggression is certainly the same if you breach a special treaty or if you just invade your neighbor—it is the same condemnable policy.

MR. JUSTICE JACKSON. The other doubt that I have is whether this draft sufficiently and explicitly embodies the common plan or conspiracy idea which is necessary to reach a great many of the equally guilty persons against whom evidence of specific violent acts may be lacking although there is ample proof that they participated in the common plan or enterprise or conspiracy. I think that if those points could be clarified, so that we don't leave them in doubt, we might be able to work out from this an acceptable basis. I do like the brevity of the French version. But I again repeat that in connection with this we should attempt to make some provision as to what constitutes aggression, in which I think all of the American proposals were defective. Otherwise we may get into litigation over whether what we call a policy of aggression was in fact a policy of long-range self-defense. That is the point which I suggested the other day and is one on which I would like to present this written proposal to this group [XXXVI]. Would it be a good thing to consider that now or later?

PROFESSOR GROS. I think to embody the common-plan theory would

be easy. It is only a question of drafting. We thought of putting the word "planned", but it is difficult. It would have "or the plan of", but as it refers to conduct—

SIR DAVID MAXWELL FYFE. It occurred to me you could do it in either of two ways. In the beginning "and took part in a plan to further", or the policy of aggression could be put in a more concrete form by "conduct of a plan to achieve aggression against". What is in my mind is getting a man like Ribbentrop or Ley. It would be a great pity if we failed to get Ribbentrop or Ley or Streicher. Now I want words that will leave no doubt that men who have originated the plan or taken part in the early stages of the plan are going to be within the jurisdiction of the Tribunal. I do not want any argument that Ribbentrop did not direct the preparation because he merely was overborne by Hitler, or any nonsense of that kind.

GENERAL NIKITCHENKO. Will Professor Gros excuse me if I try to amend his draft? In my opinion, in the Russian the word "policy" is not quite enough to mean actually the carrying out of a wide plan of aggression or domination over other nations, and in my opinion Ribbentrop, Ley, and others can say that they do not come under that.

PROFESSOR GROS. "Policy" is the widest term we can use.

SIR DAVID MAXWELL FYFE. Our difficulty is that "policy" is rather a loose word in English and is inclined to be used by people when they want to get out of expressing a concrete meaning. I should have to consider that a little. With the idea which Professor Gros initiated and General Nikitchenko supported I am in entire agreement. That is what we want to draft in order to do as inclusive a job as we can.

MR. JUSTICE JACKSON. May I ask one question more on the French draft? Could the "and" in the last paragraph be "or"? You could drop both "and who" and thus eliminate the issue that seems to lurk in the definition.

PROFESSOR GROS. In fact we put under that responsibility everything that has been committed in detail, and they are responsible because they are the instigators of the plan. It puts the charge of every detail on them.

MR. JUSTICE JACKSON. If you are embodying our concept of conspiracy in that language, my difficulty is that an American judge would not be certain to recognize it in that dress.

PROFESSOR GROS. We imply that all people who have planned invasions and atrocities are responsible for all the atrocities which have been committed in execution of that plan. They are the instigators of the crimes.

MR. JUSTICE JACKSON. Well, I think that clarifies a point that was troublesome in my mind, and I think in the Attorney General's mind, about this, and we do seem close together in our ultimate meaning.

PROFESSOR GROS. Mrs. Mackenzie suggests we might put "and who is therefore responsible". That would be acceptable.

Shall we return to Mr. Justice Jackson's proposal to define aggression?

MR. JUSTICE JACKSON. On the aggression point, what we did was to look at some of the treaties which have been made on that subject and try to draft something in line with what has been accepted before. I have here a draft of a proposed provision. That is a draft from what was used in one treaty to which the Soviet Union was a party. There is another treaty of nonaggression that was the subject of a great deal of consideration, and I call attention to the other treaty, the London nonaggression treaty of July 4, 1933, the language of which is followed closely. The point is that we take the actual attack, actual invasion, as constituting the aggression, and we cut off arguments that there wasn't an "attack" because invasion really was in defense against political or economic measures. Now Germany will undoubtedly contend, if we don't put this in, that this wasn't a war of aggression although it looked like it. They will say that in reality they were defending against encirclement or other remote menaces. Then you are in the whole political argument of who was doing what to whom in Europe before 1939.

I think we should not litigate the cause of the war but should hold this case within the issue as to who first made an attack, without allowing trial as to any motive that involved only economic or political considerations.

This language is not suggested as perfect, but I think the idea of defining "aggressor" is very important and that we shall have to face it at some point in this prosecution. We either have to define it now, in which case it will end argument at the trial, or define it at the trial, in which case it will be the subject of an argument in which the Germans will participate; and it seems to me that it is much better that we face it now and preclude all of that argument.

SIR DAVID MAXWELL FYFE. I wonder whether it would meet our purposes if, on the explanation of Professor Gros, the French draft is accepted as a basis in essentials covering our purpose. Then I think I would be happier myself if after "directed" is inserted a combination of some such words as "or took part in a plan to further". I would suggest that, if we accept that as a basis, including some such words again referring to the substance of a plan, Professor Gros and Mr. Clyde and Mr. Troyanovsky could act as an unofficial drafting committee on that point, and they might present us with a final copy which we would consider.

GENERAL NIKITCHENKO. On the point of the Jackson proposal as to the definition of "aggressor", this question has been frequently dis-

cussed at various conferences and meetings, and it seems to us it does not enter into the competence of this commission to do so; in trying to punish persons guilty, we should base ourselves on the definitions entered in the various previous documents.

I do not quite share the fears expressed by Mr. Justice Jackson that this would provoke an argument in court between prosecutors and defense because the Tribunal would always be in a position to put a stop to irrelevant matters. The Tribunal would not be competent to judge really what kind of war was launched by the defendants; neither would it go into the question of the causes of war. If we try to enter a definition of aggression into the charter, that we would not be competent to do, as the Tribunal would not be competent to do so. It would really be up to the United Nations or the security organization which has already been established to go into questions of that sort. There is an international court forming part of the U.N.'s organization which would pass judgment on conflicts and arguments between the different states. The task of the Tribunal is to try war criminals who have committed certain criminal acts.

SIR DAVID MAXWELL FYFE. I would like General Nikitchenko to help me on this. If we accept the French draft, that one of the crimes which the Tribunal will try is directing the preparation and policy of aggression, would not the Tribunal have to decide whether and why the policy charged is a policy of aggression? I would like to know how he would envision this being carried out.

GENERAL NIKITCHENKO. The policy which has been carried out by the Axis powers has been defined as an aggressive policy in the various documents of the Allied nations and of all the United Nations, and the Tribunal would really not need to go into that.

MR. JUSTICE JACKSON. If we are to proceed on that basis, why do we need a trial at all?

GENERAL NIKITCHENKO. The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment—the sentences.

SIR DAVID MAXWELL FYFE. To take an actual case, one that involves my country and one in which the Soviet Union and the United States are not involved at all—take Norway for example—you see there you have a clear aggressive attack by the Germans on Norway. But we have information that they are going to say that it was done in anticipation of measures which they claim we were about to take to prevent the Norwegians from assisting the Germans by the supply of iron—that is the sort of point. If we are going to introduce Norway—and we might want to for the atrocities in Norway—I think we are rather opening the door for trouble if there is no definition. That is a concrete point about which I am worried.

GENERAL NIKITCHENKO. Would a question of that sort really come up before the Tribunal? The Tribunal would not concern itself with questions like that—why Germany attacked Norway—but take it as granted.

SIR DAVID MAXWELL FYFE. I don't think the defense will take it as granted. It is going to be difficult. If you charge Ribbentrop as having "directed the conducting of the policy of aggression" against other nations, one of them probably Norway, and he says there was no policy of aggression, can you keep that issue away from the Tribunal?

GENERAL NIKITCHENKO. Of course a question like that might come up, but we should pass judgment on the whole policy of Germany and not on individual acts taken apart from the whole. There might be other acts in this war which were taken in self-defense, but here we should take it as the general policy of Germany.

PROFESSOR GROS. I think that is also our view of the question. I hope we get the inside story of the Nazis and are able to prove that they had maps in 1934 covering Norway as northern territory for German colonization. If so, it would shut the door to the German lawyers. The German plan should not be judged only in 1939 and 1940. It will be presented by the Chiefs of Counsel since 1933. I have no inside knowledge of the German archives but think we could find plenty to establish their intention much before the war. The question by Mr. Justice Jackson is, what aggression would be considered criminal by the Tribunal? I wonder whether we are in a position to choose the definition which should be up before the Tribunal. First, there are plenty of documents in actual international law defining aggression, and they will be used by the court; and second, if we put in an agreement on that text, it will be an anticipation of what will be adopted by the United Nations. Thus, if the new one differed from ours on this point, we would be in difficulty. Perhaps we could agree on a companion text which would be sent by us to our governments. We would make a note of this text or any text which may be adopted and say we consider this would be a useful definition for the court; but it would not be on the same level as the rest of the agreement, to try to avoid the difficulties mentioned by Mr. Nikitchenko. It might even be only one of the rules suggested to the Tribunal. The Tribunal will look into all those declarations and treaties.

MR. JUSTICE JACKSON. But the fear I have, and the fear which I take it is shared to some extent at least by the Attorney-General, is that this problem will come up at the trial as it seems certain to do. Some vague idea that Germany was defending herself against some remote menace is the line of defense taken by apologists for

Germany in all countries. Certainly an American judge will then say, "Why did not you fellows define aggression when drawing up the agreement? It is not a clearly defined term of art—we find no body of law that clearly defines it." The treaties that I have cited use different language and sometimes with quite different meaning, and I am sure that an American judge would say that, if you charge a man with making aggressive war, it is his privilege to show that the war he made was not aggressive, and it is his privilege to show, in defense or in mitigation, provocation, threats, economic strangulation, and that sort of thing. It might be that from the point of view of the application of Continental law you would not have that difficulty. But, you see, you would have here two judges brought up in the common-law tradition, and I would be greatly surprised if they would not say that the charge of aggression could be met by any evidence showing that the purpose was ultimately defensive, if we do not define aggression in such a way that it excludes resort to war to redress economic or political disadvantages or threats of encirclement, et cetera.

PROFESSOR GROS. I may be overconfident, but it is confidence in you. If the prosecution presents its case on that policy of aggression, there will be no necessity of defining aggression. If you begin by making a definition of aggression in this agreement, you will have to define other things—launching of war contrary to international law—and you will have to define what you call the laws of humanity and the dictates of the public conscience. When you begin clarifying, if you go to the full length of it, you will have 340 articles. In contrast, if you will leave it in the American way of dealing with international law, you leave it to the judge to consult the sources. And even if you give that definition, it is controversial. It remains controversial because, if you give the definition which is now proposed, your judge may discuss and disagree with that definition; so you run the same danger.

SIR DAVID MAXWELL FYFE. Professor Gros, it comes to this: that your argument is bound to admit the possibility of an argument at the trial on what is aggression. We have three choices: first, leave aggression out, which does not appeal to us because it is the essence of our complaint against the Germans; second, have political argument; third, define aggression. I am merely trying to clarify it. You really would run the risk of having a long trial.

PROFESSOR GROS. We had a great trial at the end of the last century—the Dreyfus case. The French court's president said always when there was a difficulty that such a question could not be raised; you must settle our difficulty in the court.

MR. JUSTICE JACKSON. I really think that this trial, if it should get into an argument over the political and economic causes of this war,

could do infinite harm, both in Europe, which I don't know well, and in America, which I know fairly well. If we should have a prolonged controversy over whether Germany invaded Norway a few jumps ahead of a British invasion of Norway, or whether France in declaring war was the real aggressor, this trial can do infinite harm for those countries with the people of the United States. And the same is true of our Russian relationships. The Germans will certainly accuse all three of our European Allies of adopting policies which forced them to war. The reason I say that is that captured documents which we have always made that claim—that Germany would be forced into war. They admit they were planning war, but the captured documents of the Foreign Office that I have examined all come down to the claim, "We have no way out; we must fight; we are encircled; we are being strangled to death." Now, if the question comes up, what is a judge to do about it? I would say that, before one is judged guilty of being an aggressor, we must not only let him deny it, but say we will hear his case. I am quite sure a British or American judge would say to a defendant, "You may prove your claim", unless we had something like this which says, "No political, military, or other considerations excuse going to war". In other words, states have got to settle their grievances peacefully. I am afraid there is great risk in omitting this, and I see no risk in putting it in. It may be criticized, but I see no such risk in putting it in as in leaving it out. We did not think it necessary originally, but more recently we have.

SIR DAVID MAXWELL FYFE. There is one point that Mr. Clyde suggested, and it is worth exploring because it is a difficult point. He points out that in the French draft after "aggression" you have the words "and of domination over". Now, in fact, every country that was the subject of aggression was the subject of domination. If I might just remind you, there were Austria, Czechoslovakia, Denmark, Russia—the plan was to dominate Russia—Yugoslavia, Belgium, and Holland. Aggression was succeeded by domination, and in the case of Russia there was an attempt to dominate which failed. Mr. Clyde suggests also that we limit it to "the domination of others"—that we say in the charter everything we wanted.

PROFESSOR GROS. I think ultimately we must face the facts that difficulty exists now and that we have to try to have a fair trial. The question is whether one deals with it as you suggest by putting it in writing now or by leaving it to the judges. I do not object to the idea of trying to find a solution, but what I mean is that the text in itself should not be equivalent to the charge, "No, you cannot say that." For public opinion there is always a certain difficulty in shutting out a defense.

MR. JUSTICE JACKSON. I had not thought of it in just that way. It

seems to me that it is quite a proper thing to be said as a matter of law in advance of a trial that an attack by one upon another is not justified by political or economic considerations. Just as we would say in advance of a trial for assault that an attack of one person upon another would not be justified by the fact that there were political or economic advantages in doing it, that one must not pursue his political or economic aims by that method. And that is what I understand to be the substance of the Kellogg-Briand pact, the whole non-aggression policy, and of nonaggression treaties, that the states renounce the right to pursue those advantages by attack upon each other. And from the point of view of the sentiment of the world and the average man, I think that is a very important consideration and one that it is quite justifiable to embody in our statement of the law of the case to be applied by the court. I think that is the law; I think that ought to be the law; and I think that if we could make it clear in the instrument it would avoid a great deal of controversy.

PROFESSOR GROS. Could I make a suggestion? What is stopping us practically is that this is a definition of aggression and we do not see a possibility of adopting between our four delegations a definition of aggression. But if in that agreement we refer the Tribunal to the existing definition of aggression—which is a complete text—the declaration of the League of Nations of 1927, signed by Germany, Italy, and Japan, by way of denouncing war, we have a solid basis in international law defining war of aggression. If we say that the Tribunal will refer to those two pacts and to any other convention defining aggression that will give them the possibility of choosing their definition, they will have to do that. Do you not think that, if we just put in three lines referring the Tribunal to the definition of those texts, it would be enough? [Here Professor Gros read from the Kellogg-Briand pact.] It covers political, military, and economic situations; so there you have a part of your definition. The pact condemns international war, and the declaration of 1927, which they signed, condemns it too.

MR. JUSTICE JACKSON. You would prefer just a general reference to it, or would there be any objection to using language that the court should apply the principle of that treaty to which Germany was a party? Would you find any objection to that?

PROFESSOR GROS. No, none at all.

MR. JUSTICE JACKSON. That treaty was the pact of Paris of 1928 (Kellogg-Briand) and the 1927 resolution by the Assembly of the League of Nations. Germany, Italy, and Japan were there. Perhaps we could work out some reference covering what we have in mind. I think it is very important here.

PROFESSOR GROS. I do not see any harm in referring to pacts signed by Germany, because they will be referred to by the Tribunal.

SIR DAVID MAXWELL FYFE. I should be glad to accept that as a compromise between the two views.

GENERAL NIKITCHENKO. I wish to repeat it is not part of our task to try to work out a definition of aggression because, however perfect or good our definition would be, it would not be binding to the defendants, and they might question it. If such an argument does crop up, it would be up to the Chief Prosecutors, who would be very competent to parry any arguments that the defendants or counsel might put up. As far as I know, although I have not studied in detail the United Nations Charter adopted in San Francisco, even there there was no attempt to define aggression as such. If the San Francisco Conference did not do that, the more reason I think that this commission, or I personally, am not competent to work out a definition.

SIR DAVID MAXWELL FYFE. I wonder whether it would meet that point and give us the assistance we want if we were to put in quite briefly as the policy of aggression the policy defined, for example, by the Kellogg-Briand pact and the declaration of the United Nations. That would give a pointer without defining it. That would not be tying us to defining it but would be showing us the sort of aggression at which we were aiming.

PROFESSOR GROS. I cannot see any difficulty. It is only the position of the treaties, and it should be said that it is only an example, because there are other treaties.

GENERAL NIKITCHENKO. Wouldn't it be rather disrespectful to the members of the Tribunal to point out to them the treaties which we should expect them to know or at least to study?

MR. JUSTICE JACKSON. I do not think so. We don't usually assume that a judge knows any specific laws in my country and require counsel to file a brief on nearly every point.

SIR DAVID MAXWELL FYFE. I do suggest that that would really give us reasonable basis of compromise; it would indicate to the Tribunal where they ought to look and what they ought to see, which, though I haven't been in Mr. Justice Jackson's high judicial position, I think would help without offense. On the other hand, we would not be falling into the position which General Nikitchenko and Professor Gros have envisaged of trying to decide a problem which the United Nations organization has not yet tackled.

PROFESSOR GROS. It was implied that—if Mr. Justice Jackson thinks it will give satisfaction, particularly to public opinion—materially it is in the text of the treaties.

MR. JUSTICE JACKSON. Really I do not think it concerns me very much. That is probably one thing we Americans would not get in at all at the trial. It concerns European powers rather than ourselves. I should hate to see a political controversy at this trial, which will be

widely reported, and the suggestion really comes to mind because of the Soviet suggestion that we should eliminate propaganda. I do not think we can eliminate what may be propaganda if it also is relevant to issues we ourselves raise in the case. But I should think we could so limit the crime charged in this case that it would not be necessary to worry about propaganda. It is an entirely different thing trying to define aggression for the United Nations organization as a future policy and solving it as a juridical policy. This Tribunal will have to act on the subject, and the United Nations organization does not. Political definition seems to me much more difficult than judicial definition. Either we or the court have got to define this concept on which we predicate a charge of crime.

SIR DAVID MAXWELL FYFE. Then I revert to my original suggestion: If we take the French draft as the basis, perhaps Professor Gros could discuss it with Mr. Clyde and Mr. Troyanovsky on the question of wording, and we might meet tomorrow afternoon after our pleasant interlude as guests of General Nikitchenko [see note following] and see whether we have the form to suit us.

GENERAL NIKITCHENKO. As for this reference, would it not be better to refer to some more recent declarations—say, for instance, the policy of aggression condemned by the United Nations organization?

PROFESSOR GROS. The reason for referring to the Kellogg-Briand pact is that it was signed by Germany.

SIR DAVID MAXWELL FYFE. Perhaps, if you could find a good modern one to add to them, it would do no harm. Perhaps you could turn that over in your mind—a very short one, but I think it would be necessary.

The draft of article 15 [XXXVIII] was circulated, and the Conference adjourned.

Note: On Friday, July 20, 1945, all delegations were guests of the Soviet Delegation at a luncheon at the Savoy Hotel in London. At that time the Soviet Delegation advised that they would not be able to go on the trip to Nürnberg on the following day. Justice Jackson offered to change the date to any time that would be agreeable to them. They said, however, that a change of date would not make any difference to them. On consultation with the Attorney-General and Judge Falco it was decided that the remaining delegations should proceed to Nürnberg nevertheless.

On July 21, 1945, the British Delegation and the French Delegation, together with the American Delegation and staff, flew to Nürnberg, inspected the Palace of Justice and the prison, as well as hotel facilities, billeting, and other features entering into the desirability of the selection of that city as the place for the trial.

XXXVIII. Proposed Revision of Article 15 of
Draft Agreement, Submitted by British
Delegation, July 19, 1945

COMMITTEE FOR THE INVESTIGATION AND
DESIGNATION OF MAJOR WAR CRIMINALS
AND THEIR PROSECUTION

19th July, 1945.

15. Each Signatory shall appoint a Chief Prosecutor for the investigating of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a Committee for the following purposes:

(a) to make a general plan for the carrying out of any trial or trials:

- (i) Until all the Signatories have appointed Chief Prosecutors, each of the Chief Prosecutors already appointed shall take such steps as, in his view, are best calculated to assist in the preparations for trial.
- (ii) When the Chief Prosecutors have been appointed, they shall, as soon as possible, meet and arrange a general plan for the first trial and shall, so far as possible, adopt the steps taken under (i).
- (iii) In the execution of that or any subsequent plan, each of the Chief Prosecutors shall be entitled to take such action as he thinks best calculated to carry it out and to decide how best the portion of the plan undertaken by him can be carried into effect.
- (iv) If one Chief Prosecutor proposes that any subject-matter be included in any plan, such subject-matter shall be included unless, by a majority vote, the Chief Prosecutors decide otherwise.

(b) to settle the list of major war criminals to be tried by the Tribunal:

If one Chief Prosecutor proposes that any Defendant be tried by the Tribunal, such Defendant shall be tried unless, by a majority vote, the Chief Prosecutors decide otherwise.

Unless otherwise agreed, there shall be submitted to the first trial before the Tribunal, only Defendants who have been unanimously designated by the Chief Prosecutors.

- (e) to settle the draft of the Indictment and the documents to be submitted therewith, copies of which are to be furnished to the Defendants.

The documents to be submitted with the Indictment shall include:

- (i) lists of treaties, agreements or assurances, to be referred to by the Prosecution, and copies of relevant clauses and parts thereof:
- (ii) official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes and records or findings of military or other tribunals of any of the United Nations:
- (iii) copies of the statement, deposition or affidavit of any witness on which the Prosecution intends to rely save in cases where it is proposed that the witness shall testify before the Tribunal in person:
- (iv) copies of any statements made by any Defendant.

No document of a class other than those mentioned shall be submitted with the Indictment unless the Chief Prosecutors, by a majority vote, decide otherwise: but nothing herein contained shall prejudice the right of the Chief Prosecutors to submit to the Tribunal (with the duty to serve copies thereof on the Defendants) at any time after the lodging of the Indictment or at the Trial, any other document (whether or not of the classes referred to in subparagraphs (i) to (iv) hereof) which was not available or convenient for lodging with the Indictment: or to call at the Trial any oral evidence.

- (d) the lodging of the Indictment and the accompanying documents with the Tribunal:
- (e) the drawing up and recommending to the Tribunal for its approval draft rules of procedure contemplated by Article 14 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

In the event of any difference of opinion as to matters (d) and (e) the Committee shall act on a majority vote, and any proposal which fails to secure more than two votes shall be deemed rejected,

XXXIX. Proposed Revision of Definition of “Crimes” (Article 6), Submitted by British Delegation, July 20, 1945

The Tribunal shall have power to try, convict and sentence any person who has, in any capacity whatever directed or participated in the planning, furtherance, or conduct of any or all of the following acts, designs, or attempts namely :

1. Domination over other nations or aggression against them in the manner condemned or foresworn in (*inter alia*) the following Pacts or Declarations -----

2. Systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians

3. Launching or waging war in a manner contrary to the laws, usages and customs of warfare

and who is hereby declared therefore to be personally answerable for the violations of international law, of the laws of humanity, and of the dictates of the public conscience, committed in the course of carrying out the said acts, designs or attempts by the forces and authorities whether armed, civilian or otherwise, in the service of any of the European Axis Powers.

XL. Report of American Member of Drafting Subcommittee, July 20, 1945

MEMORANDUM TO MR. JUSTICE JACKSON

Subject: Report on the Drafting Subcommittee meeting on the morning of Friday, July 20, 1945.

1. This morning the Drafting Subcommittee got over the whole redraft of the agreement and of the charter and adjourned *sine die* to await the further developments in meetings of the heads of delegations on article 6 and article 15 of the charter.

2. As I told you in my report of yesterday, the worst difficulty yesterday arose from the complete refusal of Professor Trainin to budge on the question of empowering the Tribunal to appoint special masters or examiners. I told you orally of the debate on that point.

3. The other sticking point which developed with great sharpness today was in connection with our effort to redraft article 22. Barnes, Clyde, and I had redrafted it, in accordance with our understanding of what happened at the plenary session, to read as follows:

“The administrative seat and secretariat of the Tribunal shall be at Berlin. The first trial before the Tribunal shall be held at Nuremberg and any subsequent trial shall be held at such place as the Tribunal shall decide.”

4. Professor Trainin would not agree to that. We tried “headquarters”, “Central Office”, and various other formulae for the site at Berlin, but to no avail. He insisted on amending article 22 of the agreement so as to make it read that “There shall be established in Berlin an International Military Tribunal”, et cetera. It became quite obvious in the discussion that he had it in mind that the Tribunal would be “permanently located” in Berlin, that its “archives” would be there, that preparations for trials would take place there, and, apparently, that the prisoners would be there.

Respectfully,

SIDNEY S. ALDERMAN

XLI. Proposed Amendment to Paragraph 1
of Article 15 on Functions of the Prosecu-
tion, Submitted by American Delegation,
July 20, 1945

It is suggested that there be added to paragraph 1 of article 15 the following:

In case the Chief Prosecutors shall be equally divided any Chief Prosecutor may (1) bring to trial before such International Military Tribunal any person in the custody of his government or of any government which consents to the trial of such person, and any group or organization, representative members of which are in the custody of his government, if, in his judgment such person, group, or organization has committed any criminal violation of International Law defined in article 6 hereof; and (2) introduce any evidence which in his judgment has probative value relevant to the issues raised by the charges being tried.

XLII. Minutes of Conference Session of July 20, 1945

The Conference was called to order by Sir David Maxwell Fyfe and resumed discussion of the definition of "crimes".

PROFESSOR GROS. I think that on the first point the French word "try" implies try, convict, and sentence [XXXV]. I don't know as a matter of drafting whether to say "try, convict, and sentence", because it could also acquit. On the other point of the draft, I am in a difficult position to criticize because it is an extremely able attempt to put in good English what was in bad English. So it does not change much of the French text. But on the last paragraph I'm afraid that there is more in the actual British draft [XXXIX] than in the French text. In the first line only where it is said, "and who is hereby declared therefore to be", the text declares something that means a pronounced judgment of liability, and that is what I want to avoid. I might be too literal, but, if they are declared, there is no need to try them. My building of that article was perhaps a bit heavy, but it was this: I started from the commission of crimes, which is a fact not denied and certainly contrary to the laws of war and laws of humanity, and I tried to explain in that article that those acts had been committed as a consequence of policy which was defined in 1, 2, and 3, and that the effect of the relation of causation between the commission of acts and the execution of policy was a responsibility of the man who had planned policies. I recognize that this is certainly given in the French text and it might not be sufficiently expressed in the British translation I gave, but the new draft seems to me to go too far in so far as it "declares". So if there is any possibility of modifying that first line only, I am quite willing to accept. I tried to make a draft which gave effect to those facts presented and to avoid any discussion afterward by the prosecutors on the jurisdiction of the court. As it is more or less only a question of drafting, I will accept any formula which will be agreeable to the delegations.

SIR DAVID MAXWELL FYFE. The point I want to be clear on is this: As I understood it, you agree that if someone is guilty of 1, 2, and 3, it should follow as a consequence of law that he is personally responsible for the violations of international law.

PROFESSOR GROS. As a consequence of law. I might misunderstand

the word "declare", but, as we had explained in French and Russian, it would mean we would declare it or pronounce it.

SIR DAVID MAXWELL FYFE. Would it meet your point if we used the words "and who is therefore in law personally answerable"?

PROFESSOR GROS. I should think so.

MR. JUSTICE JACKSON. Of course we have studied this problem a great deal, and the definition is a very difficult task. The word "declare" has, I think, a different connotation for us than it appears to have for Professor Gros. We frequently enact what is known as a declaratory statute which merely declares what the law was—merely declares some point that was not clear; or frequently we enact statutes which are declaratory of the common law, merely reducing decisional law to statute form. That does not mean that the law embodied in that statute had no existence previously. I think "declaration" merely sums it up and crystallizes it, and in using "declare" in this connection I have thought of it as just having that connotation. Thus we crystallize it, drawing together all the disputed points, and the Four Powers agree that this is and has been the rule and announce it as a declaratory act rather than as the creation of new doctrine. So "declare" does not offend me.

GENERAL NIKITCHENKO. I have only been able to make an acquaintance with this new draft of the article. I have not been able to study it thoroughly and therefore cannot at the present stage set forth my considerations in detail. But one thing strikes me as unnecessary here and that is reference to the pacts or declarations of number one. No pact or declaration is named here, but, if it is mentioned, the pacts that are named were the Kellogg-Briand and League of Nations declaration. The Soviet Union was not a member of the League at that time, and it would seem to us that reference to a declaration as to which one of the signatories was not a member should not be put into the draft. The question of defining crimes is, as we have learned, a difficult one to solve, and attempts have been made by individual delegations and by several delegations to work out an agreeable solution. At yesterday's meeting I stated that the French proposal was generally acceptable to the Soviet Delegation as it is apparently to the other delegations. But some changes or alterations have been made which at first glance I have not been able to study thoroughly. Therefore, if other delegations will allow, we on our part shall try to work out a formula which will be based on this French proposal. We shall try to take into consideration the views expressed by Professor Trainin, who in my opinion is well versed in questions of international law. We will submit a formula based on this French formula.

SIR DAVID MAXWELL FYFE. Have you got that at the end, the suggested alteration to meet Professor Gros' point—"and who is therefore in law personally answerable"?

PROFESSOR GROS. If that is the only modification of the draft by the French Delegation and the Soviet Delegation are willing to accept the French text, I cannot see the necessity of having a new draft.

SIR DAVID MAXWELL FYFE. If General Nikitchenko wishes to consult Professor Trainin, he must have an opportunity of doing so. But there is no difference between Professor Gros and me on the last paragraph. That does leave the question of reference to pacts or conventions. Of course I appreciate the General's point, that the Soviet Union and the United States were not members of the League of Nations. Russia, however, adhered to the Kellogg-Briand pact.

MR. TROYANOVSKY. General Nikitchenko has not acquainted himself with this text sufficiently.

SIR DAVID MAXWELL FYFE. The other point which I should like General Nikitchenko to have in mind is this: We were prepared to include along with these other pacts or agreements some other modern expressions of opinion on that point. What we want is just to give a pointer to the court as to where they may look for a definition of aggression.

GENERAL NIKITCHENKO. Sometimes treaties change. When one was signed it had one significance and may in the course of time change that significance and acquire a new significance. For that reason I thought it best not to refer to old history and possibly have a more modern statement by the United Nations organization.

SIR DAVID MAXWELL FYFE. Now, referring to our redraft of number 15, the first three paragraphs of (a) in this draft [XXXVIII] I took as well as I could from the speech of General Nikitchenko in our preliminary discussion. One point raised was pending the appointment of other Chief Prosecutors—Mr. Justice Jackson and I shall carry on with the work—that is with whom will we go on with our work of preparation until colleagues are appointed? We just wanted to be sure we can use the work that has been done. (iii) is well put into words. Nikitchenko said that within that plan the Chief Prosecutors should work independently.

Paragraph (iv) deals with the solution of differences and it seemed to me that the most likely difference that would arise would be whether something should be included or not. Therefore, I have suggested that the subject matter should be left in unless there is a three to one majority for cutting it out. The same principle is applied to point (b), the list of major war criminals. The only variation is that in the last part, unless otherwise included, there should be submitted to the first trial before the Tribunal only defendants who have been unanimously designated by the first prosecutors because it is my opinion—and I think it is shared by my colleagues—that the first business should be the really front-rank criminals whom everyone in the United Nations knows by name and expects to be tried quickly.

The point I bring is the question of the documents together with the draft of the indictment. And this is an attempt to find a working compromise between the two views, the one, that the court should be fully informed in the indictment of the case of the prosecution, and the other, that the court starts with a clean sheet. In (i) we have documents which are going to be referred to by our people, documents which in my view it is entirely convenient that the court should have in front of them from the beginning and should know all about. In (ii) are the documents included in the redraft of the paragraph dealing with judicial notice and admissibility, and they are, roughly, official government documents. It seems to me that, if we are going to agree that they are admissible, then the sooner the court and the defendants know their contents the fairer it will be for everyone. In (iii) we have statements of witnesses who have made statements but whom it is impossible to call, and, in (iv), copies of statements made by any defendant. In our English procedure these would be attached to the depositions and given to the judge and to the defendants. The first bit of the last paragraph is intended to meet the point that Mr. Justice Jackson made, that he would not want documents or evidence to be included merely because they existed. Therefore I have tried to take the four main types of documents which I think should go to the court and of course to the defendants, and then I have said that no document of a class other than those mentioned shall be submitted except indictments unless the prosecutors by three to one so desire. Now the remainder is a saving clause to allow for the documents to be put in between the indictment and the trial, so that we shall not be embarrassed or prejudiced by a new document turning up. Or there may be some document we do not want to produce until the trial. In each of the first three points I have suggested that the voting should be such as to preserve the fears or dislikes or views which have been expressed at this table and which I hope will evaporate when we come to deal with the actual point.

Paragraphs (*d*) and (*e*) deal with more formal points. Paragraph (*d*) refers to the lodging of the indictment and the accompanying documents with the Tribunal. It is agreed that the indictment and certain documents will be lodged and it merely becomes a question of the time when they should be lodged. Paragraph (*e*) has to do with drawing up and approving the draft of rules of procedure, which is merely a suggestion to the Tribunal for the Tribunal has complete power to make rules for itself. I thought it would be enough in case of a disagreement; then anyone who makes a proposal has got to get three votes to have it carried through. I don't anticipate that there could be any point of serious difference on these last, (*d*) and (*e*).

I apologize for being thus elaborate, but I was very anxious that

we should if possible agree on the solution for any foreseeable point of difference.

JUDGE FALCO. I accept the suggested draft for article 15, but there is one point which strikes my mind from the point of view of a French prosecutor as a little shocking: the indictment and the documents lodged with the Tribunal should contain the whole case of the prosecution so that from the time the indictment is filed both the Tribunal and defendants can know the whole case against them. It seems there is a possibility under this draft that the defense could be faced during the trial with the opening of Pandora's box of unhappy surprises, in as much as during the trial there is liberty to the prosecution to produce something new.

SIR DAVID MAXWELL FYFE. Our system is that, when you do that, you give notice to the other side as soon as you can, and the Tribunal can say, "If you are taken by surprise, we will give you a day to consider it."

JUDGE FALCO. But the defense has not so much time to answer.

SIR DAVID MAXWELL FYFE. It is irrelevant, but I have myself worked on that system for 20 years, and I don't think it produces unfairness. In very rare cases the defense are given time or assistance to produce a witness to help meet it.

MR. JUSTICE JACKSON. From the very beginning it has been apparent that our greatest problem is how to reconcile two very different systems of procedure, each of which carried out by itself seems to do justice acceptable to the people who use it. It is very difficult to arrive at the point at which you can change some practices from one to the other. I think that in some ways the Continental and Soviet systems are perhaps better than ours. I mean no criticism in saying that I, of course, am used to working with the other kind of system, and I would not know how to proceed with a trial in which all of the evidence had been included in the indictment. I would not see anything left for a trial, and, for myself, I would not know what to do in open court.

SIR DAVID MAXWELL FYFE. I wonder, Mr. Justice Jackson, whether you would mind dealing with point (a). The first point was designed to meet your apprehension as to the difficulty of getting on with the job in the meantime. I have tried to meet that on the lines of General Nikitchenko's speech.

MR. JUSTICE JACKSON. I think this effects about as fair a compromise of the two systems as we could make. The question of avoiding a tie vote is pretty well met. We might have some differences in detail, but in general I think it is a workable basis on which we could arrive at agreement. I think there should be some time limit within which the signatories should appoint prosecutors, because obviously we cannot

wait. We are under pressure and criticism for the delay already and I think that meanwhile we should go ahead and prepare for trial. We want to get these prisoners and witnesses assembled at the place of trial and begin interrogating them.

GENERAL NIKITCHENKO. From my point of view, every attempt by any delegation to improve the drafting of any article of the agreement and the charter is to be welcomed, and from this point of view I wish to express my gratitude to Mr. Fyfe for his attempt to work out a suitable solution. But in considering new proposals we should consider them from the point of view of whether they would bring us to the conclusion of our work more speedily or would perhaps hold up our work. We are, on our part, attempting to make proposals which in our view would facilitate the work, but it sometimes happens it makes the work more complex.

I might be wrong but it was my impression that during the previous discussion the principal difficulty about article 15 was how to work out a solution of (a), (b), (c), and (d) in case of a tie vote. The other difficulty was in point (a) with the word "coordination", and to facilitate the work I propose to include the words "coordination of plan". As for the last paragraph of point (i) of 15, as far as I can judge that was the one point of difficulty.

In answering the question put by Mr. Justice Jackson concerning the work of the Chiefs of Counsel until the other two are appointed. I made observation that that work would not be impaired. It is the right of every sovereign state to appoint any person to fulfil tasks which may in the future become part of an international work. That is why it seems to me quite unnecessary to make a proviso that the committee would, so to speak, adopt the individual work of the Chiefs of Counsel. That is why points (i), (ii) and (iii) of (a) in the new draft of article 15 go further than should be provided for in the charter. If during the preliminary discussion the delegations are agreed in principle to 15 and the new text now proposed does not change anything, there is no reason why we should drop the original text. The only question really left is point (b) of original 15 about designation of persons to be tried. If there is a tie vote, we think that in regard to the other points the principles stated in the paragraph coming after (e), that is, by majority vote, should remain in the original. In regard to (b), that is, the final designation of persons to be tried, we agree that in case of a tie the decision should be that proposed by the side which intends to turn the prisoner over to the Tribunal. That is, if one side proposes to turn a person over to the Tribunal and another prosecutor supports him, then the person should be turned over even though the other two should be against it. The new draft, while it does not in principle depart from the original text, would in fact only make the

work more difficult. In view of the fact that in the meeting of the drafting committee a whole series of questions which had not previously been discussed was raised, we admit that each delegation has the right to refer back to the questions supposedly settled but consider that should not be done too often to make our work too complex.

While admitting that this going back to putting questions under discussion again might do good and that a better draft might be worked out, we consider it necessary to make a statement to the effect that we on our part may whenever we wish revert back to any of the articles agreed to in preliminary discussions, both in the agreement and in the charter.

As for article 15, the Soviet Delegation would propose that in point (a), the word "plan" should be added and the question of designation of persons to be turned over to the Tribunal should be decided as proposed by the chairman, while otherwise the article should stand as it is.

SIR DAVID MAXWELL FYFE. How would that work?

GENERAL NIKITCHENKO. "Coordination of the plan of individual work of the Chief Prosecutors."

SIR DAVID MAXWELL FYFE. Does that mean that, except for (b), the original end of 15 would stand, that is, the committee shall act? Does General Nikitchenko suggest that 15 should stand as it is in the original draft?

GENERAL NIKITCHENKO. That is, the change in article (a) and the new procedure of voting only in regard to (b). The rest of the article should stand.

SIR DAVID MAXWELL FYFE. "Coordination" seemed to worry Mr. Justice Jackson when we last discussed it. I thought it would get rid of that worry if we set out what we meant by coordination. I took 1, 2, and 3 from the memo sent to the Conference. How does Mr. Justice Jackson feel about "coordination"?

MR. JUSTICE JACKSON. Well, I never like such general phrases when defining people's duties and powers because they really mean just what you read into them rather than what is written into them. Therefore I never like a proposition as general as that. But my chief difficulty is that there was no provision in 15 as it stood dealing with a tie vote of the prosecutors. I have not understood what the principle of rotation is, that is, how it could be applied to the work of the prosecutors. I recall that the proposal of rotation was made by the Soviet Delegation, and I don't understand whether it means a rotation of chairmanship in separate trials or a rotation during the trial.

GENERAL NIKITCHENKO. It would be difficult in the charter to specify just how this rotation would take place since we do not know exactly how this work of the Chief Prosecutors is going to move along.

The rotation which the presidency or chairmanship might take for a period of time—that is, week to week, session to session, as these meetings would not take place very often—in any case the prosecutors themselves would be able to specify that principle. At the present, it is really only necessary to state the principle itself.

JUDGE FALCO. Why should a chairmanship of the prosecutors be necessary since they could manage their own discussions and it would be unnecessary for us to resolve how they should settle their differences? I understand the difficulty, and we may have to make some arrangement about a tie vote, but I do not quite see the necessity for any chairmanship.

MR. JUSTICE JACKSON. Article 15 would be substantially acceptable to us as in the original draft if provisions were made for a tie vote somewhat in the language of the suggested amendment I shall pass around at this time [XLI].

SIR DAVID MAXWELL FYFE. Would that connote, Mr. Justice Jackson, that other prosecutors could take part in the trial if they carried on completely independent action?

MR. JUSTICE JACKSON. No. I was thinking of doing it in this way: the prosecutor who wanted to prosecute an organization, for instance, although the others did not, would be entitled to introduce his evidence. The others might say, "We are not participating in this part of the case." I don't see how we can protect the rights of anyone in case of a tie except in that way.

GENERAL NIKITCHENKO. The main principle which applied in international institutions of this sort would be either a unanimous vote or a majority. Unfortunately we face a position in which a tie is possible. It would be quite wrong to give one of the prosecutors the right, despite and contrary to the opinion of his three colleagues, to try a person.

In regard to other issues, such as the approval of the indictment and of the documents to be submitted therewith and the lodgment of the indictment, the Chief Prosecutors will without great trouble be able to find a solution without redrafting—by adding certain documents or by taking some away—and in this way will reach a desirable solution. The main thing that as far as I could judge was causing anxiety to Mr. Justice Jackson, and with very good reason, was the designation of defendants to be tried by the Tribunal, if there is a division of vote. Naturally, when there is a majority for one or the other in the decision, there would be no doubt. Apparently the French, British, and Soviet Delegations would agree that, in case of a tie vote, the decision would be in favor of the party which had proposed to turn the defendant over to the Tribunal for trial. Therefore, if the vote is three to one, then naturally the person who is in the minority

would have to submit to the decision of the majority. If, on the other hand, the vote is two to two, if the person is turned over to the Tribunal, he may be tried. In any case we would avoid the case of some criminal being passed over.

SIR DAVID MAXWELL FYFE. We are all agreed on that point. It seems to me the real point of difference between us is in the last words of Mr. Justice Jackson's suggested draft, "introduce any evidence which in his judgment has probative value relevant to the issues raised by the charges being tried." Suppose we applied the same principle to that. Wouldn't that give us the compromise in case anyone wished to introduce any evidence which in his judgment was of probative value? That would only be rejected if there were a three to one vote against it. The introducer would be entitled to add the evidence unless three of his colleagues were against it. We could introduce that and leave what we have agreed on (b) and the rest of 15 as it is. Would not that meet us all?

GENERAL NIKITCHENKO. Point (a) of the 'second part of article 15 [XXV], in which it is said that "investigation and collection" is part of the individual work of the Chief Prosecutors—in this respect there is no need for a majority vote really. But the question of whether a person concerning whom the prosecutor had collected evidence would be turned over to the Tribunal or not would be decided by the whole committee. Once a person has been designated for trial as a war criminal, each of the Chief Prosecutors is free to collect what he thinks fit for the trial of that person.

SIR DAVID MAXWELL FYFE. That seems to me to solve the difficulty of coordination. If it is understood that each individual is free, then we are really attacking an empty position in being worried about "coordination". We will let (i), (ii), and (iii) go, but if we have the wording we had for (a) "to make a general plan for the carrying out of any trial or trials" [XXXVIII], I do not think there is any difference between that and coordination of individual plan for prosecutors. There is no difference in ideas but just in words. To make or to agree upon a plan between the individual prosecutors as in (a) then—in view of what General Nikitchenko has said in 15 (2) (a), I do not think there is any real difference between us—to agree upon a plan of individual work or plan between the individual prosecutors.

GENERAL NIKITCHENKO. That is acceptable.

SIR DAVID MAXWELL FYFE. To agree upon a plan of each. Then (b) is altered as in the new draft [XXXVIII]. We leave (c), (d), and (e) as they are and put in the committee, which act in all the above matters except (b) by a majority vote.

GENERAL NIKITCHENKO. In regard to (b), the rule should be by majority or unanimous vote. "If there is a division of votes concern-

ing the designation of the defendants to be tried by the Tribunal, that proposal would be adopted which had been made by the party proposing the prosecution." We could leave the last paragraph that comes after (e) and just add this in reference to point (b).

MR. JUSTICE JACKSON. All that I care to be free about is the people we have in our possession. I don't care to prevent the other parties who want to try other people. We have these people and must soon release them or try them.

SIR DAVID MAXWELL FYFE. I think you are in the favorable position there. You have so many prisoners that this proposal is bound to clear your books.

MR. JUSTICE JACKSON. I wonder about the language which was being used here—

SIR DAVID MAXWELL FYFE. We suggest this wording: "If there is a division of vote concerning the designation of defendants to be tried by the Tribunal, that proposal will be adopted which was made by the party proposing the prosecution."

The only point then that still remains is to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff. General Nikitchenko said that that implies that under 15 (2) (a), "Investigation and collection of all necessary evidence", each prosecutor can add the evidence. Mr. Justice Jackson raises the difficulty that that does not say "and offer at the trial". Couldn't we put into (2) (a) "investigation and collection and preparation for offering at the trial of all the necessary evidence"? Then there is no question of its having to be referred back to the four prosecutors as to when it comes in. He puts it in on his own responsibility.

GENERAL NIKITCHENKO. Isn't it clear that if they investigate and collect the evidence all that is done as preparation for the offering of that evidence at the trial?

SIR DAVID MAXWELL FYFE. It is, but the point that is worrying Mr. Justice Jackson is this: Suppose he has collected what he thinks is an effective piece of evidence. He doesn't want it to go back to the four prosecutors and have long discussions before he can use it. The four agree on the plan, and he works out his own way of carrying it out.

MR. JUSTICE JACKSON. I should use "and offer at the trial" instead of "preparation and offer".

GENERAL NIKITCHENKO. Apparently we don't quite understand each other. Perhaps we mean the same thing. The Tribunal naturally cannot try the case of any defendant about whom no evidence has been collected beforehand. Perhaps it is wrong, but I understand Mr. Justice Jackson to mean that after the trial has started one of the Chief Prosecutors would be able to submit evidence which would enable the Tribunal to try additional persons?

SIR DAVID MAXWELL FYFE. No.

MR. JUSTICE JACKSON. No. The persons would be put on trial by the vote of the majority or of the proposer in case of a two to two vote, but under your system, if we did not have a piece of evidence in the indictment, we could not offer it. Under our system, if we did not have a certain piece of evidence in the indictment we could offer it nevertheless at the trial. We will have evidence in the form of documents which will not be translated and ready to put in the indictment, but it could be offered at the trial. That is, I don't want to be spending thousands of dollars on getting evidence which cannot be presented at the trial if some other system of law should prevail by having two votes.

SIR DAVID MAXWELL FYFE. I should have thought we could put it, "investigation and collection for production at the trial of all necessary evidence".

GENERAL NIKITCHENKO. The real point of paragraph (a) refers to collection of evidence before the trial starts, but we have another paragraph in article 24, paragraph (d), which provides that the prosecution may after the trial starts apply to the Tribunal for permission to submit any other evidence. This paragraph (d) of 24 gives the right to the prosecutors to submit additional evidence.

SIR DAVID MAXWELL FYFE. I don't think our minds are still really on the same point. The one Mr. Justice Jackson wants is this: Suppose he collects a piece of evidence. Whether it be in time for the indictment, or after the indictment, he should be entitled to put it to the Tribunal. Now, he does not want the other Chiefs of Counsel to have the right not to allow him to put that piece of evidence if they are equally divided. That would be covered if we put in "investigation and collection". There is no intention of bringing in new defendants. It is only to give the prosecutors opportunity to produce their own evidence.

GENERAL NIKITCHENKO. If we phrase it that way, would it not imply they should collect evidence for production only at the trial itself? If there is a provision that evidence should also be collected—only for production at the trial—the obligation for collecting evidence before the trial would drop.

SIR DAVID MAXWELL FYFE. Before or at the trial. I quite agree.

MR. JUSTICE JACKSON. The point is that the American people will not recognize as a trial a trial at which no evidence is produced in open court. There is no use of our going ahead with a trial that our people will not recognize as a fair trial. I can't do that. I am perfectly willing to go as far as we can in making this case complete in the indictment, presenting all that is available, but, if you present all the case in the indictment and have to stop at that point, then there will

be 30 days or so to enable these defendants to prepare for trial—three weeks at least, I should say. During that period we might find the most important evidence. You would be amazed at the documents we keep turning up all the time in Germany. There is a lot buried in your territory, the territory occupied by Russia, that we haven't seen yet. I think we ought to get an indictment filed against these people and make as much of a case in it as we can, but I think we should reserve the right to use at the trial as much evidence as we can get up to the time of trial. I cannot go beyond that point.

SIR DAVID MAXWELL FYFE. That is why I thought we would meet both points if we used the words "and production before or at the trial". If the evidence turns up in time for the indictment, it will be used to draft the indictment; if it turns up between the indictment and trial, it will be used at the trial.

GENERAL NIKITCHENKO. In the Soviet system it is very often practiced that evidence is produced at the trial, new evidence that has not been produced before, and the French system apparently also.

JUDGE FALCO. Evidence yes, but not a new judge.

SIR DAVID MAXWELL FYFE. I think we are agreed then on article 15, and it remains to perfect its drafting.

The Conference adjourned until July 22, 1945.

XLIII. Redraft of Definition of "Crimes", Submitted by Soviet Delegation, July 23, 1945

DRAFT ARTICLE 6 OF THE CHARTER

(As proposed by the Soviet Delegation)

The Tribunal shall have power to try any person who has in any capacity whatever directed or participated in the preparation or conduct of any or all of the following acts, designs or attempts namely:

a) Aggression against or domination over other nations carried out by the European Axis in violation of the principles of international law and treaties;

b) Atrocities against the civilian population including murder and ill-treatment of civilians, the deportation of civilians to slave labour and other violations of the laws and customs of warfare;

c) Waging war in a manner contrary to the laws and customs of warfare including murder and ill-treatment of prisoners of war, wanton destruction of towns and villages, plunder and other criminal acts;

and who is therefore personally answerable for the violation of international law, of the laws of humanity and of the dictates of the public conscience, committed in the course of carrying out the said acts, designs or attempts by the forces and authorities whether armed, civilian or otherwise, in the service of any of the European Axis Powers.

XLIV. Minutes of Conference Session of July 23, 1945

Sir David Maxwell Fyfe called the Conference to order.

GENERAL NIKITCHENKO. This is the paper we are submitting this morning—a rough draft or preliminary draft of article 6 [XLIII], which is based, as can be seen, on the French draft submitted last week [XXXV]. The Soviet Delegation have taken the French draft as a basis and made some alterations. This being a rough draft, it is contemplated that further alterations might be submitted by other delegations and perhaps even by the Soviet Delegation after we have considered it. The only thing we did not find it possible to do was to put in a reference about pacts which condemned aggression. We looked through the Charter of the United Nations once again and observed that, while aggression is mentioned several times, it is not defined anywhere. Apparently this is due to the fact that aggression has become sort of a formula in itself. Apparently, when people speak about “aggression”, they know what that means, but, when they come to define it, they come up against difficulties which it has not been possible to overcome up to the present time.

PROFESSOR GROS. I think we are perhaps the last people who should speak, because that draft, as General Nikitchenko said, is a redraft of the French text, and it is only a matter of some words which we could suggest changing—which is not important.

SIR DAVID MAXWELL FYFE. I think that my points are largely points of clarification. But there is one fundamental point that I want to see whether we are agreed on. I think we are. I want to make clear in this document what are the things for which the Tribunal can punish the defendants. I don't want it to be left to the Tribunal to interpret what are the principles of international law that it should apply. I should like to know where there is general agreement on that, clearly stated—for what things the Tribunal can punish the defendants. It should not be left to the Tribunal to say what is or is not a violation of international law. That is why I wanted in the English draft the words “convict and sentence after trial”—that is, the Tribunal should have the power to “try, convict and sentence”. Developing the same point, I am a little worried by the inclusion in *a*) of “in violation of the principles of international law and treaties”, because I would be afraid that that would start a discussion before the Tribunal as to

what were the principles of international law. I should prefer it to be simply "in violation of treaties, agreements, and assurances".

Now *b*) and *c*)—paragraph *b*) deals with the civilian population and *c*) deals with the actual waging of war. I'm not clear why the draft includes at the end of *b*) "and other violations of the laws and customs of warfare", because the draft seems to cover that so explicitly in *c*). But I should have preferred to leave it "ill-treatment of civilians"—stop at "slave labour". "And other violations of the laws and customs of warfare" seems to limit it.

With regard to the final paragraph, again I want to be clear as to what it implies, and later I should like the assistance of Professor Gros on it too as it is largely in his form. What I want to know is that it is an imposition of law on the Tribunal. Let me take a concrete example. If it is shown that Ribbentrop was guilty of *a*), then it would follow as a matter of law and not be for the Tribunal to decide that Ribbentrop would then be personally answerable for all the crimes of the German forces. There is one general point which I think is covered; that is, you note in the second line you used the words "in the preparation". The preparations would in my view include such acts as the terrorization and murder of their own Jewish population in order to prepare for war; that is, preparatory acts inside the Reich in order to regiment the state for aggression and domination. This would be important politically for us because the ill-treatment of the Jews has shocked the conscience of our people and, I am sure, of the other United Nations; but we should consider it at some stage, and I thought it was covered by this act in the preparation of the design. I just wanted to make it clear that we had this in mind because I have been approached by various Jewish organizations and should like to satisfy them if possible. I have in mind only such general treatment of the Jews as showed itself as a part of the general plan of aggression.

MR. JUSTICE JACKSON. Well, I think a great deal depends on what we are trying to accomplish by definition, and I don't think this one accomplishes what the United States has had in mind to try to accomplish. This leaves open, as I see it, to be argued before the Tribunal what the international law is on nearly every question. Our basic purpose is that article 6 should settle what the law is for the purposes of this trial and end the argument. If any definition is not a proper one to settle on by agreement, it is not a proper one for us to support as advocates before a Tribunal. I think it is entirely proper that these four powers, in view of the disputed state of the law of nations, should settle by agreement what the law is as the basis of this proceeding; and, if I am wrong about that, I do not see much basis for putting these people on trial in a quasi-judicial proceeding.

The introductory paragraph of the subcommittee draft is unequivocal and unambiguous and says that the acts it sets forth shall be considered criminal violations of international law and shall come within the jurisdiction of the Tribunal. It would not leave it open for argument that this is not the law. The draft before us submitted by the Soviet Delegation literally only confers jurisdiction to try persons; it does not, as I see it, define the substantive law which creates the crimes. Therefore, if this were adopted, it would be entirely open to the Tribunal if it thought the international law was such as to warrant it, to adjudge that, while these persons had committed the acts we charge, these acts were not crimes against international law and therefore to acquit them. That we think would make the trial a travesty.

Now let us take *a*). If we look at it as defining a crime, it is one consisting of three elements: first, there must be "aggression against or domination over"; second, it must be carried out by Axis powers; third, it must be in violation of international law and treaties. Now the moment you look at it as broken into its elements, it seems to me you find great difficulties in it. I do at least. The first is that aggression against or domination over other nations, in violation of some treaties, would not be in my judgment, if accomplished by peaceable means, an international crime. For example, if we violated our fishing treaties and continuously encroached on British waters and dominated them without a declaration of war or going to war, I should hardly think it an international crime; it would be a violation of treaties to which you might be entitled to remedy. It might lead to war, but that is not what we are aiming at, which is aggression or domination by making war. Then the second element contained in *a*) is, it must be carried out by Axis powers. We would think that had no place in any definition because it makes an entirely partisan declaration of law. If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us. Therefore, we think the clause "carried out by the European Axis" so qualifies the statement that it deprives it of all standing and fairness as a juridical principle. Then the third element of *a*), that all of this must be in violation of international law and treaties, brings us right back to the question which we set out to solve, which is to say that certain aggressions which have been declared illegal long before this war was begun are violations of international law, rather than to leave that to the Tribunal to argue about and possibly disagree about.

Paragraph *b*) from our point of view does not reach all that we

want to reach and reaches a good deal we would not want to reach. It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.

Paragraph c), of course, comes down to the violation of the rules of land warfare and we really need no international tribunal to punish that. We have evidence as to nearly every one of these prisoners that we have that they violated the laws and customs of land warfare against American soldiers, and therefore we can put them on trial before an American military tribunal within a month for ordering the slaughter of American prisoners of war. We don't need an international tribunal for that. So that does not seem to advance us very much on an international trial except when we couple these individual acts with the German plan to make warfare by that lawless and terroristic method.

And then the last paragraph, "and who is therefore personally answerable"—it seems to me to leave open the very question we want to settle. We must declare that they are answerable personally, and I am frank to say that international law is indefinite and weak in our support on that, as it has stood over the recent years. This definition seems to me to leave the Tribunal in the position where it could be argued, and the Tribunal might very reasonably say, that no personal responsibility resulted if we failed to say it when we are making an agreement between the four powers which fulfils in a sense the function of legislation. I think there is greater liberty in us to declare principles as we see them now than there would be in a court to use new principles that we had failed to declare in an organic act setting up the court. And therefore we leave open to an argument, and to interminable argument, and to determination by, and division of, the court, the question as to whether one is personally answerable for such acts as are set out.

Now all of this brings me back to a consideration of the plan which we put forward, however crudely, to accomplish that which we are trying to do, and I would invite reconsideration of paragraph 6 as

reported by the subcommittee on drafting [XXV]. The opening paragraph settles the law that certain acts are criminal violations. I think Professor Gros' criticism, that it does not declare individual responsibility but leaves it as a matter of state responsibility, is a valid criticism which should be met, but apart from that I think no departure from our definition is acceptable on criminal violations of law for the purposes of this trial.

Now, what are these acts which should be criminal violations? First of all, we say it is the violation of laws, rules, and customs of war, which includes murder and ill-treatment, deportations, wanton destruction, plunder, and other violations of the customs of war. We are prepared to prove against every person whom we would propose to indict guilt under those well-defined classes of crimes. We are prepared to show that as against the top men, not merely against the little soldiers who were out in the field and did these things, but against the top Nazis who ordered them. We have the captured orders, we have the reports, we have the evidence to show that they were guilty, and guilt will not be an inference merely because they were in office or in authority but because they personally knew and directed and planned these violations as their deliberate method of conducting war.

And then the second thing of which they are all guilty—and we can show they all participated in it with knowledge—was the launching of a war of aggression. They went to war as a means of carrying out a policy after their country had renounced war as a means of policy and after, we think, the civilized world had come to recognize any war except a defensive war or one undertaken to discipline an aggressor as a criminal violation of international law.

Now the next is the invasion or initiation of war or threats against other countries, or otherwise in violation of international law. I am quite prepared to concede that threats should go out of this definition. I think actual invasion is all that we need deal with in this case, and I should be prepared to drop the thought that mere threat of invasion is a crime under international law. Also it involves us in great difficulty as to what constitutes a threat—the building of strategic fortifications or strategic railroads or defenses might be construed as a threat—and I am willing to drop that from the definition.

And the next, of course, is the common plan or enterprise, which is the means by which we hope to reach a great number of persons who are deserving of trial and punishment but against whom specific acts, other than joining in the plan and promoting the plan, might be very difficult to prove. And we see no acceptable substitution for that article as a means of reaching any large number of persons.

Then the last is the atrocities, persecutions, and deportations on po-

litical, racial, or religious grounds, and the reason for the latter part of that definition is, as I pointed out, that ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state. Without substantially this definition, we would not think we had any part in the prosecution of those things which I agree with the Attorney-General are absolutely necessary in this case.

Therefore I come back to the proposition that we don't know how we can work out this plan except around a definition that is substantially what we have proposed, although we admit it is no doubt capable of improvements at points and clarifications.

PROFESSOR TRAININ. In fact we all know what the major war criminals have to be tried for, but it has been found that to put it in words is a very difficult task indeed. Several attempts have been made. The American proposal, the French, the modified British proposal, now the Soviet proposal, and, going a little ahead, I might say we have no perfect articles yet. This article will have to be considered further, and in connection with that may I make a few remarks? The remarks made by the chairman could very well be incorporated in the article. The remarks made by Mr. Justice Jackson are more of a general character and concern questions of principle. I quite agree with Mr. Justice Jackson that this article should be the substantive law according to which the criminals should be tried. In this respect I must say that while the French formula has its advantages, it may be a bit too general in its introductory and concluding paragraphs. It is quite true that the American draft is better than the French draft in that it is more precise in stating that these are violations. But in the opinion of the Soviet Delegation the subsequent part of it could be modified by adopting some points from the French. There can be no doubt that, as stated in the French formula, violations of the customs of war, whether in regard to prisoners of war or civilians, is in fact an international crime. An action becomes an international crime even though it may be carried out in accordance with definitions of international law if it is done as part of preparation of aggression or domination over other nations. There might come a time when there will be a permanent international tribunal of the United Nations

organization, but this tribunal has a definite purpose in view, that is, to try criminals of the European Axis powers, and it is quite natural then that this fact should be noted in the French proposal. Although of course aggression or domination would not be permissible by any power, this Tribunal has been established for the trial of European Axis criminals. It is very pleasant to hear Mr. Justice Jackson say they have documents about personal responsibility of these various leaders for these various crimes, but it seems to me that the thought is incorporated in the French draft, that having prepared aggression and domination of other nations, these leaders are personally answerable for crimes committed in the course of this war, in the course of fulfilment of these plans. In conclusion, may I say that I made an attempt but quite agree with Mr. Justice Jackson that some more attempts have to be made and am sure the other delegations will join in this enterprise?

SIR DAVID MAXWELL FYFE. I should like, greatly daring, to try to achieve a compromise between Mr. Justice Jackson and Professor Trainin, because on a first hearing there is nothing in what Professor Trainin has said with which I disagree at all. It seems to me that this is the first point: Mr. Justice Jackson says, "I want these acts defined as crimes"; Professor Trainin has said, "It is quite true that the American draft is quite precise in that it states these are the violations." It seems to me that on that point in the introductory paragraph there is really substantial agreement except for the argument against *ex post facto* legislation which Professor Gros put forward.

I put this point to Professor Gros: The drafting committee's draft says that "The following acts shall be considered criminal violations of International Law" Our usual word in English statutes is "deemed", but there is no difference. It is a common word with us. Doesn't that meet Professor Gros' point that we are not declaring the law as it was but the law as we agree on it for this purpose?

PROFESSOR GROS. Yes, I agree with you, Sir David—not to state the law as we want it to be, but the exact formula. By the fact of saying those acts are deemed criminal violations we admit some of them were not, and the old construction which I attempted in my draft was to get the same result which we all want without incurring the risk of any criticism against that construction. All the acts which are enumerated in the French or Soviet drafts are not declared or deemed to be criminal violations of international law. It goes more or less on these lines: the following people will be considered as major war criminals; for that purpose they should have taken part in the preparation or conduct of such and such acts; and those plans, having been committed by army or civilian services, are criminal acts. The first

people are major criminals because they have been instigators or accomplices or agents of the commission of those acts. The position seems to be better because we invite less criticism on the question of deeming any act as a criminal violation where we cannot say it is made so in any statute. We will not prevent any criticism by what has been written, but nobody can say those enumerated in *b*) or *c*) are not criminal violations of international law.

SIR DAVID MAXWELL FYFE. This seems fundamental to it. You are saying the persons who committed these acts are major criminals. Does not that imply the acts which they committed are crimes?

PROFESSOR GROS. Yes, it certainly does; but there is a difference in saying that, if they are convicted to have taken any part in any capacity in the planning of those criminal acts, they will be dealt with as major war criminals, and declaring those acts are criminal violations of international law, which is shocking. It is a creation by four people who are just four individuals—defined by those four people as criminal violations of international law. Those acts have been known for years before and have not been declared criminal violations of international law. It is *ex post facto* legislation.

MR. JUSTICE JACKSON. Could I ask a question? As I understand it—and I may not be correct—but as I understand it, Professor Trainin does not agree with you about that. If I understand it, Professor Trainin's book takes the position that a war of aggression or initiating war in violation of treaties is an international crime.

PROFESSOR TRAININ. Yes.

PROFESSOR GROS. But I explained to you that even Professor Trainin intended to contract the notion of international crime, and I point out the notion of international crime is different from violation of international law. It is declaring as settled something discussed for years and settling a question as if we were a codification commission.

MR. JUSTICE JACKSON. But we are a codification commission for the purposes of this trial as I see it. That is my commission as I understand it.

PROFESSOR TRAININ. I welcome the fact that in the French draft personal responsibility is well emphasized and that we should try to incorporate it in our draft, but I still think the question of declaration of law remains. That is, the four countries may, for the purposes of this trial, declare certain acts to be criminal; and for the purposes of this trial the laws declared by the Four Powers should be sufficient.

SIR DAVID MAXWELL FYFE. It seems to me you might get it in this way, by saying "the following acts shall be considered criminal violations" instead of "international crimes"—I am not sure whether

there is a difference—"and those who are proved to have directed or participated in the preparation and conduct of any and all of them shall be liable to be tried, to be convicted, and punished by the tribunal".

PROFESSOR TRAININ. In my opinion we have made a step forward and we understand each other better in this respect. But it would be very difficult here and now to try to work out the form which would be acceptable.

SIR DAVID MAXWELL FYFE. It seems to me these are the two principles which we have to marry: first, a statement that this is the law which the Tribunal will apply; and secondly, the personal responsibility. Now, Professor Gros, may I put this point to you? Do you join in a distinction between international crimes and criminal violations of international law, or is there a phrase which would not offend the codification point you make?

PROFESSOR GROS. That is precisely very interesting. I am perfectly sure there is no fundamental difference between those two drafts. I will repeat: In the American draft the fact that you say that launching of a war of aggression is a criminal violation of law does not give you the power to convict and condemn the people responsible for those crimes if you do not say they are responsible.

SIR DAVID MAXWELL FYFE. Then may I make this suggestion, that we try in another draft to introduce both these conceptions? Can we include the two things: what we would consider the crimes triable by the Tribunal, and who will be the persons triable by the Tribunal?

PROFESSOR TRAININ. We agree.

SIR DAVID MAXWELL FYFE. There are two points on which I could not quite see the weight Mr. Justice Jackson gave to them. The "aggression against or domination over" seems to me to go into a different field from the violation of a fishing treaty or something of that kind. It implies, even without definition, military attack and aggression or intention to become the master rather than a mere breach of agreement. The other point was that I thought that, if we limited the trial to the European Axis criminals, no one in the future could say we were discriminating in limiting this definition to Axis aggression. I would like Mr. Justice Jackson to consider that point. It seems one on which we are governed by limitations from our governments.

MR. JUSTICE JACKSON. Well, I agree that we are dealing only with them, but I should think that our definition would sound pretty partial if we are defining an act as a crime only when it is carried out by the Axis powers. That is what I have in mind: If it is a good rule of law, it should bind us all, and if not, we should not invoke it at this trial. It sounds very partial to me, and I think we would get great criticism from it.

PROFESSOR TRAININ. We don't say that other countries would not be equally responsible for that but say that these persons would be responsible for acts committed by the European Axis powers.

SIR DAVID MAXWELL FYFE. Then we come to point *c*). Having made two points against Mr. Justice Jackson, I now make one in his favor. I don't like principles of international law coming in there, because I think that would leave it to the Tribunal to define principles of international law.

PROFESSOR TRAININ. Yes, that could be changed.

SIR DAVID MAXWELL FYFE. Has anyone any disagreement with the view that acts inside the Reich, in Germany, which were preparatory to the plan of aggression and domination should come into our purview? [No response.] Then we are agreed on that. Then we come to the common plan. As I understood the last paragraph of the Soviet draft, it of course is based on the last paragraph of Professor Gros' draft. The intention of that is to state that anyone who has entered into the plan will be responsible for all acts of all persons who carried it out. Now, Mr. Justice Jackson, I would like to help on that. What was your difficulty about the way it is framed? You said we must declare the principle.

MR. JUSTICE JACKSON. Yes, declare the principle that he is responsible rather than to assume that "therefore" international law does make him answerable. We would have to declare that or settle that to be the law. Otherwise the question would be raised: is he answerable because he has done these things, particularly under the objection Professor Gros has stated? If we go back to the pre-Briand-Kellogg-pact days, there is no doubt that for a period of international law all warmaking was legal. And it seems to me that that treaty and the acts which followed it did something to the law of war, and that change is what we stand on. But we must declare it, otherwise we shall have argument on that.

SIR DAVID MAXWELL FYFE. Would you mean, Professor Gros, in that last paragraph that it would be open to the Tribunal to say whether they should be personally answerable, or should we declare?

PROFESSOR GROS. I think we should compare it to the common criminal law. If someone is sitting behind a desk and sends some people to kill others, the man sitting behind the desk is answerable for murder, at least in French law, and I presume he is under other systems. Well, the man sitting behind the desk under the common plan, if he did not do anything else, is answerable for the same reason, as instigator; if you say that he is therefore answerable as instigator or accomplice, you give satisfaction to Mr. Justice Jackson's views.

PROFESSOR TRAININ. We are approaching common ground here. We are incorporating the best features of Mr. Justice Jackson's draft and

Professor Gros', and we would leave the introductory words of Mr. Justice Jackson's draft together with the part about personal responsibility. [Apparently Professor Trainin was referring to the subcommittee draft, XXV.] Section *a*) would probably be left as it is in the American draft and *e*) probably in a somewhat different draft. As for *d*), it would as a matter of fact come under *a*) of the French draft.

SIR DAVID MAXWELL FYFE. Well now, would the Conference like me to try the marriage on this line? I will prepare a redraft for presentation tomorrow at 2:30.

MR. JUSTICE JACKSON. We have other points referred to us and will run into grave difficulty if we don't soon get our work concluded here. I wonder whether we should not make an effort to deal with some of them.

SIR DAVID MAXWELL FYFE. Have you a note of them?

MR. JUSTICE JACKSON. Professor Trainin would know whether I am correctly informed. As I understand it, there are Soviet objections to the matter contained in the language which was redrafted in article 22. There is also a difference of opinion about article 17 relating to interpreters and the power to appoint special masters.

SIR DAVID MAXWELL FYFE. Shall we take 17 [XLV]? The three points in the differences are: first, the present draft of 17 (*e*) and (*g*); second, Mr. Clyde's suggestion; third, Professor Trainin's. It occurred to me that perhaps Professor Trainin could help us. Is there any objection to the Tribunal's appointing someone to take the evidence of a witness, or is it the Professor's point that it is only for the Tribunal to decide and not to be put in the agreement?

PROFESSOR TRAININ. I have some doubts whether the Tribunal would do that—whether there would be need, and if there were, whether the Tribunal would do it. In any case I think it is a question which the Tribunal could very well decide itself, and the Soviet Delegation suggest that by saying "the functions and duties of these officers" in the rules of procedure we give the Tribunal the right to do so if it wishes.

SIR DAVID MAXWELL FYFE. What do you think, Mr. Justice Jackson?

MR. JUSTICE JACKSON. I don't think you could by so limited a phrase authorize the court to name what would in our practice answer as special masters. This is not a new problem. The Permanent Court of International Justice had to consider plans to bring about a combination of the Anglo-American and Continental law procedure in this respect, and it attempted to do so by permitting the court, or the president, when the court should not be sitting, at the request of one of the parties or on its own initiative, to take the necessary steps to provide for examination of witnesses and experts other than by the court itself. That is the rule adopted by the Court pursuant to

authorization of the statute, and they have had quite elaborate dealing with this question of nominating a commission to take testimony. It seems to be a general custom in international tribunals to authorize it, and I don't see how we can ever do this job unless we can delegate some evidence taking to masters. I just think it is an unworkable thing, otherwise, and since it is agreed that the court may do it under the formula suggested by Professor Trainin, I don't see what objection there could be to expressly authorizing it so that there could be no question about it.

PROFESSOR TRAININ. Of course there is a difference between an international court and an international military tribunal which would try criminal cases. I doubt whether that would be really necessary, but in any case there is nothing to prevent the Tribunal's doing that. For instance, in the Charter of the United Nations organization certain questions are left open such as the important question of contingency of armed forces placed at its disposal. That question will be settled by separate agreement. We could leave this question for the Tribunal to decide. It would be much easier. We would lose less time that way. There isn't a single word in this charter which would prevent the Tribunal's doing that.

JUDGE FALCO. A word of subsidiary nature would perhaps prevent the court's thinking it had no power to appoint officers to take testimony.

MR. JUSTICE JACKSON. Particularly when the document is concerned with naming of secretaries, reporters, et cetera, who are merely clerical officers, it should not omit masters.

SIR DAVID MAXWELL FYFE. It means "somebody who can be sent to the bedside of a witness to take his evidence". That is exactly what it means.

JUDGE FALCO. You could perhaps find another expression of subsidiary nature.

SIR DAVID MAXWELL FYFE. Suppose we merely say that the Tribunal shall have power to appoint officers designated to carry out tasks designated by it.

MR. JUSTICE JACKSON. I hate to leave questions open in this agreement for argument among the prosecutors. It seems to me the amendment suggested here meets the situation frankly and clearly and the Tribunal would then have no trouble. Since it is conceded that the court ought to have that power, I cannot understand the objection to making it clear so that we shall not be in dispute or confusion when we come to apply it.

PROFESSOR TRAININ. The Tribunal would appoint these masters only in very special cases, and I don't think in the charter of the International Military Tribunal it is necessary to state that the Tribunal

might delegate its powers to somebody. If it finds it necessary, then it would do so.

MR. JUSTICE JACKSON. There is nothing accomplished by discussing it further. It is something we disagree on, and I think a case of this size is unworkable if masters cannot be used; at least, it is unworkable in anything like our system of trial.

PROFESSOR TRAININ. We would be willing to accept your formula.

SIR DAVID MAXWELL FYFE. I should have thought that would have covered it. Take out "secretaries and interpreters" and say "appoint officers for the carrying out of any task designated by the Tribunal."

MR. JUSTICE JACKSON. Are not we agreed on the question? Does this leave it open to argument as to whether the court would have the power?

SIR DAVID MAXWELL FYFE. I don't think there is any question that it would not. I should imagine it gives the Tribunal the power. I think Professor Trainin's point is that it is one for the Tribunal and not for the charter, and really that is the main point, that this is a Tribunal matter and not a charter-makers' matter.

PROFESSOR TRAININ. According to this new formula of yours, it would have full power then.

MR. JUSTICE JACKSON. Well, I think we can pass it. We know each other's positions about it.

SIR DAVID MAXWELL FYFE. The other point is 22. "The administrative headquarters . . . shall be located at Berlin. The first trial. . . ." Is there a Soviet objection?

PROFESSOR TRAININ. We propose it shall be said, "The Tribunal shall be located or established in Berlin." And of course it could sit in various places. Perhaps you could say, "The Tribunal shall be located in Berlin and it shall sit in such places as shall be determined by the Tribunal."

MR. JUSTICE JACKSON. What is meant by that? Just what would be in Berlin?

GENERAL NIKITCHENKO. Before the first trial takes place certain organizational work would have to be carried out in preparation for the trial. That work would be carried out in Berlin. Furthermore, the administrative headquarters would be in Berlin, the secretariat in Berlin, the judges would meet there before the first trial begins, and when the trials begin they would take place in various other cities.

SIR DAVID MAXWELL FYFE. Apart from the administrative headquarters and the secretariat—that is in the draft—there would be, I think General Nikitchenko said, a meeting of the judges and preparatory work of the prosecutors. What I suggested was that there should be a meeting of the prosecutors in Berlin—that the indictment

should be handed over at Berlin. And now I think we are getting nearer agreement if we take it as concrete and specific things. Would that meet the Soviet Delegation's approval if we had these four things: administrative headquarters, secretariat, meeting of the prosecutors, and the indictment should be handed over at Berlin?

GENERAL NIKITCHENKO. The Tribunal is really made up of its members and also of various organisms such as secretariat, et cetera. If we just speak of administrative organization and secretariat, the members would think that should be in Berlin before the first trial began, that is, to get ready for that trial. That does not in any way mean that the members of the Tribunal or the prosecutors would have to live in Berlin. They would decide to meet, say once a week or once every fortnight or whatever they thought fit—to meet there, and settle certain general questions before the trial begins—to have a place where they could meet.

MR. JUSTICE JACKSON. Our people on the Control Council have told me that they thought it much better if the proceedings of this court were held some place other than where the Four Power military government was trying to function. And that is why they suggested Nürnberg, that Berlin already is having great difficulty to find adequate housing and other facilities. It has been badly destroyed, and the situation there is such that neither transportation nor communication nor housing would be easy to provide for us in addition to the requirements made by government. So far as I am informed, there simply are not facilities at Berlin to carry this on.

GENERAL NIKITCHENKO. That has nothing to do with the trials. They would not take place in Berlin probably. All that this first sentence provides for is a place where the members can meet before the trial begins to look at the indictment and settle any other questions that may be brought about. As we learned in an international court which has its address in The Hague, the members would not remain there permanently, and this, of course, would not in any way prevent the Tribunal from having trials not in Berlin. As a matter of fact, they probably would take place in other places but should have a residence where they could meet.

MR. JUSTICE JACKSON. But why should we go to Berlin where our records wouldn't be—we have tons of records—where the prisoners wouldn't be, and meet there when it seems to me that we should meet where the prisoners and the records and the evidence are.

PROFESSOR TRAININ. The members of the Tribunal and Chief Prosecutors may decide somewhere else but every institution of that sort should have an address, or permanent residence, that is.

SIR DAVID MAXWELL FYFE. That is what I thought we had covered by the "administrative headquarters".

GENERAL NIKITCHENKO. These words are not quite clear. What does it actually mean?

SIR DAVID MAXWELL FYFE. It would be the administrative headquarters which would be the permanent residence and personal address. What we call a registered office—the permanent residence. It certainly would cover the seat of the Tribunal and the personal address.

GENERAL NIKITCHENKO. Yes, that is what we contemplate. This new firm of ours—the Tribunal—would have to have an address and that should be Berlin. Do not say “administrative headquarters”, which in Russian at least is not clear.

MR. JUSTICE JACKSON. That is what I want to be perfectly clear about, what is being asked? In the first place we have had, I think, different ideas about the system of trials—what we are going to do. Now the British have filed a draft list naming nine and two more for consideration as defendants. Our plan has been, as I have said here, to include key men in a single trial and to reach others through that trial of organizations so that we would not have to hold more than one trial or at least not more than a few trials. We think on studying our list of prisoners that we would reach, through the trial of organizations, almost all of these people by our methods. Now I gather there is a different idea in the Soviet Delegation’s mind, and I would like to inquire how many prisoners in addition to ours you want tried and what kind of prisoners they are. What is their rank, what is their position, what is the problem of reaching your prisoners, as you see it?

GENERAL NIKITCHENKO. We have no lists with us of the prisoners held in custody by the Soviet authorities; so we are really not in a position to answer that question, but in any case we do not contemplate that this Tribunal should deal with a great many prisoners. Prisoners who would come under the jurisdiction of this Tribunal would be the major criminals, that is, mainstays of the Nazi government, leaders of the Nazi Party, chiefs of the Gestapo and S.S., et cetera. Of course apparently the United States and Great Britain, and probably France, have their own lists of criminals, and at the present time we could not precisely answer that question, but we do not contemplate having too many of these people—that would be only the major leaders.

SIR DAVID MAXWELL FYFE. I think that view is universal, what we all have in mind. That would be exactly my answer. I would include high-ranking generals that we can prove have taken part in any of the crimes—High Command, not chiefs in general.

GENERAL NIKITCHENKO. And perhaps certain major organizers of war, such as Schacht, Krupp, or persons like that.

SIR DAVID MAXWELL FYFE. My mind is quite open and prepared to take any case put up by the prosecutors. I don’t think that there is any disagreement with us, Mr. Justice Jackson.

MR. JUSTICE JACKSON. Well, I think we agree on certain things, but I have got to get our prisoners some place where we can go to work on their cases, and the only place I can find to do it is in Nürnberg. And you see I cannot find out, in addition to our list and yours, how many are involved. The principal man that is missing from our list is Martin Bormann, and apart from him there isn't much that we have not got in prison. I have been told that the Russians have Bormann, and I am wondering if that is true—if they can bring Bormann to trial along with the rest.

GENERAL NIKITCHENKO. Unfortunately we have no information at the present time about Bormann. The Soviet idea was that, immediately after the agreement is concluded, a person would be appointed who would deal with these matters. Of course the Soviet authorities are carrying out investigations on their part, but the Soviet idea was that that would be taken up immediately after we have the charter and agreement ready and signed.

SIR DAVID MAXWELL FYFE. I was wondering whether something of this sort might do. Then we leave the place to be fixed by the prosecutors if it is to be elsewhere than Berlin.

MR. JUSTICE JACKSON. I would not agree to that, Mr. Attorney-General. We would have to meet in Berlin unless there were a majority to meet somewhere else. I think we have to fix the meeting place. There comes in there the tie-vote situation. I think we would have to fix it. I don't want to be stubborn about it, but I have to tell the Army where to get ready for these trials. I can't leave it for prosecutors, two of whom are not yet appointed.

SIR DAVID MAXWELL FYFE. No, it is much better to have the thing out now.

MR. JUSTICE JACKSON. I think it is something to be settled in the agreement, because I have got to get these prisoners there. I am really getting very discouraged about this, I must say. And it seems to me that there are one or two or three things to do. I am getting very discouraged about the possibility of conducting an international trial with the different viewpoints. It isn't the fault of anybody, but we have very different viewpoints. I think the United States might well withdraw from this matter and turn our prisoners over to the European powers to try, or else agree on separate trials, or something of that sort. It seems to me our difference in viewpoint is too great to work without so much difficulty and delay that it is going to be impractical to try these people within the length of time I can commit the United States to this venture. The matter has taken a different shape than when I came here authorized to sign on behalf of my Government, and it looks quite discouraging, I must say.

SIR DAVID MAXWELL FYFE. I am sorry. I am a born optimist myself

and also a working politician. This is the first time for the United Nations to get to work on a concrete task, and there are bound to be difficulties, but I have been struck this afternoon, as on Friday when we dealt with article 15, with the realization that, when we got down to it, we found agreement. I should be displeased, and my Government would be extremely disappointed if we could not find means of working this out as an international body. Apart from our own people or the peoples of Europe, our work is to see these top-notch Nazis tried, condemned, and many of them executed. And I should be very sorry if we fell down when we have drafted out so much agreement over, to my mind, matters of detail. As I see this problem as we are dealing with it at the moment, we give the Tribunal an address of residence and a secretariat, the judges meet or the prosecutors meet, and then as soon as possible the men go to the place of their own decision. I don't really think there is any point of difference between us yet.

GENERAL NIKITCHENKO. Not a single government would have sent its representative here unless it wanted united action on this matter, and the Soviet Government on its part wanted and does want united action, and that is why under the Moscow and Crimea declarations they have done so. Our committee here has done a good deal of valuable work, and, of course, we would not be happy about the fact we have met with difficulties. There have been moments when the Soviet Delegation was rather discouraged with the progress of the work and thought perhaps some details could impair our reaching an agreement. But as a result of good will and good intentions on all sides we have been able out of 30 articles of the charter and of the agreement to come to agreement on 27 articles of the charter and the whole agreement. Therefore all we have left is three articles, and as a matter of fact in principle we agreed this afternoon on what should be included in the sixth article.

In regard to the article about special masters, the Soviet Delegation thinks that on that point agreement which would satisfy everybody could be reached. So apparently all that is left now is to name or not to name the permanent seat of the Tribunal and of the Chief Prosecutors. This would have extremely great importance if the permanent seat of the Tribunal would necessarily mean that all the trials would be held there. Mr. Justice Jackson says that the most convenient place for the American prisoners would be Nürnberg, and very probably the first trial would in fact take place in Nürnberg, but as there are prisoners in the hands of the British, French, et cetera, investigation of charges against those persons would probably go on at the same time in preparation for subsequent trials. I do not say that there would be many trials, perhaps three or four, probably not

more. In any case there should be a place where members of the Tribunal could meet to discuss certain questions before the first trial or in between the trials. For separate meetings they can choose any place they like. The trials would also take place not in Berlin but in other places. But the center where they should meet if they wanted to should be the permanent seat.

JUDGE FALCO. The French Delegation thinks it would be very disappointed if we do not manage to make an international agreement and think we nearly reached doing it. As the Russian delegate said, on all questions and exceptions we have had of any consequence there are only perhaps one or two questions we are not quite agreed on—but nearly agreed on all but the last. As far as I am concerned, after what I saw at Nürnberg, it is certainly an excellent place to hold the trials and have all the organization of the court and prosecution and I think it would be a great mistake to have the headquarters and secretariat at another place where the trials are not going on. There we saw all is very well for the trials, but, if the Russian Delegation makes this a question of principle and tells us that question is only settled if the headquarters of the secretariat be at Berlin, I would consider it.

MR. JUSTICE JACKSON. Well, the difficulty with the proposition here is that, if the United States is going to take responsibility as host for these trials at Nürnberg, we must put a staff to work getting physical plans ready, and the same is true any place else. The Army has told me again and again, "Don't come at us without consultation months ahead of time because it takes time." Now we could not even find out under the proposal now before us where the trial could be held until the other prosecutors are appointed. It would be the middle of September before we could know whether we could even go ahead, and I cannot wait that long. I shall have to say to my Government that they will have to put someone else to this task because I must be back to the Supreme Court. That is not your trouble, of course, but it is a very practical one for me. I think this agreement should fix the place for the first trial so that we can be at work at once getting it ready. I have tried to point out the facilities at Nürnberg. I am willing to give a list of my prisoners and lay all my cards on the table, but if you let this thing drag we will be running into different currents of public sentiment and people will be disgusted with too much delay. I don't see how we can, as lawyers responsible to our people, permit it. I could not accept the draft that is suggested by the chairman much as I would like to be agreeable to a man who is so agreeable to us, but I regard it as an unworkable thing to leave it so that there could be no meeting place fixed until some remote time when all are appointed.

SIR DAVID MAXWELL FYFE. I don't think I made it clear that draft is only of the first sentence. I hoped that we would go on to deal with the question of the first trial after that. That was only taking the place of the words "administrative headquarters of the Tribunal and its secretariat shall be located at Berlin", which was the agreed draft. I was elaborating on that to meet the Soviet point on the address and the meeting unless otherwise agreed. That is the first sentence only; then I thought we should approach the question of the first trial.

GENERAL NIKITCHENKO. I have already stated that we took upon ourselves to recommend to our Government Nürnberg as the place of the first trial. So far we have no answer to that communication and as soon as we do, and we hope that it will be positive, we will be able to state in the charter that the first trial would take place in Nürnberg. But at the present time it is a question as to whether we have a permanent seat of the Tribunal.

SIR DAVID MAXWELL FYFE. Is there a hope of getting an answer on Nürnberg in time to incorporate it this week in the charter?

GENERAL NIKITCHENKO. We hope to have the answer in one or two days.

SIR DAVID MAXWELL FYFE. Then I think that is a most helpful hope. I think the method of getting an agreement is to decide to put in a slightly longer form what should be done at Berlin and then hope to put in the first trial at Nürnberg. Then it would be for the Tribunal and Chief Prosecutors to decide what meetings they would have at Berlin and at Nürnberg, and, if the prisoners were taken to Nürnberg, it would be a matter of convenience. The Chief Prosecutors would all want to go and examine them there.

PROFESSOR TRAININ. We agree.

MR. JUSTICE JACKSON. Let me suggest what would seem to me possible. I don't know just what is meant by administrative headquarters myself, but the address, secretariat, and administrative headquarters, and the permanent record of proceedings, wherever held, could be in Berlin. The first meeting of the judges and Chief Prosecutors could be held at the headquarters. The first trial shall both be prepared and held at Nürnberg, and any subsequent trials shall be held at such places as the Tribunal shall decide.

SIR DAVID MAXWELL FYFE. As Mr. Justice Jackson suggests, as well as the Tribunal you have the first meeting of the prosecutors at Berlin.

MR. JUSTICE JACKSON. After the word "Berlin" I would insert "and records of the proceedings wherever held shall be permanently lodged there." Then before the word "meeting" I would insert the word "first" so that it would read "the first meeting of the judges and of the Chief Prosecutors shall be held at the headquarters which shall be

fixed by the Control Council". That is, the location in Berlin shall be determined by the Control Council. "The first trial shall be prepared and held at Nürnberg and any subsequent trials shall be held at such places as the Tribunal may decide." Then I could get to work at once and get ready. Also we can have the Control Council pick us some headquarters which would have to be, I assume, in the neutral zone in Berlin. Perhaps if we consider that at our next meeting, we can agree.

The Conference adjourned. _____

XLV. Redraft of Charter, Submitted by British Delegation, July 23, 1945

AGREEMENT by the Government of the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, the UNITED STATES OF AMERICA, the Provisional Government of the FRENCH REPUBLIC and the Government of the UNION OF SOVIET SOCIALIST REPUBLICS for the Prosecution and Punishment of the MAJOR WAR CRIMINALS of the EUROPEAN AXIS

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will 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 that will be created therein;

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals, whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorised thereto have concluded this Agreement.

Article 1.

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of

war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.

Article 2.

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3.

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4.

Nothing in the Agreement shall prejudice or release the obligations of the parties to the Moscow Declaration for the return of persons to be tried at the scenes of their crimes.

Article 5.

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

Article 6.

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Article 7.

This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it.

IN WITNESS WHEREOF the Undersigned have signed the present agreement.

DONE in quadruplicate in this day of
1945 each in English, French and Russian, and each text to have
equal authenticity.

For the Government of the United Kingdom of Great Britain
and Northern Ireland

For the United States of America

For the Provisional Government of the French Republic

For the Government of the Union of Soviet Socialist Re-
publics

Charter

CONSTITUTION OF THE INTERNATIONAL MILITARY
TRIBUNAL

Article 1.

In pursuance of the Agreement dated entered
into by the Government of the United Kingdom of Great Britain and
Northern Ireland, the United States of America, the Provisional Gov-
ernment of the French Republic and the Government of the Union
of Soviet Socialist Republics there shall be established an Interna-
tional Military Tribunal (hereinafter called "the Tribunal") for the
just and prompt trial and punishment of the major war criminals of
the European Axis.

Article 2.

The Tribunal shall consist of four members, each with an alternate.
One member and one alternate shall be appointed by each of the
Signatories. The alternates shall, so far as they are able, be present
at all sessions of the Tribunal. In case of illness of any member of

the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

Article 3.

Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

(a) The presence of all four members of the Tribunal or their alternates shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If however a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a simple majority vote and in case the votes are evenly divided, the vote of the President shall be decisive; provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5.

In case of need and depending on the number of the matters to be tried, other Tribunals may be set up and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

JURISDICTION AND GENERAL PRINCIPLES

Article 6.

The following acts shall be considered criminal violations of International Law and shall come within the jurisdiction of the Tribunal.

- (a) Violations of the laws, rules or customs of war. Such violations shall include murder and ill-treatment of prisoners of war: atrocities against and violence towards civil populations: the deportation of such populations for the purpose of slave labour: the wanton destruction of towns and villages: and plunder: as well as other violations of the laws, rules and customs of war.
- (b) Launching a war of aggression.

- (c) [Invasion or threat of invasion of or] initiation of war against other countries in breach of treaties, agreements or assurances between nations or otherwise in violation of International Law.
- [(d) Entering into a common plan or enterprise aimed at domination over other nations, which plan or enterprise involved or was reasonably calculated to involve or in its execution did involve the use of unlawful means for its accomplishment, including any or all of the acts set out in sub-paragraphs (a) to (c) above or the use of a combination of such unlawful means with other means.]
- (e) Atrocities and persecutions and deportations on political, racial or religious grounds [in pursuance of a common plan or enterprise referred to in sub-paragraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated.]

Article 7.

The official position of Defendants, whether as heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9.

Organisers, instigators, and accomplices who participated in the formulation or execution of a common criminal plan or in the perpetration of individual crimes are equally responsible with other participants in the crimes.

Article 10.

At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the

application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 11.

In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

Article 12.

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 11 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.

Article 13.

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 14.

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

**COMMITTEE FOR THE INVESTIGATION AND PROSECUTION
OF MAJOR WAR CRIMINALS**

Article 15.

Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

(1) The Chief Prosecutors shall act as a committee for the following purposes:

- (a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff.
- (b) to settle the final designation of major war criminals to be tried by the Tribunal.
- (c) to approve the Indictment and the documents to be submitted therewith.

- (*d*) to lodge the Indictment and the accompanying documents with the Tribunal.
- (*e*) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 14 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: Provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried.

(2) The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

- (*a*) Investigation collection and production before or at the Trial of all necessary evidence.
- (*b*) The preparation of the Indictment for approval by the Committee in accordance with paragraph (1) (*c*) of this Article.
- (*c*) The preliminary examination of all necessary witnesses and of the Defendants.
- (*d*) To act as prosecutor at the Trial.
- (*e*) To appoint representatives to carry out such duties as may be assigned to them.
- (*f*) To undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

FAIR TRIAL FOR DEFENDANTS

Article 16.

In order to ensure fair trial for the Defendants, the following procedure shall be followed:

- (*a*) The indictment shall include full particulars specifying in detail the charge against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment translated into a language which he understands shall be furnished to the Defendant at a reasonable time before the trial.
- (*b*) During any preliminary examination of a Defendant, he shall have the right to give any explanation relevant to the charges made against him.
- (*c*) A preliminary examination of a Defendant and the Trial shall

be conducted or translated in a language which the Defendant understands.

- (d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.
- (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence.

POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17.

The Tribunal shall have the power

- (a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them
- (b) to interrogate any Defendant
- (c) to require the production of documents and other evidentiary material
- (d) to administer oaths to witnesses.

Article 17 (e).

Present draft

To appoint special officers of the Tribunal to take evidence and to make findings (except findings of guilt) and to certify summaries of evidence to the Tribunal whether before or during the Trial.

To appoint interpreters, reporters, clerks, marshals and other officials, either generally or for the Trial of a particular case. Persons so appointed shall, before assuming their duties, if required by the Tribunal, take an oath in a form approved by the Tribunal.

Amendment suggested by Secretary

To appoint interpreters, reporters, clerks and other officials, either generally or for a particular case. In particular, if at any time during the trial, it shall be established before the Tribunal that (for a reason which the Tribunal finds sufficient) a witness cannot be brought to the place of trial, then the Tribunal shall have power to appoint a special officer to take the evidence of such witness and to report to the Tribunal. Persons so appointed shall, before assuming their duties, if required by the Tribunal, take an oath in a form approved by the Tribunal.

Suggestion of Professor Trainin

The Tribunal shall have the power to appoint officers (secretaries, interpreters, etc.) for the carrying out of tasks of a subsidiary nature. The functions and duties of those officers shall be set forth by the Tribunal in the Rules of Procedure.

Article 18.

The Tribunal shall

- (a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges;
- (b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever;
- (c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19.

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.

Article 20.

The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21.

The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22.

[The administrative headquarters of the Tribunal and its secretariat shall be located in Berlin. The first trial before the Tribunal shall be held at Nuremburg and any subsequent trial shall be held at such place as the Tribunal shall decide.]

Article 23.

One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorised by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country or by any other person who may be specially authorised thereto by the Tribunal.

Article 24.

The proceedings at the Trial shall take the following course:

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty".
- (c) The prosecution shall make an opening statement.
- (d) The Tribunal shall ask the prosecution and the defence what evidence (if any) they wish to submit to the Tribunal and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The Tribunal may put any question to any witness and to any Defendant, at any time.
- (f) The prosecution and the defence shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
- (g) The defence shall address the court.
- (h) The prosecution shall address the court.
- (i) Each Defendant may make a statement to the Tribunal.
- (j) The Tribunal shall deliver judgment and pronounce sentence.

Article 25.

All official documents shall be produced, and all court proceedings conducted, in English, Russian and French, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

JUDGMENT AND SENTENCE**Article 26.**

The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall be motivated by the reasons supporting its findings and shall be final and not subject to review.

Article 27.

The Tribunal shall have the right to impose upon a Defendant on conviction, death or such other punishment (including imposition of a pecuniary fine) as shall be determined by it to be just.

Article 28.

In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29.

In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council which may at any time reduce or other-

wise alter the sentences but may not increase the severity thereof. If the Control Council, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 15 of this Charter, for such action as they may consider proper, having regard to the interests of justice.

EXPENSES

Article 30.

The expenses of the Tribunal and of the Trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council.

XLVI. Redraft of Soviet Definition of "Crimes"
(Article 6), Submitted by British
Delegation, July 23, 1945

23rd July 1945
9.45

The following acts or designs or attempts at any of them shall be deemed crimes on conviction of which punishment may be imposed by the Tribunal upon any person who is proved to have in any capacity whatever directed or participated in the preparation or planning for or carrying out of any or all of such acts designs or attempts:

- (a) Aggression against or domination over other nations carried out by the European Axis Powers in violation of treaties, agreements and assurances
- (b) Atrocities against civilian populations including (inter alia) murder and ill-treatment of civilians and deportation of civilians to slave labour, and persecutions on racial or religious grounds where such persecutions were inflicted in pursuance of the aggression or domination referred to in paragraph (a) above
- (c) Violations of the laws rules and customs of war. Such violations shall include (inter alia) murder and ill-treatment of prisoners of war, the atrocities referred to in paragraph (b) above when committed against the civilian populations of conquered or occupied countries, the wanton destruction of towns and villages, and plunder.

Any person who is proved to have in any capacity whatever directed or participated in the preparation for or carrying out of any of the acts designs or attempts referred to in (a) (b) and (c) above shall be personally answerable therefor and for each and every violation of international law, of the laws of humanity and of the dictates of the public conscience committed in the course of carrying out the said acts designs or attempts or any of them by the forces and authorities whether armed civilian or otherwise in the service of any of the European Axis Powers.

XLVII. Minutes of Conference Session of July 24, 1945

The Conference was called to order by the Attorney-General and at once took up the redraft submitted by the British of article 6 [XLVI].

PROFESSOR GROS. I have nothing to say on the material. It seems to me everything has been discussed. Now, as to drafting, naturally it is a question of general approach to the problem of drafting for an international conference. I don't know whether, when you put in for example, "murder and ill-treatment of civilians" it helps the difficulty. The fact that you are obliged to say "including (inter alia)" proves that it is only an illustration, and it makes the text a little heavy. But it is only a question of drafting. I do accept it with one or two verbal amendments.

I have one remark on (b), where we appear as wanting to prosecute because of racial or religious treatments only because they were connected with the war. I know it was very clearly explained at the last session by Mr. Justice Jackson that we are in fact prosecuting those crimes only for that reason, but for the last century there have been many interventions for humanitarian reasons. All countries have interfered in affairs of other countries to defend minorities who were being persecuted. Perhaps it is only a question of wording—perhaps if we could avoid to appear as making the principle that those interventions are only justified because of the connection with aggressive war, it would not change your intention, Mr. Justice Jackson, and it would not be so exclusive of the other intervention that has taken place in the last century.

GENERAL NIKITCHENKO. The Soviet Delegation considers that in general this proposal of article 6 is quite acceptable. It takes into consideration views expressed by Mr. Justice Jackson that we should state such and such actions are considered crimes, and that at the same time in the end it gives a certain amount of prominence to individual responsibility and the responsibility not only of the persons who had carried out the crimes but also of the persons who had participated in those crimes. Of course there may be some alterations of drafting, as for instance in the first paragraph, where it is stated that "on conviction of which punishment may be" inflicted upon any

person who has been proved, et cetera, while at the end practically the same is repeated, "any person . . .". Perhaps it would be better to cross it out in the first paragraph and just leave it as it is in the end. If we come to the question of drafting, then perhaps we could make some suggestions on that score.

MR. JUSTICE JACKSON. Well, I have not had the time that I would like to give to studying a thing that is as technical as this. We are trying to embody a great deal in a very small space, and accuracy is quite essential. Of course it leaves out entirely our (b) as it was reported by the drafting committee [XXV]. And it does seem to me that it leaves it very doubtful, at least arguable, whether we have included the "common plan" or "enterprise" idea. I think probably it was the intention to do so, but I think it makes it more doubtful than it ought to be.

In paragraph (a) it seems to me that the words "carried out by the European Axis Powers" should come out of the definition because, as I said yesterday, if it is a crime for Germany to do this, it would be a crime for the United States to do it. I don't think we can define crimes to be such because of the particular parties who committed the acts, but for the purpose of meeting General Nikitchenko's suggestion that we are only supposed to deal with the Axis powers, we could in the opening paragraph state that this Tribunal has jurisdiction only over those who carried out these crimes on behalf of the Axis powers so that we could keep the idea of a limitation, but not in the definition. Other than that I should like to reserve comment until I have studied it a little further.

SIR DAVID MAXWELL FYFE. With regard to Professor Gros' point about the prosecution on racial and religious grounds, I thought that this was the general view that we had accepted yesterday, that they were to be limited to those carried out in pursuance of aggression and domination mentioned in point (a). The heads of delegations remember that I took the contrast between a Nazi chastising a Jew before the war and the systematic persecution of the Jews in order to carry out the Nazi plan, and that is the sort of contrast that I tried to get in the draft, but I am very pleased to consider any improvement.

PROFESSOR GROS. I think that it puts on us an obligation to prove that those persecutions were inflicted in pursuit of aggression and that is a difficult burden because, even in the Nazi plan against the Jews, there is no apparent aggression against other nations. Paragraph (a) speaks of aggression over other nations; so it would be easy for German counsel to submit to the court that the Nazis' plan against the Jews is a purely internal matter without any relation whatsoever to aggression as the text stands.

SIR DAVID MAXWELL FYFE. From what I have heard I think we shall

be able to prove that. Take the anti-Jewish measures as an example. The anti-Jewish measures were a result of the orders of the Nazi leaders and not only the Nazi leaders but the Nazi government. It will not be very difficult for anyone to associate them with the general plan of aggression, but if Professor Gros will consider that point and suggest an improvement in the words I should be pleased to consider it. With regard to what General Nikitchenko said, I would be grateful for his general agreement and would appreciate suggestions. With regard to Mr. Justice Jackson's point, I had hoped that the "common plan" which was in the old 6 (*d*) was covered by the words "who is proved to have in any capacity whatever directed or participated in the preparation or planning for or carrying out of any . . . acts," and then in the last half of the last paragraph, which is Professor Gros' words—and to be responsible "for each and every violation of international law", et cetera, committed by the Axis powers. That means that, if anyone is shown to have participated in a plan to do (*a*), (*b*), or (*c*), or any of them, he is responsible for all acts in carrying it out. I hoped it had got the "common plan" idea adapted to this form.

With regard to the second point, I think the answer to Mr. Justice Jackson's anxiety is the Moscow declaration. And so long as we make clear that we are following the heads of state at Moscow, then I think it only a matter of words as to how we put it in. I think we should make it clear that we are carrying that out as given us by the heads of three states and in which the French are good enough to collaborate. Now what is the best step for dealing with this?

MR. JUSTICE JACKSON. Well, I am willing to do most anything. We are still at several points of difference. If we are within drafting distance of each other, perhaps the next step is drafting. I would like to point out, on this common plan or enterprise, what I think is substantial difference between the American draft and your redraft. And with characteristic stubbornness I submit that ours is superior, if I may do so without offense. Under your draft, the last paragraph, any person who is proved to have participated in any capacity whatever in the carrying out of any of these acts shall be personally answerable therefor. Now that literally reaches millions of people whom our definition wasn't intended to reach. That would reach the private soldier who had no choice but to go where he was ordered; it would reach the farmer who may have accepted some slave labor on his farm at the height of the harvest; it would reach a great many people of that kind. If you notice, the emphasis in the American (*d*) is not that he did something that helped the government but that he entered in a common plan or enterprise aimed at these forbidden acts. Now that to my mind was the crime to reach. I think the difference

is quite substantial. We are trying to reach by our "common plan or enterprise" device the planners, the zealots who put this thing across. We are trying not to confuse it with the people who in most countries have very little to do with the policies they are called upon to execute. And it seems to me that the emphasis should be on the planning level rather than on the mere fact that at some point one voluntarily or involuntarily, knowingly or unknowingly, participated in carrying it out.

PROFESSOR GROS. May I say that that was our intention and that was why we put in the French draft the words, "preparation" and "policy"; but I could support Mr. Justice Jackson fully on his observations because I can also see that our word "policy" might be vague. It certainly covers the planning irrespective of acts, designs, or attempts and covers much more than "plan" as it also covers execution.

In paragraphs (b) and (c) we could cover more than the instigators as it stands here. I suggest "took part in a plan to further", but I don't know whether we could come back to that draft.

MR. JUSTICE JACKSON. That is the only observation I had that occurs to me at the moment.

SIR DAVID MAXWELL FYFE. I wonder whether this would commend itself to the Conference. I find that, if we start conversational suggestions on drafting, we are apt to get wide of the points. If the delegations would put their suggestions in writing, we could deal with this line by line. If we refer it to the drafting committee, they may not realize on how many points we agreed.

PROFESSOR GROS. I think the ideas on which we insisted are included in the draft, and it is essentially a question of wording; so I would certainly be quite happy to accept anything in accordance with Mr. Justice Jackson's or General Nikitchenko's desires.

I present first the French and Soviet draft, and in consequence I accept the British as it would be amended to give satisfaction to the other delegations, but I don't like to work on a draft which is not ours and to put modifications on it, as I don't think that is fair.

MR. JUSTICE JACKSON. The difficulty with that is that I would come back close to the draft we suggested because I did a great deal of work on definitions and it was the best we could do; and this redraft leaves out the launching of aggressive war, which is a subject of great interest to us. Secretary Stimson, who was at one time Secretary of State and is now Secretary of War, has persuasively contended that the German war was illegal in its inception and that therefore the United States was justified in departing from the strict rules of neutrality. While I shall submit, as I have no alternative by reason of being outvoted on it, I would not abandon that proposal. I would return to the "common act or enterprise" language, or "policy"

in place of "enterprise", which would bring us about back to our definition, except in the opening, about which Professor Gros is quite right; our draft is defective in failing to put emphasis on individual responsibility. I repeat that we shall be making a mistake if we don't put in some provision which so limits aggression as to prevent a general litigation of the causes of war. Those would be the things I would put in, and they have all been passed on adversely by the Conference. I don't want to be unduly persistent about it.

GENERAL NIKITCHENKO. We are trying here to work out the common article which would be acceptable to the four delegations present here. It is very probable that, if the Soviet Delegation had to work out an article 6 just for itself, it would look quite a bit different from what it looks now. We accepted the French proposal as a basis because we thought we could come to an agreement on that, and we thought we could work out our own idea on the French text. Then, as that has proved unacceptable as the proposal which we hoped would form a basis for an agreement, it is quite possible that this text as it stands will not satisfy in its entirety all the delegations. But perhaps it is the best compromise that can be reached. If the chairman says we must work on a new text again and on a redraft of this text, I think we shall be back where we started three weeks ago. That is why it seems to me this proposal should be taken by him as a basis. We could make alterations, of course, but it should expedite matters. It would seem better to take this as a basis and just have certain drafting changes. We do not intend to submit a new text. We just have a few drafting corrections or alterations.

SIR DAVID MAXWELL FYFE. I hope we shall be able to work that out, if the delegations will try to let me have any alterations to this text as soon as they can.

The other matter is paragraph 22, which Mr. Justice Jackson suggested last night—the address and administrative headquarters.

GENERAL NIKITCHENKO. Perhaps we could shorten this text a bit and, rather than go back to the one that was proposed by the drafting committee, say as follows: "The administrative headquarters of the Tribunal and its secretariat shall be located in Berlin. The first meeting of the judges and of the Chief Prosecutors shall take place in Berlin. The first trial shall take place in Nürnberg and subsequent trials" et cetera. We could leave out for the time being the word Nürnberg, as we said we are waiting for a reply on that score. As for the fact that records should be lodged there permanently, it seems unnecessary to mention it in the charter. Probably if the secretariat is to be in Berlin, the records will also be kept there.

SIR DAVID MAXWELL FYFE. We understand that the Soviet Delegation is waiting for instructions on Nürnberg, and we hope that they will come.

MR. JUSTICE JACKSON. There is only one addition, "is located and that the location in Berlin shall be determined by the Control Council."

GENERAL NIKITCHENKO. We are quite agreed that the Control Council is supposed to do that, but perhaps it is a question of finding a building in Berlin, and is it necessary to put details of that sort in the charter?

MR. JUSTICE JACKSON. You see somebody has to do it right away if space is going to be available, and, if the Control Council is to be asked to do it, they will make the effort. If not, we are going to be so long getting it done. I am just anxious to get this thing done. That is my point about it.

GENERAL NIKITCHENKO. Perhaps we could then say, "The first meeting of the judges and of the Chief Prosecutors shall also take place in Berlin in a place to be determined by the Control Council."

MR. JUSTICE JACKSON. I suggest one thing more about that. I think the meeting should be held at a time to be determined by someone who should be so authorized. I suggest that our chairman be authorized to call that meeting. Otherwise who is to call it, and suppose some don't come? It ought to be the duty of someone to call this meeting immediately after this agreement is signed and fix a date for it after calling all the parties. Otherwise, if left, no one will be authorized to institute it.

GENERAL NIKITCHENKO. ". . . shall take place in Berlin in such a place and at such a time as shall be determined by the Control Council."

MR. JUSTICE JACKSON. I don't think the Control Council should determine the time. I think that should be determined by the prosecutors themselves. They won't know when we are ready.

JUDGE FALCO. Have not the judges the right to get together—meet if they wish, for instance, in Paris?

GENERAL NIKITCHENKO. Perhaps after we have this agreement signed we could ask the chairman to take care of that and put it in the charter.

SIR DAVID MAXWELL FYFE. I am very pleased merely to act as the missionary to summon the meeting of the Chief Prosecutors, and I shall do it as soon as possible after the Chief Prosecutors are appointed.

MR. JUSTICE JACKSON. Then I want to be clear as far as the holding of the trial at Nürnberg. That is where preparation would have to take place. As far as any of our prisoners are concerned, we shall have them in jail there available for interrogation, but the preparation would have to take place there. We could not prepare several places, or take the prisoners or witnesses to different points—that is why I put in "prepared" as well as "held" at Nürnberg.

GENERAL NIKITCHENKO. We took those words out because we

thought it was self-understood that if the trial took place in Nürnberg the defendants would be examined there, but, if we say "shall be prepared", that is not enough as preparation is being carried out now not only at Nürnberg but at various places. Naturally defendants will be examined there. Otherwise we would have to say the "first trial shall be held in Nürnberg and subsequent trials in some other place"—which would be rather complicated.

MR. JUSTICE JACKSON. My anxiety is that it be understood.

SIR DAVID MAXWELL FYFE. I think General Nikitchenko said there—and I for my part entirely agree—that if I want to examine any American prisoners I should be quite prepared to go to Nürnberg to do it. Mr. Falco says the same.

GENERAL NIKITCHENKO. I agree.

SIR DAVID MAXWELL FYFE. I think that concludes the points referred to the chiefs of delegations, doesn't it? We are agreed that: Administrative headquarters of the Tribunal and its secretariat shall be located in Berlin. The first meeting of the members of the Tribunal and of the Chief Prosecutors shall take place in the place to be determined by the Control Council. The first trial shall take place in Nürnberg and any subsequent trials shall be held at such places as the Tribunal may decide.

GENERAL NIKITCHENKO. There is the question of article 4 of the agreement. It is partly a question of drafting. As we took down the suggestion proposed by Mr. Justice Jackson at the preliminary session, in meaning it is absolutely the same but in words it is a bit different. "Nothing in this Agreement shall prejudice the obligations undertaken by the parties of the Moscow Declaration for the return of war criminals to the countries in which they had committed their crimes."

SIR DAVID MAXWELL FYFE. "Nothing in this Agreement shall prejudice the obligations of those who are parties"—so as not to forget France.

MR. JUSTICE JACKSON. Would your Foreign Office take the position that they are under an obligation to return? As I understand the Moscow declaration, three powers stated that to be their policy, but I think it is quite a different thing to create an obligation to return persons to a state not a party to the declaration. We intend fully to carry out that policy, but I am not authorized to add an obligation to the statement of policy in the declaration. As I pointed out before, the whole subject of war criminals, except those to be tried by the International Tribunal, is not within my guidance except as I am free from time to time to advise the military authorities or State Department, but I am not authorized to make any agreements concerning that. I can say nothing which prejudices the statements contained in that declaration, but to characterize them as obligations I would not do without specific authorization.

SIR DAVID MAXWELL FYFE. Then you would prefer to say nothing in this agreement that will prejudice the statement of policy made by the parties of the Moscow declaration. Mr. Clyde suggests, "Nothing in the agreement shall prejudice or affect the position of the parties in the Moscow declaration in regard to the return"

GENERAL NIKITCHENKO. Our impression was that this was the agreed formula, and we would not propose to change it but just to make a very slight change in the drafting.

SIR DAVID MAXWELL FYFE. I would not appreciate the difficulty myself, but as Mr. Justice Jackson has explained it I would be prepared to accept it in these words. It would leave the powers who made the Moscow declaration in the same position as before.

GENERAL NIKITCHENKO. It isn't quite clear to me. Is it proposed to change the text of this article 4 of the agreement now—that is, change the word "obligation"?

SIR DAVID MAXWELL FYFE. That is Mr. Justice Jackson's suggestion. Really the only change would be that. We had put in General Nikitchenko's suggestion about return of war criminals at the end.

GENERAL NIKITCHENKO. I shall take that into consideration when looking over this final draft.

"Nothing in this Agreement shall prejudice the obligations undertaken by the parties to the Moscow Declaration concerning the return of war criminals to the countries where their crimes had been committed."

In article 27 of the charter it seems the words "pecuniary fine" do not really fit in when we consider major war criminals. The responsibility is too great for pecuniary fine. Could not we just leave out those words and say "death or such other punishment as the Tribunal may consider just"?

In article 7 of the charter I do not propose any change but would like to point out two considerations. Would it be proper really in speaking of major criminals to speak of them as carrying out some order of a superior? This is not a question of principle really, but I wonder if that is necessary when speaking of major criminals.

SIR DAVID MAXWELL FYFE. There are two points: first, they have already said they were just doing what Hitler said they should do; and secondly, in international law, certainly in some cases, superior orders were a defense, but in the sixth and seventh edition of Oppenheim it appears that they aren't a defense. If we don't make it clear, we may have some trouble on it.

GENERAL NIKITCHENKO. There is a misunderstanding. I wasn't against disallowing orders of a superior as a defense, but I thought that in regard to major criminals it would be improper to say that superior orders could be used in mitigation of punishment.

SIR DAVID MAXWELL FYFE. It seems to me difficult. Suppose someone said he was threatened to be shot if he did not carry out Hitler's orders. If he wasn't too important, the Tribunal might let him off with his life. It seems to be a matter for the Tribunal.

In one of the German cases on trial which were such a farce after the last war they did say that superior orders were no defense but could be taken into account on mitigation. That has been the general rule on superior orders in international law books.

GENERAL NIKITCHENKO. If the other heads of the delegations consider it best, we have no intention of pressing it. In general, it should be considered in mitigation; we think it is proper.

MR. JUSTICE JACKSON. Of course that was put in when we were considering trial of organizations, which would reach thousands of people who are not major criminals but would be reached through major criminals. And if you are going to get members of the Gestapo and S.S. through the conviction of the organization, it would be quite unfair if you would not take into consideration in fixing punishment the degree of real responsibility that they had. I think it would be a useful provision if we are to try organizations.

JUDGE FALCO. Leave it. Is it necessary to indicate to the Tribunal the reason for mitigation? If we say simply that orders are not a defense, it would seem to be left to the Tribunal to say that they may be a mitigation.

MR. JUSTICE JACKSON. That is about what we proposed originally—not an absolute defense but a mitigation.

SIR DAVID MAXWELL FYFE. The important part is that it should not be an absolute defense.

JUDGE FALCO. That is the important part. Must we add that that is the reason for the Tribunal to consider mitigation?

SIR DAVID MAXWELL FYFE. We have covered the charter except for article 6.

MR. JUSTICE JACKSON. I don't think we have specifically settled whether we shall have special masters, nor what we shall do in cases of a tie, except in a very limited number of cases.

SIR DAVID MAXWELL FYFE. No. You reserved the question of masters. I thought we had settled paragraph 15.

MR. JUSTICE JACKSON. But, if you recall I stood on the original suggestion we have here. If there is equal division on a vote, the proposal would be adopted if made by the party which brought that particular defendant to be tried. But we have in no other case arrived at a tie solution.

SIR DAVID MAXWELL FYFE. The committee shall act in all above matters upon majority vote, and that means that on the other matters except (b) you have to have a three-to-one majority for the proposal.

MR. JUSTICE JACKSON. That is what I object to.

SIR DAVID MAXWELL FYFE. I thought we agreed to this.

MR. JUSTICE JACKSON. No. I agreed as to the designation of defendants.

SIR DAVID MAXWELL FYFE. I thought we had agreed as to the whole article. I thought we met your point by putting in (b) that the preparation of indictment by the committee would be proceeded with as an individual matter. Remember we altered 15 (b).

MR. JUSTICE JACKSON. But suppose we get up to the time of trial and there is a question of how to proceed and we have a vote of two to two. How shall we deal with it? It might very well happen, as we have seen here at this table, because two of us represent one system of law and two another.

SIR DAVID MAXWELL FYFE. But I thought that was covered by the first draft on that by majority vote, for frankly I could not see the sort of point on which we would disagree at that stage.

GENERAL NIKITCHENKO. Yes, we thought we agreed by a majority vote.

MR. JUSTICE JACKSON. Maybe it was agreed to by majority vote, but I did not agree consciously. We want something that will work. We don't want just to postpone differences. Here we are, and have been free of outside or press criticism of our disagreements. But get in trial and have disagreements, and we are right out in public. We had far better iron out differences here than at the trial. The thing could be the subject of a great deal of criticism if we left our agreements so that we could be equally divided and perhaps have an unfortunate situation as a result of it.

SIR DAVID MAXWELL FYFE. I do hope we wont have to go over this because I may say I suggested the compromise on the selection of defendants, which, of course, means that it was a concession directly to those who had the defendants so that they could go forward, as I appreciated especially the position of the Americans who had most of the defendants and wanted to get clearance and wanted to get quit of them by trying them. I really find it difficult to see what point of difference before the trial would not be left to three to one majority.

MR. JUSTICE JACKSON. You have a question of difference of view between those of the Continental systems and of our own as to how and whether to try organizations, and as to conspiracy, and on definition of crimes. If disagreements at a trial cannot be solved, it will be disorganized and we will not think it a workable plan. We want some way to break any tie that may occur.

SIR DAVID MAXWELL FYFE. Organizations are covered by article 10. I think we agreed with Mr. Justice Jackson.

MR. JUSTICE JACKSON. Well, we agreed that they may be tried.

Suppose that, when we get right to it, there is a disagreement as to how or whether we shall try them. We have seen a great misunderstanding of our proposal in that respect.

SIR DAVID MAXWELL FYFE. No one could defeat the trial if article 10 is accepted as an agreed compromise on that point. Suppose you put forward the trial of Kaltenbrunner as a member of a group. You propose him as a member of a group, but under the charter that makes article 10 apply. Then you have only to get one person with you on that. Because that is a proposal to deal with a defendant.

MR. JUSTICE JACKSON. I would think it is a little broader than that. You see, we start with very basic differences of viewpoint as our approach to a trial. In many ways, as I have said before, I think the Continental system is better than ours, but we get into those points where we don't see alike because we were brought up in different systems. I should be happy to recommend to our Government to turn our prisoners over to you three and retire from it. We want to do our duty about this and no more, but we do not want to come out of here with an unworkable agreement which will get us into friction and difficulty at the public trial.

SIR DAVID MAXWELL FYFE. Let us take article 1 of the agreement. "There shall be established . . . an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities." Then you come on to article 15 of the charter, "The Committee shall act in all the above matters by a majority vote . . . Provided that . . . that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried." Surely the reading of these two articles together would give you the right, provided you got one vote, for instance, for Kaltenbrunner as a member of a group. Then article 10 applies and you get your procedure.

MR. JUSTICE JACKSON. But that would only apply to the designation of a defendant. Each other point as to how we would proceed is left open if we disagree.

SIR DAVID MAXWELL FYFE. Would it meet your point if, at the end of 15, there were a provision for an equal division of vote concerning the designation of defendant or the capacity in which he has to be tried.

MR. JUSTICE JACKSON. I think we should have a provision such as I submitted on the twentieth of July in writing and which I realize was voted down, that in any case where we are equally divided the person whose prisoner is involved may bring to trial or offer any evidence relative to the issues provided he has the support of one other Chief Prosecutor.

SIR DAVID MAXWELL FYFE. But you have got that.

MR. JUSTICE JACKSON. I don't think we have it except as to the designation of defendant.

SIR DAVID MAXWELL FYFE. I intended to give you that. All the delegations meant by article 10 to give you the right to try, provided you could get one other Chief of Counsel to support you.

JUDGE FALCO. That was my impression also.

GENERAL NIKITCHENKO. We were under the impression that article 10 provided for the declaration of an organization to be a criminal organization during the trial of its responsible members or representative members. As for Mr. Justice Jackson's remark that it perhaps might be better for the European powers to try the criminals, as far as we know this question would be up to the parties here represented; but as far as we know the United States showed the initiative in this respect in the holding of an international trial and the other parties agreed to that. Each head of the delegation of course speaks for his own country, but on our part we can say the position of the Soviet Delegation in this respect has not changed since we started these talks. That is why we are trying to reach agreement taking into consideration the points of each delegation and trying to attempt a compromise solution.

SIR DAVID MAXWELL FYFE. I should have thought you were covered.

MR. JUSTICE JACKSON. Well, I don't feel we are quite, and I don't think we should leave it in doubt in anyone's mind. There is a way out of any tie. I am probably unduly cautious and insistent, but it is always my practice in drafting, if I see a point is disagreed, to meet it and settle it instead of leaving it to cause trouble later. And it seems to me that, if we don't meet this issue as to breaking any tie and solve it now, we may meet it in the midst of trial with a hundred reporters writing about points on which we disagree. We have worked well here together. We don't always agree, but we respect each other's opinion and try to reach agreement. But if we leave these things to come up in the midst of the trial, it would be a very discouraging thing to me. When we are tied two to two, who settles it? No matter what it is? Counsel often disagree. I have frequently disagreed with my American associates in an American trial, and, where no one is boss over the others, there must be someone to settle such disagreements.

SIR DAVID MAXWELL FYFE. But on that point, the point of evidence—we discussed that on Friday and amended 15 (a) by putting in "and production before or at the Trial", so that that would come under the action the Chief Prosecutors could take individually and would be left to you. That was put in to cover that difficulty.

GENERAL NIKITCHENKO. We agree.

SIR DAVID MAXWELL FYFE. We are all agreed there—to meet you on that point. We discussed this point on Friday.

MR. JUSTICE JACKSON. At considerable length—but I did not think we had met it squarely. However, I will look it over further. I don't want to leave any points that are arguable.

SIR DAVID MAXWELL FYFE. We all intended to meet your difficulties on that fairly and squarely and thought we had in the alteration of 15.

GENERAL NIKITCHENKO. We suggested that we divide article 15 into two parts.

SIR DAVID MAXWELL FYFE. A separate article on what prosecutors can do individually—We shall try and have the amendments tomorrow by eleven o'clock and meet at two-thirty. The drafting committee is waiting on the heads of counsel. We meet tomorrow on the question of masters.

MR. JUSTICE JACKSON. I think we should accept the committee's draft on it because it is clear that, if you have in the draft that you may appoint special masters and then leave it out, it is always open to the people who do not want masters appointed to say that it was in and later taken out and hence the power was withheld. I think it should be quite clear. In my entire lifetime we couldn't get all the evidence in this case if we did not use special masters.

SIR DAVID MAXWELL FYFE. That point, quite frankly, is not one on which I have any great feeling. I suggested the alteration to Professor Trainin's draft which I thought would meet it, but might I make this appeal to the Conference? If, apart from article 6—which obviously is on a different plane because there we are discussing the law which we are going to create—if Mr. Justice Jackson could waive his difficulties as much as possible on 15 and 16, we would accept that, and I would make an equal appeal to General Nikitchenko to accept the intermediate on 17. I think then we could abide by the decision. I suggest that the delegations consider that point. I am most anxious to come to agreement this week and ask that both consider it in that light.

GENERAL NIKITCHENKO. I share your hopes to wind up our work this week.

The conference adjourned.

XLVIII. Redraft of Definition of "Crimes", Submitted by Soviet Delegation, July 25, 1945

July 25, 1945.

The following acts, designs or attempts at any of them shall be deemed crimes and shall come within the jurisdiction of the Tribunal:

- a) Aggression against or domination over other nations carried out by the European Axis Powers in violation of treaties, agreements and assurances;
- b) Atrocities against civilian populations including murder and ill-treatment of civilians and deportation of civilians to slave labour, and persecutions on racial or religious grounds inflicted in pursuance of the aggression or domination referred to in paragraph (a) above;
- c) Violations of the laws, rules and customs of war. Such violations shall include murder and ill-treatment of prisoners of war, atrocities, wanton destruction of towns and villages, and plunder.

Any person who is proved to have in any capacity whatever directed or participated in the preparation for or carrying out of any of the above-mentioned acts shall be personally answerable therefor and for each and every violation of international law, of the laws of humanity and of the dictates of the public conscience committed in the course of carrying out the said acts, designs or attempts or any of them by the forces and authorities whether armed, civilian or otherwise in the service of any of the European Axis Powers.

XLIX. Redraft of Definition of "Crimes",
Submitted by American Delegation,
July 25, 1945

DEFINITION OF CRIMES PROPOSED BY
UNITED STATES REPRESENTATIVE

July 25, 1945

6. The following acts shall be deemed criminal violations of International Law, and the Tribunal shall have power and jurisdiction to convict any person who committed any of them on the part of the European Axis powers.

- (a) Violation of the laws, rules or customs of war. These include but are not limited to murder or ill-treatment of prisoners of war; atrocities against and violence towards civilian populations of conquered or occupied countries; deportation of civilians for slave labor; plunder or spoliation.
- (b) Persecutions, exterminations, or deportations on political, racial or religious grounds, whether or not in violation of domestic law of the country where perpetrated, when in pursuance of a common plan, enterprise or policy to prepare for or wage a war of aggression.
- (c) Invasion, attack or initiation of war against another state in breach of treaties, agreements or assurances, or otherwise in violation of International Law.
- (d) Launching a war of aggression.
- (e) Entering into a common plan or enterprise aimed at subjugation of other nations, which plan or enterprise did involve or was reasonably likely to involve in its execution any of the foregoing acts or a combination of such acts with lawful ones.

No political, military, economic or other consideration may serve as an excuse or justification for any such action. Exercise of the right of legitimate self-defense, that is to say, resistance to armed invasion or attack, or action to assist a State which has been subjected to armed invasion or attack, shall not constitute a war of aggression.

L. Proposed Definition of "Aggression",
Submitted by American Delegation,
July 25, 1945

SUGGESTED TEXT FOR CONSIDERATION AS
AN ADDITION TO ARTICLE 6

An aggressor, for the purposes of this article, means that state which is first to commit any of the following actions:

1. Declaration of war upon another State.
2. Invasion by its armed forces, with or without a declaration of war, of the territory of another State.
3. Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State.

No political, military, economic or other considerations may serve as an excuse or justification for such actions, but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression.

LI. Minutes of Conference Session of July 25, 1945

SIR DAVID MAXWELL FYFE [*presiding*]. The drafts of the Soviet Union [XLVIII] and the United States [XLIX] on article 6 have not got together so well. Since we have gone over it in detail, there is really one point of supreme importance in the American draft, obviously important to them, which is the main stumbling block to agreement. That is (*e*)—the question of the common plan. As I understand the American draft, that is the vital point in it which is not included in that form in our draft. I would like the delegations to concentrate on that point first. Is that fair, Mr. Justice Jackson?

MR. JUSTICE JACKSON. Well, that and our (*d*)—launching a war of aggression, and, of course, the corollary to it, which is limiting wars of aggression, as I have proposed in a short draft [L], so as to rule out economic justification—which I think is quite important.

SIR DAVID MAXWELL FYFE. Could we deal with the common plan or enterprise first? It seems to me the other points will be dealt with by drafting, but I think that is a point on which we ought to see whether there is any difference in principle as to its inclusion before we go on to the other points. If Mr. Justice Jackson would be good enough just to explain the mission of that point—

MR. JUSTICE JACKSON. Well, we think it would be basic to our plan of conducting the case and basic to our interest in the case that the planning, whipping up, and carrying through of this plan of aggression against other nations be proved and judged as criminal. I think we have discussed it until I am quite sure there can be no misunderstanding of its importance to our plan of the case. I don't know that I can add very much more to it.

SIR DAVID MAXWELL FYFE. Mr. Justice Jackson, just to clarify the discussion, could your point be fairly put this way: that you want the entering into the plan to be made a substantive crime?

MR. JUSTICE JACKSON. Yes. The knowing incitement and planning is as criminal as the execution.

SIR DAVID MAXWELL FYFE. I think that, if we dealt with that point to see whether there is any difference between us, it would be helpful.

PROFESSOR GROS. It does quite agree with the views of Mr. Justice Jackson and the language of the other draft covering the question when to say, "to have directed or participated in the preparation". We could have said "planning"—that was the intention of the French

draft [XXXV] when we said "directed the preparation and conduct of"—so it is only a question of words. If it can be worded differently, we would agree immediately.

GENERAL NIKITCHENKO. I have already had occasion to state, and may repeat again, that in drafting this article 6 we should base our deductions on the Moscow declaration, which points to the necessity of punishment for certain concrete crimes and to punish those who had actually perpetrated those crimes and who had organized them. And from that point of view I should have thought that Sir David's draft of article 6 would answer these points raised by the Moscow declaration. In this draft, participation in the preparation and carrying out of the general plan is provided for, as are certain concrete crimes. It seems to me that we have gone one or two steps back during the last few days, that some time ago we seemed to be nearer agreement than we are now, as regards all the articles except article 6, and even as regards 6, in which there was a certain measure of agreement to take the French proposal as a basis. If we continue to discuss the same things over and over again, the question comes up of whether such discussion would have any profit at all. It might well be that it would be profitable to adjourn, perhaps, for a few days so that during those days the delegations could study the various proposals in detail and try to reconsider the position and perhaps after that we could have a better chance of reaching mutual understanding and coming to agreement.

PROFESSOR GROS. We are open to any suggestion, but we are in a position to accept the Soviet draft with the exception of three words, and it seems to us to be a pity at such a stage not to finish that article today or tomorrow. Each day lost is a day lost for the prosecuting officers, and we had, as the Soviet Delegation pointed out, thought we were near the end of discussion of article 6. May I give just one indication on one point which has been raised by Mr. Justice Jackson? I was impressed by the argument of Mr. Justice Jackson that it does not seem fair in paragraph (a) to speak of acts carried out only by "the European Axis Powers". And I was also convinced, as the Attorney-General put the question, that it was in error to say something like that. I might suggest that in the beginning of the article we could say something like this: "In view of the decisions of the United Nations, the major war criminals of the European Axis powers will be judged by the International Military Tribunal." And after that would come the jurisdiction of the Tribunal, and that would provide for trial of the crimes and atrocities committed by the Axis powers because we have been put in charge of that job only, and are not to set up a general international court. That would give satisfaction to Mr. Justice Jackson. Now, just to show how near we are on other

points to the Soviet draft, the modification which I would suggest is only a formal one in the second line—"shall be deemed to be crimes coming within the jurisdiction of the Tribunal". There seems to be a slight difference as it stands—"shall be deemed crimes and shall come within the jurisdiction of the Tribunal". What we are doing is putting all war crimes before the Tribunal. The last change is to satisfy Mr. Justice Jackson, and I hope to do it. I think we could put after the last paragraph some words like "in the planning", or "in the common planning, preparation for", et cetera. I must say that the criticism which was made against the generality of the word "policy" seems to me to apply to the word "common plan". But I don't object to that; in fact, the result would be a decision of the court, and it would be after the decision of the court that the common plan would be established. So it does not matter very much whether we use in that article the words "policy", "design", or "plan" because the real thing is to get a decision of the court which will say "the general plan". The important thing is the conviction against the German leaders.

GENERAL NIKITCHENKO. Actually this is not the Soviet text. It is the English text. We have just a few alterations.

PROFESSOR GROS. I think it is not such a bad one that we could not accept it, considering it is a conclusion of a draft we like. When you read it, and it will be read widely, it is clear that actually the Soviet draft is a very clear draft. Anyone can understand it, and I would like it adopted. I am sure there would be no justifiable comments on the article as it is drafted, because there has been a political declaration by the three powers which says there must be a judgment by a court of the major war criminals. Well, that does not give a free hand to us to say exactly what we want. We have just to say what crimes will go before the court. This article says that and only that. The American draft would be a perfect article if we were charged with the duty of making a codification of rules of international law for the punishment of international war criminals, which we are not charged to do. We must not try to get too much in that draft, because it will not help. The result of the International Military Tribunal will not be judged by what is in that article, but it would be judged in the next 10 years—and I would not be afraid to say judged severely—by the American draft, by critics who would say that this is partly a political charge. We must leave the law to the judge to decide, and I am not afraid, as it has been said in other meetings, of what lawyers will say. I am afraid of the public opinion which will take the whole work of the Tribunal, and I would prefer to have this result: "Well, the victors have decided to judge the vanquished, and they put it to the court and that court has judged them for crimes committed

by the people in the service of the leaders." That is sensible, and you will get no adverse comment from anyone for the years to come. On the contrary, if you put in a declaration deeming something to be international law, and saying that launching a war of aggression is a violation, you will be criticized, and not by lawyers but by people who will make accusations that the result of the trial was made beforehand. In that draft we are just making plain the work which has been given to us.

SIR DAVID MAXWELL FYFE. I want to make my position clear. I am confused. I thought the British draft gave expression to the common agreement, and I hoped that it included the American conception of the plan, which I think also of great importance. Like Professor Gros, I had thought that the American conception would be introduced more clearly if we introduced the words "or planning" or some such word, in the last paragraph. That was really the only substantial suggestion I had to make to the Soviet adaptation of our draft. We had the word "planning" in the first paragraph of our draft and thought we could put it in. But I do feel this very strongly: there is a special duty on me, as you have been good enough to treat me as chairman, to try to bring about an agreement. This has been my main purpose throughout, and I am still wondering whether we could not meet Mr. Justice Jackson's point by splitting our original (*a*) between aggression and domination; that is, not adding to the conceptions, but splitting it in two and, while keeping in "aggression over other nations", as in the Soviet adaptation, at the same time introducing another paragraph which would be "to enter into a conspiracy for domination", which would really meet the substance of the American paragraph (*e*). Mr. Justice Jackson, how would you feel on that as to meeting your point?

MR. JUSTICE JACKSON. Well, I agree with General Nikitchenko that we have been moving backward on this matter of definition since before I left Washington, because there was presented to me there an *aide-mémoire* by the Soviet Government accepting in principle our definition, making additions which we thought embodied the same plan, making additions to it, making annihilation and other atrocities crimes, which we were agreeable to adding. Then the drafting committee had only a few points reserved, and now we are in questions involving everything. So I am afraid we are not making progress. We tried very hard in defining crimes, which is a very difficult and technical subject, to adopt definitions consistent with the views of Professor Trainin as we understood them from his book. It is a rather difficult subject to analyze without taking a good deal of time to do it. Of course, the violation of the laws, rules, and customs of war are matters for which no international tribunal is needed. I think

that every one of the top prisoners that we have is guilty and provably guilty of joining in a plan of warfare that involved ordering the execution of American prisoners of war, et cetera, and they can be tried in our military courts and disposed of within the next two months. So far as it affects our nationals, our interest in an international trial of offenses set out in that paragraph is rather secondary. About the only difference we have about that is that we left out of our draft the destruction of villages and towns, because I have seen the villages and towns of Germany. I think that you will have great difficulty distinguishing between the military necessity for that kind of destruction as distinguished from some done by the Germans, assuming the war to be legitimate. It seems to me those subjects invite recriminations that would not be useful in the trial. The provision as to atrocities against civilians is much the same as the draft we submitted except that we expressly provided for disregard of domestic law because otherwise there would be difficulty reaching some of the German activities toward their own population. The difficulty with the phrase "aggression or initiation of war in violation of treaties, agreements, and assurances" seems to drop out entirely if the launching of war of aggression regardless of agreements, treaties, or assurances is in itself—as it is in our judgment—a crime. We are supported by a course of dealings in which the countries have given up war as a means of promoting policy.

The next definition, joining in a common plan aimed at other nations and involving in its execution any of the above crimes, may reach the same end that we have suggested; I am not quite sure.

The last is one of those rather vague declarations that I don't know that I object to particularly, but I think a better conspiracy provision, perhaps a more exact declaration of responsibility, could be made. Of course it omits our suggestion of a definition of aggression that, as I have said before, we did not make at the outset. It is not in our original draft, but it seems to us very essential as we have heard these discussions go on.

Now, however, we propose that no political, economic, or other consideration may be justification for a war of aggression, reserving, of course, the right of legitimate self-defense. As I have said before, our country was so far from this war and we were so late coming in that I am not at all worried, so far as the United States is concerned, about the countercharge that there has been no aggression, because there were acts of Germany's enemies which made the aggression really self-defensive in character. But I don't want to be in a position where the United States is obliged to enter into a discussion at this trial of the acts or policies of our allies. If that arose in the trial, I should withdraw and leave it to be discussed by the powers involved. I think it

would be a most unfortunate situation if the trial became involved in the political policies that lay back of the war. Too many recriminations would result. And why should the court stop it if we four men are not willing to stop it? There is much more justification for us to stop it than for the court to stop it, and it seems to me this trial is likely to take a very unfortunate course if we don't so limit it that it does not get into the remote causes of the war.

SIR DAVID MAXWELL FYFE. On the last point—just to make one thing clear on the question of initiation of war—I think we could show that every war with which we were concerned was in violation of treaties, agreements, and assurances. That is the particular point. It looks to me as if there is no answer to the point made by both General Nikitchenko and Mr. Justice Jackson that we don't seem to be getting any further. It may be that the only answer to that is to adjourn for a final effort to see what concessions we are all prepared to make to get agreement before the announcement to a desolate world that we have failed to come to agreement on a question on which we all have the same designs. The only point I want to make clear is that I think the problem was covered by our draft and should be answered if the word “planning” were introduced in the suggested adaptation. I should be quite prepared to agree that to enter into a plan or conspiracy to dominate be made a substantive offense in order to reach an agreement, if the other delegations could consider that point. Then I should have thought that the major difficulty of Mr. Justice Jackson was met. I wasn't sure, Professor Gros, whether you had any objection to that.

PROFESSOR GROS. Not at all. We hope we show the right consideration, because finally we have accepted quite a lot of things and still are ready to accept quite a lot more, and the other would mean many modifications. We have criticized the American draft on two things: one, it covers all violations—it is an article which gives jurisdiction for all war criminals, not only the major; and two, in the last paragraph it wants to dispose of the whole question of reprisals—the question of reprisals in international law is one existing for the last 500 years and you cannot wipe it out in just one word. That is the real reason we cannot go on on the American draft. We could agree to improving, according to the desires of Mr. Justice Jackson, the Soviet draft and also would accept any suggestion because we think the meaning of the common plan is already in there. If we break the Conference and show the minutes of the conferences, they will not explain why it was broken because there is no fundamental difference between those two plans. And I do not know how we will reply to questions as to why we broke up. All questions are dealt with in the last Soviet draft. I should think that in consequence our differences are more or less this: the Americans want to win the trial on the ground that the Nazi war

was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits. It is not very difficult to show. There has been an organized banditry in Europe for many years. The result was crimes, and we want to show that those crimes have been executed by a common plan. The result of that will be to show that the Nazis have launched and conducted an illegal war; so it is really a difference of wording, but the results will be shown to the world as you want to show them. I would like to make an appeal to the spirit of conciliation of Mr. Justice Jackson and ask him to consider our intentions and feelings when we are going to speak for the people of occupied countries and show that those Germans have acted as bandits and there has been a conspiracy; so we are truly at a point where we do not know what to do, but we feel there is no fundamental difference in our views.

SIR DAVID MAXWELL FYFE. Would General Nikitchenko object to the adding of a paragraph explicitly mentioning the common plan?

GENERAL NIKITCHENKO. First of all I would like to repeat that this actually is not the Soviet proposal—the proposal which Professor Gros has supported. Just as the French Delegation would probably have a very different article 6, so the Soviet Delegation would have a different article 6 for its internal consumption. There are quite a few things here with which we might not have agreed, but, taking into consideration the fact we must try to reach agreement, we are of the opinion that that draft would be most suitable for a general agreement. I quite agree with Professor Gros' suggestion that at the beginning we should say, "shall be deemed crimes coming under jurisdiction of the Tribunal". That formula would be more precise, and it seems to the Soviet Delegation that, if we took this draft as a basis, that would be the shortest way to the agreement. We could put in alterations which would not in principle alter the spirit of it. As for the question about inclusion of the common plan idea, that would depend on its drafting; that is an idea that might very well be acceptable, but, if it were prepared in an unacceptable form, that would make a lot of difference. Just as Professor Gros says, I think that it is not our task to try to draft a code which could be applied at all times and under all circumstances. I wish to emphasize again that we must act under the Moscow declaration, and, although in that declaration there is nothing establishing a court, it does speak of the crimes for which these people must be punished. The last part of Mr. Justice Jackson's proposal about exercise of right of legitimate defense would invade a field which is outside our competence really. In any case the defendants might very well refer to this very paragraph and say they had been acting in legitimate self-defense; that is, the arguments which this paragraph is trying to avoid are not in fact avoided, because, if they do crop up, they will crop up in any case as legitimate defense.

When I was speaking about our going backward, I really meant not in our whole work, which was profitable but for the last few days. I have no minutes of our proceedings, and I may very well be mistaken, but I thought that, when the French proposal was submitted, there was more or less general agreement including Mr. Justice Jackson as to its forming a basis for discussion. And since then—but really not since San Francisco, Mr. Justice Jackson has said—we have made little progress. The draft that was submitted in San Francisco was not really discussed here although the Soviet Government had in principle agreed to it. I wish to point out in my comments on the draft agreement prepared in San Francisco that the Soviet Government had emphatically objected to the trial of organizations. Since then in respect to the American point of view we have found it possible to meet that point of view and to say that during the trial of individual persons organizations of persons may be declared criminal. That is why the Soviet Delegation since San Francisco has been trying to meet the views of other delegations and to reach common ground.

JUDGE FALCO. I ask Mr. Justice Jackson to reconsider and tell what he would add, or to what he objects, in the Soviet draft and what would be necessary to join their paragraph with his point of view.

SIR DAVID MAXWELL FYFE. Mr. Justice Jackson, it seems to me that, if we could find words as to the introduction or the clarification of the conspiracy or common plan, the other delegations would be prepared to meet on that. It seems to me that the much greater difficulty is on the question of defining aggression. I think that is fair, isn't it, Professor Gros? That was why I suggested such words as "violations of treaties, agreements, and assurances".

MR. JUSTICE JACKSON. Well, first of all, I would, of course, agree to consider the French draft. I would be willing to consider anybody's draft of any article, but I don't think that to agree to consider a draft binds me to accept it. Always I supposed I had made clear that I had reserved my position. I think there is a very basic difference between us. I think Professor Gros put his finger on it when he said the American Delegation wants to show that war is illegal, while they only want to show that the Nazis were bandits. Without boring you too much, I will tell you why we are interested in that and explain what our basic difference is here, as I see it.

It is probably very difficult for those of you who have lived under the immediate attack of the Nazis to appreciate the different public psychology that those of us who were in the American Government dealt with. Our American population is at least 3,000 miles from the scene. Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides

in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order. And throughout the efforts to extend aid to the peoples that were under attack, the justification was made by the Secretary of State, by the Secretary of War, Mr. Stimson, by myself as Attorney General, that this war was illegal from the outset and hence we were not doing an illegal thing in extending aid to peoples who were unjustly and unlawfully attacked. Now we believed, and the American people believed, just the doctrine that I have put into this definition. No one excuses Germany for launching a war of aggression because she had grievances, for we do not intend entering into a trial of whether she had grievances. If she had real grievances, an attack on the peace of the world was not her remedy. Now we come to the end and have crushed her aggression, and we do want to show that this war was an illegal plan of aggression. We want this group of nations to stand up and say, as we have said to our people, as President Roosevelt said to the people, as members of the Cabinet said to the people, that launching a war of aggression is a crime and that no political or economic situation can justify it. If that is wrong, then we have been wrong in a good many things in the policy of the United States which helped the countries under attack before we entered the war. Now it may be that we were mistaken in our attitude and philosophy and that what Germany has done is legal and right, but I am not here to confess the error nor to confess that the United States was wrong in regarding this as an illegal war from the beginning and in believing that the great crime of crimes of our century was the launching of a needless war in Europe.

Now I realize fully that the interests of those who were under immediate physical attack take a different angle. That the war was an attack on the international order does not have so much significance to them, because it affected them in more direct and immediate respects. But it was the attack on world peace that involved us and justified, we thought, the course we took. When it came to dealing with war criminals, the position of the President was clearly stated to the American people—the launching of a war of aggression was a crime. That is one of the things we want to prove, because we want the Germans and anybody else to know that as far as the United States is concerned it regards any attack on the peace of the world as an international crime. It may become necessary to abandon the effort to try these people on that basis, but there are some things worse for me than failing to reach an agreement, and one of them is reaching an agreement which would stultify the position which the United States has taken throughout. I can realize that our position may seem academic and theoretical to those who have been subject to more direct attack,

but it was not too theoretical a basis for our help in action. I do not consider that I would be authorized to abandon the American position, and, if I were so authorized and it were left to my discretion, I would not be willing to do it. I think there are four possible courses here: one is to set up the international Four Power trials we have been considering; another is to refer the war-criminal matter back to the Potsdam Conference for a political decision as to what they will do with these prisoners; another is for the United States, whose interests and views in the matter do not seem to be in accordance with those of the European Allies, to turn over its prisoners to the three Allies and permit their trial or disposition by such method as you three agree upon; and the fourth course would be for each of us, by separate trials, to proceed to try those we have as criminals. I am willing to recommend sending the question to Potsdam for a political decision if we cannot agree on a judicial disposition of it, and certainly a definition is necessary to any judicial disposition of it. I am willing to recommend to my Government that we turn these prisoners over, willing to recommend separate trials, and willing to recommend international trial on any basis which seems to assure a reasonably successful trial and which preserves our position.

SIR DAVID MAXWELL FYFE. I do not think anyone suggests that aggression does not make a crime. "The following acts . . . shall be deemed crimes": number one, aggression.

MR. JUSTICE JACKSON. Well, aggression limited to violation of specific treaties, not the general treaty to outlaw war of aggression. Now, Germany did not attack us in violation of treaties, or otherwise.

PROFESSOR GROS. They violated the pact of Paris.

MR. JUSTICE JACKSON. But they would not attack the United States. We were acting under the theory that there was an illegal war long before we were attacked. As I say, your position is a somewhat different position from ours.

PROFESSOR GROS. Everybody examined if the war was illegal in France and Great Britain and found it so in 1939. Also we realized the attack by Germany against Poland and the German war was illegal on the German side. I always thought the decision of the Tribunal would begin by first considering that Germany, having violated the Pact of Paris, launched an illegal war and that it would be said to be illegal by the court as its first finding. That would cover the fact of aggression and the explanation could be given by the court; so we would all agree that the war of aggression is illegal. What is not agreed is that the fact of launching the war of aggression makes it possible to have a government of war criminals. So, if you put it as accepted by the three delegations, you do not imply that the members of the German Government are war criminals—you'd just

say that the court will judge for itself and the decision will remain with the Tribunal. As I said the other day, I don't quite see how, if Germany had launched a war of aggression but had not committed any acts in (b) and (c), we could actually set up a court to judge members of the German Government. It is what is in the aggression, what comes after the aggression, that makes really the necessity and the right of judging those men. We cannot speak of American political history but remind you that more than a century ago America participated in destroying international banditry when some men came and captured Algiers, which was a port of piracy; so it is not the first time the Americans have come to us—and to the other European countries—to fight when it is useful. So there is no difference.

SIR DAVID MAXWELL FYFE. But I thought that we were prepared to include aggression against other nations as a crime.

GENERAL NIKITCHENKO. It does say in paragraph (a) that aggression or domination shall be considered crimes; so I do not think anyone objects to saying that aggression is a crime.

SIR DAVID MAXWELL FYFE. But I do not think we are at any difference from you there.

MR. JUSTICE JACKSON. Where does it say that aggression is a crime? That definition limits it decisively. That is why we set it up separately after a good deal of consideration and study.

SIR DAVID MAXWELL FYFE. I should myself be prepared to say both are crimes: aggression against other nations and initiation of war in breach of treaties. If that would help toward getting agreement, I would be prepared to have it in that way. It happens to be my view—

GENERAL NIKITCHENKO. Without a reference to the European Axis powers.

SIR DAVID MAXWELL FYFE. That would be in the introductory paragraph according to the draft. That is Professor Gros' suggestion on that point, that it would be pushed up to the beginning. I think we suggested one way of dealing with that at the beginning of ours: "to convict any person . . . on the part of the European Axis powers". We make it quite clear we are dealing in accordance with our reference from Moscow. It seems to me that there is really no difference on that point. I should not think you would get three people who hold more generally that war of aggression is a crime than General Nikitchenko, Mr. Justice Jackson, and myself.

MR. JUSTICE JACKSON. That is why I find it hard to understand why no simple statement to that effect comes to the table in any definition except that of the Americans.

SIR DAVID MAXWELL FYFE. What we were considering with the view to trying to find a reality that we all agree on was "aggression or initiation of war of aggression on other nations" in this combined draft.

You make two offenses there. What I suggested was "aggression against other nations"; or "initiation of war in violation of treaties, agreements, or assurances". Mr. Justice Jackson presents his own phrase of launching a war of aggression.

MR. JUSTICE JACKSON. I don't want to stand on that. I think it would be better to say "initiating a war of aggression or initiation of war in violation of treaties, agreements, or assurances", and we had added "or otherwise in violation of international law". Going to war without a declaration is a violation and has been for many years, and we want to get all of these recognized violations in if possible; so we think we should not drop "or otherwise in violation of international law" in order to have available the repeated cases in which these people went to war without declaration, et cetera.

MR. TROYANOVSKY. Is there any difference between initiation and launching?

SIR DAVID MAXWELL FYFE. No, just a more colorful term.

GENERAL NIKITCHENKO. Is it supposed then to condemn aggression or initiation of war in general or to condemn specifically aggressions started by the Nazis in this war? If the attempt is to have a general definition, that would not be agreeable.

SIR DAVID MAXWELL FYFE. But it would be covered by the fact that the Tribunal would only be empowered to convict a person who committed the act of aggression on behalf of the European Axis powers. It would be limited. We are avoiding your difficulty by doing that. We are saying expressly that this Tribunal can only deal with the following crimes on behalf of the Axis; so it is limiting the trial as clearly as it could to those who were doing it on behalf of the Axis.

GENERAL NIKITCHENKO. If we leave it as it is in Mr. Justice Jackson's proposal, wouldn't that limit it more, that is, a person who had not acted on the part of the European Axis powers would not have committed the crime. Perhaps the translation is at fault, but, as it is, it seems to us that it refers not only to the past but to the future—so that in the future they shall be deemed criminal violations.

SIR DAVID MAXWELL FYFE. "Shall" in a document such as this is merely mandatory. In English it is obligation and not tense. We could use the present tense "are deemed and do come within powers". It is really only a legislative form.

MR. JUSTICE JACKSON, if that point is met, don't we really meet your view?

MR. JUSTICE JACKSON. I think that takes care of that point. There are other points in connection with this. We avoided use of the word "conspiracy" in view of technical differences in the law of conspiracy in the Continental and the common-law countries and put in the words "common plan". I think you drop what is important in making the

proof if you omit joining in the common plan. It is likely to be much easier to prove that they became parties to the plan to expand Germany by force than to a plan to start a war. You will have some difficulty with that because Hitler always showed people up to the last moment that his plan would not involve war because his enemies would not fight. At the same time it was always understood that it might involve war and they were taking that chance, and I think careful words are necessary to avoid a handicap in proof.

SIR DAVID MAXWELL FYFE. Well, I cut these words out because I thought from the last captured documents I had seen that there would be no difficulty in showing the plan would involve war. This added complication for our Russian and French friends. These are legal phrases we are familiar with and they are not. The simpler form I like better. Will you forgive me if I leave? I must go and learn my fate at the polls. Sir Thomas will carry on.

SIR THOMAS BARNES. Do you attach great importance to those words?

MR. JUSTICE JACKSON. I don't attach great importance, and it has no more meaning to us than it has to anyone else.

GENERAL NIKITCHENKO. It has no real importance. It is hardly likely we could settle this on the spot. Perhaps, if Mr. Justice Jackson would find it possible to put his suggestion in writing as to alterations of this text, it could be taken as a basis for discussion.

SIR THOMAS BARNES. Would the best thing be for us of the drafting committee to prepare a document now along the lines of the compromise which we have suggested? In collaboration with our colleagues we shall consider documents which were circulated some time ago. In redrafting we shall bear in mind the discussion which has taken place this afternoon. We shall circulate that, and you can consider it.

GENERAL NIKITCHENKO. We cannot recommend that. We are afraid that, if the text turns out to be too new, we would go back to where we were before.

SIR THOMAS BARNES. We shall do our best to maintain our whole text as we have in this discussion. We have taken the compromise from both. We hope it won't be too far away.

Well then, does Mr. Justice Jackson object to the last paragraph of the Soviet draft—the question of responsibility?

MR. JUSTICE JACKSON. No, not if the common plan is clear.

SIR THOMAS BARNES. The whole purpose of this, as I understand it, is to place personal responsibility on the major war criminals for all the criminal acts which have been committed by the armed forces, civilians, and otherwise, and I thought it a useful thing to put in. Whether we have got to the actual phraseology I do not know. Then we agree that that or something of that sort goes in. Then we come

to the definition of aggression, which is a rather difficult one. What do you feel about it?

MR. TROYANOVSKY. The last draft of the Americans on definition of aggression—

SIR THOMAS BARNES. Shall we put the last American draft defining aggression into the new draft for consideration? I should like myself to put it in and so would the Attorney-General.

GENERAL NIKITCHENKO. We have already had occasion to state our opinion, and we still think that it is outside of the competence of this committee and that it would not be any help at the trial.

JUDGE FALCO. I think it is also outside of consideration. I thought we agreed to take that proposed by the Soviet Delegation. If we take a new point, I am afraid we would be delayed.

GENERAL NIKITCHENKO. If we start discussion on that again, I am afraid the war criminals would die of old age.

SIR THOMAS BARNES. What would you like to do about that, Mr. Justice Jackson? Would you like to reconsider it?

MR. JUSTICE JACKSON. As I have said before, the thing concerns chiefly the European powers. I think nothing would be more unfortunate in relations with the United States than for us to get into the causes of war, and the risks are not mine but yours. I will not commit the United States to litigating the causes of the war. Maybe you will have judges who without such provision would rule such matter out, but, if I were sitting and you objected to their political or economic justification, I would say you were drawing the agreement. If you thought it an illegal defense, why did you not say so?

GENERAL NIKITCHENKO. The judges perhaps would be experienced enough to consider that as irrelevant.

SIR THOMAS BARNES. This may put into the minds of the defense some arguments which otherwise would not occur to them.

GENERAL NIKITCHENKO. Yes, the defendants might very well make use of that paragraph by saying that they were acting in legitimate self-defense.

MR. JUSTICE JACKSON. That has been their position for a long time in propaganda in my country, and I don't think it will suggest anything to them that is new.

SIR THOMAS BARNES. Well, shall we have a redraft? We will go ahead and see what we can do.

The Conference adjourned until July 27, 1945.¹

¹ Because of Mr. Justice Jackson's absence in Potsdam and the change in the British Government, the Conference did not reconvene until Aug. 2, 1945.

LII. Revised Definition of "Crimes", Prepared by British Delegation and Accepted by French Delegation, July 28, 1945

Note: On July 26, 1945, Mr. Justice Jackson flew to Potsdam, where a conference of heads of state was in session, for consultation with Secretary of State Byrnes concerning the progress and prospects of the London Conference and its relation to questions that had arisen at Potsdam. While he was at Potsdam, the results of the British elections were announced. The Churchill government, in which Sir David Maxwell Fyfe was Attorney-General, was superseded. This foreshadowed changes in the British representation at the London Conference. Upon his return to London on July 28, 1945, Mr. Justice Jackson resumed informal conferences with Sir Thomas Barnes, Treasury-Solicitor, whose position would not be affected by the change of government. Sir Thomas delivered the following revised definition of "crimes", prepared by him, with the explanation that he had obtained French acceptance of it but that the Soviet Delegation had rejected it. The definition was as follows:

26th July, 1945.

4 p. m.

For the purpose of the trials before the Tribunal established by the Agreement referred to in Article 1 hereof, the following acts or designs or attempts at any of them shall be deemed to be crimes coming within the jurisdiction of the Tribunal:

- (a) Violations of the laws, rules and customs of war. Such violations shall include but shall not be limited to murder and ill-treatment of prisoners of war, atrocities against civilian populations of occupied countries and the deportation of such populations to slave labour, wanton destruction of towns and villages, and plunder.
- (b) Atrocities against civilian populations other than those referred to in paragraph (a). These include but are not limited to murder and ill-treatment of civilians and deportations of civilians to slave labour and persecution on political, racial or religious grounds committed in pursuance of the common plan or conspiracy referred to in paragraph (d) below.
- (c) Initiation of war of aggression against other nations, or initia-

tion of war in violation of treaties, agreements or assurances or otherwise in violation of international law.

- (*d*) Entering into a common plan or conspiracy aimed at domination over other nations, which plan or conspiracy involved or was reasonably likely to involve in its execution all or any of the above crimes.

Any person who is proved to have in any capacity directed or participated in the initiation of war or in the said plan or conspiracy referred to in paragraphs (*c*) and (*d*) hereof shall be personally answerable for each and every violation or atrocity referred to in paragraphs (*a*) or (*b*) above committed in furtherance of such war as aforesaid, or in pursuance of the said plan or conspiracy.

LIII. Revised Definition of "Crimes", Prepared by British Delegation To Meet Views of Soviet Delegation, July 28, 1945

Note: On July 28, 1945, Sir Thomas Barnes delivered to Justice Jackson a further redraft which he had prepared in an endeavor to meet the Soviet views. He explained that the Soviet Delegation had agreed to this definition and had insisted on this form. The document follows:

27th July, 1945.

12:15 p. m.

For the purpose of the trials of the major war criminals of the European Axis Powers before the Tribunal established by the Agreement referred to in Article 1 hereof, the following acts or designs or attempts at any of them shall be deemed to be crimes coming within the jurisdiction of the Tribunal:

- (a) Initiation of a war of aggression or participating in the waging of war or preparing for war in violation of treaties, agreements or assurances or participating in a common plan or conspiracy aimed at the domination of one nation over other nations and carried out by the European Axis Powers.
- (b) Violations of the laws, rules and customs of war. Such violations shall include murder and ill-treatment of prisoners of war, atrocities against civilian populations of occupied countries and the deportation of such populations to slave labour, wanton destruction of towns and villages, and plunder.
- (c) Atrocities against civilian populations other than those referred to in paragraph (b). These include murder and ill-treatment of civilians and deportations of civilians to slave labour and persecution on political, racial or religious grounds committed in pursuance of the common plan or conspiracy referred to in paragraph (a) above.

Any person who is proved to have in any capacity directed or participated in the war or in the plan or conspiracy referred to in paragraph (a) above shall be personally answerable for each and every violation or atrocity referred to in paragraphs (b) or (c) above committed in furtherance of such war, or in pursuance of such plan or conspiracy, by the forces and authorities, whether armed, civilian or otherwise, in the service of any of the European Axis Powers.

LIV. Revised Definition of "Crimes", Submitted by American Delegation, July 30, 1945

The Tribunal established by the Agreement referred to in Article 1 hereof shall have power and jurisdiction to hear, try and determine charges of crime against only those who acted in aid of the European Axis Powers.

The following acts, designs, or attempts at any of them, shall be deemed to be crimes coming within its jurisdiction :

- (a) Initiation of a war of aggression; or initiation of a war in violation of treaties, agreements or assurances, or otherwise in violation of International Law; or participating in a common plan or conspiracy aimed at the domination of one nation over other nations to be carried out by means of any such war.
- (b) Violations of the laws, rules or customs of war. Such violations shall include but are not limited to murder and ill-treatment of prisoners of war; atrocities against civilian populations of occupied countries; the deportation of such populations to slave labour; wanton destruction of towns and villages; and plunder or spoliation.
- (c) Atrocities against civilian populations other than those referred to in paragraph (b). These include but are not limited to murder and ill-treatment of civilians and deportations of civilians to slave labour or persecution on political, racial or religious grounds committed in any country, at any time, in pursuance of the common plan or conspiracy referred to in paragraph (a) above.

Any person who is proved to have in any capacity directed or participated in the plan or conspiracy referred to in paragraph (a) above shall be personally answerable for each and every violation or atrocity referred to in paragraphs (b) or (c) above committed in furtherance of such plan or conspiracy, by forces and authorities, whether armed, civilian or otherwise.

LV. Notes on Proposed Definition of “Crimes”, Submitted by American Delegation, July 31, 1945

1. The jurisdiction of this Tribunal, of course, is limited to trial of those of the European Axis Powers. The definition of a crime cannot, however, be made to depend on which nation commits the act. I am not willing to charge as a crime against a German official acts which would not be crimes if committed by officials of the United States. I think no one will respect any conviction that rests on such a legal foundation. The draft attached suggests changes which would meet those objections.

2. In (a) “participating in the waging of the war” makes one guilty of the crime. This would make the entire soldiery, conscript and volunteer, and numerous civilians guilty. It comes close to making the entire German people guilty by definition. As I have explained, the guilt we should reach is not that of numberless little people of no consequence or influence, but of those who planned and whipped up the war. I suggest words which would accomplish this change.

3. Both (b) and (c) begin with general statements and go on to more specific items. It should be made clear that these specific statements do not limit the general ones. Destruction, as well as plunder, should be specified or we fail to reach such conduct as opening dykes to flood lands with salt water, etc.

4. In (c) we should insert words to make clear that we are reaching persecution, etc. of Jews and others in Germany as well as outside of it, and before as well as after commencement of the war.

5. The objection of Note 1 applies to “participated in the war” in the last paragraph in that as it stands at present it seems to render the entire draft meaningless. It may be interpreted as meaning that a person guilty under (a) shall not be answerable unless he is also guilty under (b) and (c), and that a person guilty of crimes under (b) and (c) shall not be answerable unless the crimes are committed in connection with the planning or the initiation of aggressive war. This, of course, would largely render all three paragraphs futile.

I attach a draft intended to overcome what we regard as defects.

Respectfully submitted,

ROBERT H. JACKSON

LVI. Revision of Definition of "Crimes",
Submitted by American Delegation,
July 31, 1945

ARTICLE 6. DEFINITION OF CRIMES

The Tribunal established by the Agreement referred to in Article 1 hereof shall have power and jurisdiction to try and determine charges of crime against individuals who and organizations which acted in aid of the European Axis Powers and to impose punishments on those found guilty.

The following acts, or any of them, are crimes coming within its jurisdiction for which there shall be individual responsibility :

- (a) **THE CRIME OF WAR**, namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of any international treaty, agreement, or assurance, or in particular, of the General Treaty for the Renunciation of War, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) **WAR CRIMES**, namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; sinking of merchant vessels in disregard of international law; attack upon hospital ships; plunder of public or private property; wanton destruction of cities, towns or villages; devastation not justified by military necessity.
- (c) **CRIMES AGAINST HUMANITY**, namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, religious grounds, in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in furtherance of such plan.

International law shall include treaties, agreements, and assurances between nations, and 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 the public conscience.

LVII. Memorandum on Changes in Subcommittee Draft Desired by American Delegation, July 31, 1945

MEMORANDUM OF SUGGESTIONS BY THE UNITED STATES OF ALTERATIONS IN THE DRAFT OF AGREEMENT AND CHARTER SUBMITTED BY THE SUBCOMMITTEE

July 31, 1945

Article 4 of the Agreement as reported reads: "Nothing in the Agreement shall prejudice or release the obligations of the parties to the Moscow Declaration for the return of persons to be tried at the scenes of their crimes." The Moscow Declaration was not a legal document but was a broad statement of policy by the representatives of three nations. It did not, in my opinion, create legal obligations. I would not feel free, in the legal instrument now before us, to recognize as legal "obligations", in favor of unnamed obligees, this statement of policy. Of course, nothing that we do here should affect the Declaration. I would not object to the inclusion of the following or equivalent language: "Nothing in this Agreement shall affect the policy stated in the Moscow Declaration concerning the return of persons to be tried at the scenes of their crimes."

Article 7 provides that the Agreement for joint trials shall remain in force for a period of one year. Nothing in the Agreement releases the ready parties if one or more of them fails to appoint prosecutors or members of the Tribunal, or otherwise to take steps without which the Agreement could not function. I propose that a provision authorize withdrawal if any Signatory to the Agreement fails promptly to perform the undertakings of it.

Article 15 (1) of the Charter, in the last paragraph, we would like amended to read, "Provided that if there is an equal division of vote concerning the designation of the defendant to be tried by the Tribunal *or the charges to be made* that proposal will be adopted which was made by the party which proposed that the particular defendant be tried."

Article 16 of the Charter should allow the defendant to cross examine any witness called by the prosecution, and he should have the

right on the trial as well as on the preliminary examination to make any explanation "relevant to the charges made against him."

Article 17 (e). We support the draft suggested by the Secretary.

Article 22. The place of the first trial should be settled in accordance with previous discussions.

Article 24 makes no provision as to when the prosecution shall offer its evidence, or the defendant its evidence, or the prosecution shall offer rebuttal evidence. This omission may be taken to mean that no evidence is to be offered on the trial and appropriate additions should be made.

Article 26. The language is not clear to me and probably should read that the judgment shall be accompanied by the reasons supporting its findings.

These matters are in addition to the settlement of definition of the crimes to be adopted in Article 6.

As I have previously said if we do not succeed in agreeing upon a procedure for joint trial, I am authorized to offer to agree upon substantive law provisions and that each party may try its own prisoners for such part of the defined crimes as it sees fit to charge, and each conduct its trials according to its own procedures. This would not only eliminate disagreements as to procedures but would shorten the trials greatly and shorten the preparation. I am advised that simultaneous translation into several languages has not been successful and was, therefore, not employed at San Francisco or other recent international conferences. The translation of each step of a trial into four languages would be an extremely time-consuming and tedious matter which would be avoided by separate trials. I will be glad to submit an outline of an agreement to this end.

Respectfully submitted,

SIDNEY S. ALDERMAN

LVIII. Summary Record of Conference Between the Lord Chancellor and Mr. Justice Jackson, August 1, 1945

On August 1, 1945, Sir William Jowitt, who had been announced as the Lord Chancellor in the new Labor government of the United Kingdom, invited Mr. Justice Jackson to a conference at his chambers in the House of Lords. He stated that he had been given responsibility for the further conduct of negotiations on behalf of the new government and by conference with the British representatives had informed himself of the points upon which agreement had been reached and of the points of disagreement.

Lord Jowitt desired to be acquainted with the American point of view as to the unsettled questions. He expressed general agreement with Mr. Justice Jackson on all except one of the points, namely, the right to terminate the agreement if any of the signatories failed promptly to name prosecutors, which he suggested might be taken to imply a distrust in some signatory. He also said it was his intention to continue Sir David Maxwell Fyfe on the British staff, although the new Attorney-General, Sir Hartley Shawcross, would be Chief Prosecutor on behalf of the British with Sir David as his first deputy.

The Lord Chancellor called for August 2, 1945, a meeting of the delegations for the purpose of making a final effort to compose differences.

LIX. Minutes of Conference Session of August 2, 1945

The Lord Chancellor greeted each member of the delegations and called the meeting to order. Professor Gros had been called to Paris for consultation and was not present at the meeting.

LORD CHANCELLOR. The only claim I can make is that I bring a fresh mind to bear upon a very difficult problem. I confess that I am very anxious that we shall succeed in carrying out the Moscow declaration that the major war criminals shall be punished by joint decision of the governments of the Allies, but I think we shall all agree that the time has now come when we must finalize the thing or realize that we shall have to adopt some other procedure. So I am very anxious to see this morning whether or not we can come to some conclusion satisfactory to all. Would it be convenient to take first of all the agreement and thereafter the charter?

Mr. Justice Jackson, who has given great time and attention to this matter, has made certain suggestions which we might proceed to consider. I think nothing arises on articles 1, 2, and 3 of the agreement, but with regard to article 4 a question does arise, and that question concerns the use of the English word "obligation".

I understand that we all desire to honor to the fullest extent possible the policy which has come into being at Moscow. But the use of the word "obligation" to us Anglo-Saxon lawyers does create some slight difficulty. We should never use the word about something which is merely binding in good morals, but only about something which is binding in a court of law, and therefore I would suggest to you phrasing something like this: "Nothing in this agreement shall prejudice the Moscow declaration concerning the return of persons to be tried at the scenes of their crimes." Would that suit you, Mr. Justice Jackson?

MR. JUSTICE JACKSON. That would meet the point I had in mind and would be acceptable.

GENERAL NIKITCHENKO. We are quite prepared to do without the word "obligation", and we suggest that "Nothing in this agreement shall prejudice the provisions established by the Moscow declaration concerning the return of war criminals to the countries where they had committed their crimes."

LORD CHANCELLOR. What do you say to that, Mr. Justice Jackson?

MR. JUSTICE JACKSON. Entirely agreeable.

LORD CHANCELLOR. Nothing on 5, nothing—I think—on 6, and on article 7—Mr. Justice Jackson had some observation on that. Would you like to say something now?

MR. JUSTICE JACKSON. I had thought we would be in a rather awkward position if we were bound to hold our prisoners subject to production at this Tribunal for a year if for any reason the Tribunal should not be organized to proceed. None of the signatories has appointed its Tribunal members yet. Some of the signatories have not appointed their prosecutors. If there should be any failure to organize—and I may say it requires all four of the members of the Tribunal to constitute a quorum and at least a majority of the prosecutors—the delay would be very serious. What position would we be in if, through any of the things that sometimes happen with political bodies, particularly I speak with reference to things which happen in my country, to delay matters, there might be great delay in naming prosecutors or judges? We want to set up something here that we are quite sure can go ahead, for we all agree that not haste necessarily but expedition in this matter is necessary. That is my point.

LORD CHANCELLOR. Most feel, I am sure, that immediately after we reach agreement here the French prosecutor will be named, and at the first meeting of the prosecutors the French prosecutor will be present, and there will be no delay.

GENERAL NIKITCHENKO. The Soviet Delegation considers that it would not be quite fitting to put a provision of this sort in the agreement because, if there were delay, it certainly would not be because of persons being appointed with delay. In fact, it would be strange to appoint members of the Tribunal before this agreement we are now considering is signed, because, until then, there would be no Tribunal. Naturally, as soon as the agreement is signed, the Soviet Government will appoint both prosecutor and member.

LORD CHANCELLOR. I feel myself that speed in getting these trials going is very important and I rather feel this, that, if there is unreasonable delay—I hope and believe there won't be—but if there is delay, then, of course, the various powers might have to resort to their rights under article 6—that is, they might have to conduct their own trials. But I hope and believe that there will be no delay, and therefore, bearing in mind that there is that reserve power in case delay should arise, I rather suggest we might leave the article, Mr. Justice Jackson, as it stands. I think we might place on record that we all sign this agreement in the expectation and on the understanding that proceedings will be expeditiously carried through. What do you say to that, Mr. Justice Jackson?

MR. JUSTICE JACKSON. I am satisfied to let the matter stand as it is.

I question whether we ought not to add to this section that to terminate the proceedings will not prejudice proceedings already taken. I don't know the effect if one of the parties terminated the agreement before sentence. Some of these cases will drag on for a considerable time if we convict organizations and then bring in individuals. I just wonder whether we ought not, as a matter of good draftsmanship, to provide that the termination should be without prejudice to the proceedings already taken. I merely suggest it. It doesn't matter to me.

GENERAL NIKITCHENKO. It seems to me it is quite natural that anything done in accordance with this agreement would be enforced after the agreement has been terminated; so it seems to us that addition is really unnecessary. As for the trial of the organizations, we have article 6 in which it says, "Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court. . . ." So, if an organization has been deemed criminal, the national military tribunal can try persons after that.

MR. JUSTICE JACKSON. But the point would be that the provision of this instrument is the only law that would make the findings of this Tribunal conclusive as to the criminal character of the organization. If that were terminated and you brought individuals into a national court organized under our system of law and you offered the conviction of organizations and said, "Here is a conclusive finding", defense counsel might bring forth the termination instrument. I don't imagine it would happen. It is a risk. I don't care what is done with it, but in an American court you might not get convictions under this system of individual trials based on the conclusive findings of this Tribunal after the document which makes them conclusive has been terminated.

LORD CHANCELLOR. May I say I understand the point. Supposing you have a finding by this international court that a certain organization is a criminal organization, and supposing thereafter, after that finding has been given, the court is terminated under article 7 and after that date some individual is tried by the American courts for belonging to that organization. What the judge is telling us—and I think it would be the same in English law—it would not be possible after the termination of the court to rely on the decision of the court that the organization in question was a criminal organization. Therefore, some words of this sort might have to be added: "Such termination shall not prejudice any findings or proceedings already taken in pursuance of this agreement."

JUDGE FALCO. We agree.

GENERAL NIKITCHENKO. We agree.

LORD CHANCELLOR. Well, let those words be added. And that finishes the agreement. Now, may we take the charter? No question arises on articles 1, 2, 3, 4, and 5.

MR. JUSTICE JACKSON. I think there may be a question of clarity of language in article 4. "The presence of all four members of the Tribunal or their alternates shall be necessary to constitute the quorum." It might clarify it if we said, "The presence of all members of the Tribunal, or the alternate for any absent member shall be—". We don't want the alternates for all of them or for any who are present.

LORD CHANCELLOR. That is what we describe as a mere drafting point.

MR. TROYANOVSKY. About (a) of article 4—

LORD CHANCELLOR. I think that is an improvement in the drafting of the language.

JUDGE FALCO. That is all right.

MR. JUSTICE JACKSON. And in (c)—I am a little baffled to know what a simple majority vote is. I am a little inclined to leave "simple" out.

GENERAL NIKITCHENKO. In Russian there is a difference between a simple majority and a qualified majority. But it does not make any difference here.

LORD CHANCELLOR. Article 5? I rather suggest, gentlemen, that we pass over article 6 for the moment because it raises difficult questions, and go on and see the rest of the thing because I think the rest does not raise such difficult points. Article 7—I don't think there is anything. Articles 8, 9, 10, 11, 12, 13, 14, 15—on 15 one point. It arises in this way: After (e) you see the sentence which reads, "The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: Provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried." Mr. Justice Jackson suggests that after the word "Tribunal" we should insert the words "or the charges to be made".

MR. TROYANOVSKY. What exactly is that to cover—this new phrase, "or the charges to be made"?

MR. JUSTICE JACKSON. Perhaps it would be better to state, "or the crimes to be charged against that individual". In other words, if any party proposes that an individual be tried, and he with the concurrence of one other prosecutor is entitled to have him tried, he would

have to specify the charges on which he was to be tried and the crimes for which he was to be charged. That is what is intended, so that the person bringing forth the defendant would specify the additional charges. Of course, where the four agreed, there would be no difficulty. It is only in case of tie where the two prosecutors are entitled to name a defendant. They would have to name the charges as well.

GENERAL NIKITCHENKO. Of course we have no objection at all to that except for the precise drafting. "Or the crimes for which they shall be charged"—would that be all right?

MR. JUSTICE JACKSON. That would be all right.

LORD CHANCELLOR. Then there is nothing else, I think, on 15. Article 16 (*d*)—Mr. Justice Jackson has thought of a point. If I may state it as I understand it, he would like these words put in: "A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel." And he would put in after "Tribunal" the words, "to cross-examine any witness called by the prosecution". It would then read: "A defendant shall have the right to conduct his own defense before the Tribunal, to cross-examine any witness called by the Tribunal, and to have the assistance of counsel."

GENERAL NIKITCHENKO. There is one question. What is meant in the English by "cross-examination"?

LORD CHANCELLOR. In an English or American trial, after a witness has given testimony for the prosecution he can be questioned by the defense in order that the defense may test his evidence—verify his evidence, to see whether it is really worthy of credit. In our trials the defendant or his counsel is always entitled to put questions in cross-examination. And I think the same situation prevails in the courts of France.

JUDGE FALCO. Yes, the same.

GENERAL NIKITCHENKO. According to Continental procedure, that is very widely used too. The final form would be then, "The Defendant shall have the right to conduct his own defense before the Tribunal, to cross-examine any witness called by the prosecution", et cetera.

LORD CHANCELLOR. I think it would be better at the end of (*e*). We could leave (*d*) as it is and insert the words at the end of (*e*) so that it would read, "A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of the defense and to cross-examine any witness called by the prosecution."

GENERAL NIKITCHENKO. If we say "put questions to any witness", would it be the same? "Cross-examine" does not translate well.

LORD CHANCELLOR. It would be better to say "to cross-examine", if you can translate that, because we understand it. Would that be all right?

JUDGE FALCO. All right.

MR. JUSTICE JACKSON. All right.

LORD CHANCELLOR. All agree. Let that be added at the end of (e). Now we come to 17.

MR. JUSTICE JACKSON. I think there was another point on 16 (b). It would now appear that the defendant's only right to make any explanation relative to the charges would be in the preliminary examination, and that would be a curtailment of his rights that would hardly look well to the American and, I would think, to the British bar. I would suggest, "preliminary examination and at the trial would have the right. . . ."

GENERAL NIKITCHENKO. We had the words "and at the trial" at first, and during drafting they fell out somewhere.

LORD CHANCELLOR. Now we come to 17, and I understand no question arises with regard to (a), (b), (c), or (d). With regard to (e), may I just say this: We have in England what we call the system of taking evidence on commission, and the taking of evidence on commission means that you can send some official of the court. We call him a master or examiner. He can go and take evidence wherever he finds it—particular witnesses who need not come to the court. Let me give an illustration. Supposing a major war criminal is being tried for inciting to murder a Jew, and you are relying upon some speech he made at some time in Germany. Now we in England could send a commissioner to that town to get evidence from people who actually heard that speech instead of bringing all those people to the trial. That saves a great deal of time over a matter which is probably not in dispute at all. We should be able to use examiners and take that evidence; when it came to trial, we should have the print of what the examiner had found out, and it would be printed in all languages. We in England call it taking evidence on commission. Now I would suggest we do it in this way. Let (e) read as follows: "The Tribunal shall have power to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission." Would that meet your views, Mr. Justice Jackson?

MR. JUSTICE JACKSON. I think it would, Lord Chancellor. The only difference would be that a master often has power to make recommended findings whereas in merely taking evidence on commission, or taking depositions, as we sometimes call it, he would not. But I do not think that is so important.

GENERAL NIKITCHENKO. According to the Continental and, in par-

ticular, the Soviet procedure, a court cannot deputize its powers to an individual, that is, a court must see for itself. But in order to be able to reach an agreement more quickly we are quite prepared to put in the proposal as suggested by the chairman in the hope that, when we come to other questions in which the Soviet Delegation cannot find it possible to forego some of its positions, the other delegations would take that into consideration.

LORD CHANCELLOR. What do you feel, M. Falco?

JUDGE FALCO. I agree.

LORD CHANCELLOR. Well, we shall agree that (e) is drafted in that way—"designated by the Tribunal, including the power of having evidence taken on commission". I am very much obliged to you. Article 18—I don't think there is anything. Articles 19, 20, 21, 22. Article 22 reads as follows: "The administrative headquarters of the Tribunal and its secretariat shall be located in Berlin. The first meetings of the members of the Tribunal and of the chief prosecutors shall be held at Berlin at a place to be determined by the Control Council. The first trial shall be held at Nürnberg and any subsequent trials shall be held at such places as the Tribunal may decide." This is a question upon which I don't know the views of the members. That is satisfactory to us, and I think to you, Mr. Justice Jackson.

MR. JUSTICE JACKSON. There was a later draft made, to which I intended to refer in my memo, which changes that somewhat.

LORD CHANCELLOR. I understood what I read out was the final form at the last meeting.

MR. JUSTICE JACKSON. I think that is right. I was following article 22 as it appeared in the draft itself.

LORD CHANCELLOR. Would this be all right as we read it out?

GENERAL NIKITCHENKO. In our opinion it would be perhaps better to leave that for consideration when we consider article 6, because these are the two questions that would provoke discussion perhaps.

LORD CHANCELLOR. Very well, leave that over for the time being. Article 23—no question, I think, arises on that. Article 24—we have not set out 24. We, and I presume you too, would conduct a trial in this order. First of all, the prosecution give their evidence, then the defense give their evidence, and finally the prosecution may be allowed to call what we call "rebutting evidence" to rebut the evidence of the defense. I rather suggest that, as we set out so many details in this article, we ought to put in another letter after (f) with a provision to this effect: "The prosecution shall call their evidence first, the defendants shall then call their evidence, and thereafter the prosecution shall call such rebutting evidence as may be decided to be admissible."

That is to say, it would come after (f), and (g), (h), (i), and (j) would remain as they are. Would those words meet your point, Mr. Justice Jackson?

MR. JUSTICE JACKSON. Yes, I think so.

LORD CHANCELLOR. Is "rebuttal" quite clear to you? It is not quite clear to me. In our system it occurs when a point is raised by the defense—and suddenly he raises a point for the first time—"but I was not there"—and you have clear evidence he was at Berlin on the critical date. Then you are permitted to call that evidence to meet that point.

GENERAL NIKITCHENKO. It would seem to me that in a detailed article of this sort it might not be necessary to specify in just what way evidence may be offered, in particular this rebutting evidence. It would seem to us that it would be sufficient to say that the prosecution and defense may in the course of the trial submit whatever evidence they have. We would suggest putting the following words after (f) in a new paragraph: "Both the prosecution and the defense may offer evidence and any rebutting evidence at any time during the trial."

LORD CHANCELLOR. You see what I feel is this: I do feel that in this article 24 you have to set out properly the precise order in which things take place. For instance, (a), you read the indictment, you ask each defendant whether he pleads guilty or not guilty, then the prosecution makes the opening statement, then come on to (g), the defense addresses the court, the prosecution addresses the court. Throughout the whole thing you are setting out the precise order in which things should take place. Now, when you come to this, you do not set out the order in which evidence is to be given; you just say, "The evidence should be given." Why not an article to set out how things take place in their sequence? Why not say, "the prosecution evidence, the defense evidence, then the rebutting evidence", and so on? I don't understand why, in an article which sets out step by step the order in which things take place, you should not set out the order in which the evidence is to be given. That is my difficulty.

MR. JUSTICE JACKSON. You see, the order set forth is not just the order we would follow in an American trial. The indictment would be read and the defendant would be asked to plead at a hearing preceding the trial probably, but that order might take place at the trial. The prosecution would then make an opening statement, would then be required to produce all its evidence and exhaust its case on the main issue and to "rest", as we call it, and then the defense would have to offer all of its evidence, exhaust its case, and rest. Then the prosecution would be entitled to bring forward its rebuttal evidence and exhaust its case on rebuttal, and then the defense might have another go at it. But the order here would leave me entirely confused, and I know that, if it were published, it would leave the American bar confused as to

whether any evidence was to be presented and, if so, when and in what order. I agree with the Lord Chancellor. Having gone into so much detail, if we leave such important features of the trial out, we would create confusion among the American bar, I'm sure.

GENERAL NIKITCHENKO. But suppose that at the trial the defense might have certain rebutting evidence which the prosecution would not have. Would not we in setting out this order deprive the defense of a certain right of rebutting the evidence?

MR. JUSTICE JACKSON. No, we should not. The prosecution must put all of its evidence in and announce that it has finished its case, then the defense can meet any of that evidence in its evidence. Then when the defense has finished everything it wants to put in, the prosecution comes back and puts in its rebuttal. Now, if rebuttal brought forth an entirely new point, there would be a right on the part of the defense to meet that new point but not to go into something in answer to the main case. But it could meet anything new that had not been in.

LORD CHANCELLOR. It has been done, but so rarely that I in my experience have never known of defense rebutting evidence in a case. But I know it can be done.

GENERAL NIKITCHENKO. Article 24 (*e*) states, "The Tribunal shall ask the prosecution and defense what evidence, if any, they wish to submit to the Tribunal and rule upon the admissibility of such evidence." I think that is a sufficient provision. If we add another provision saying, "both the prosecution and the defense may at any time in the course of the trial offer evidence", would that not be sufficient to define the course of the trial?

MR. JUSTICE JACKSON. The difficulty in this is a provision to regulate the order, otherwise it serves no purpose, and if you say "at any time" you do not regulate the order. Also, in the midst of our case a defendant may get up and say, "This is not true", and offer to prove it. The court would refer to this article and would be put in an embarrassing position. But if we have the order specified, the court would say, "Now, Mr. Defendant, you will have an opportunity at the proper time and now you sit down." Otherwise I fear that we open this to disorder, and we must not forget that, of all the things these people are artists in, one of the chief things is in creating disorder. We have tried Nazi sympathizers in our courts, the American prototypes, and their policy has been to disorganize and upset a trial. I think it would worsen the provision to say "at any time", for that confounds the whole thing. It is very important to give the court a guide here so that it can say, "You will have your rights at the time specified and if you don't keep still now you will be removed from the court." This trial must be conducted in a very stern way or they may make us look ridiculous. That will be their technique.

PROFESSOR TRAININ. In this article we set out in detail the course of the trial because this article provides for new procedure. It seems to us the procedure set out here follows more the Anglo-American practice although there are some features from the Continental procedure. For instance, in the Continental procedure the prosecution would not make an opening statement nor the defense address the court after the prosecution, et cetera. Therefore, since we are making new procedure here and to meet the views expressed, perhaps we could say the defense and the prosecution may offer new evidence and rebut the evidence offered by the other side.

JUDGE FALCO. I think also we are perhaps not very different, but it is a matter of drafting because in your drafting it seems strange to us that, if the prosecution offers evidence, the defense cannot offer anything. The end is the order of the trial. We think it should say that the defense and prosecution can answer each other.

MR. JUSTICE JACKSON. I may say I agree entirely with Judge Falco. It is the intent here that the defendant have the right to offer evidence to meet the evidence brought against him, but I think we should also say when he should produce it and not leave it, "The prosecution and the defense shall produce", because that leaves controversy as to what order. The only way is to set forth when they shall do this so that there can be no controversy about it at the trial. Now we are relatively free from outside criticism. We can talk about it and discuss it. If we get into trial with the world looking on, with reporters present, and have some argument, we will have headlines about a disagreement all over the world. We must settle these things as far as we can anticipate them so that, when we get to trying this case, we will not have even minor disputes in the eyes of the world.

LORD CHANCELLOR. I agree with that. I think we had much better get things settled here in the privacy of this room than have these controversies arising when the court is sitting.

PROFESSOR TRAININ. But if we say the defense or the prosecution or the other way around may offer new evidence and then rebut the evidence offered by the other side, would not that in itself set out the order?

LORD CHANCELLOR. I don't know that it would. You see, here is an article in which we are setting out with great particularity the precise order in which things are to be done, and one question which we must face is this. I do not understand the Continental system, but is it not that the prosecution evidence is called before the defense evidence? In the English trials you always have the prosecution evidence called first and then the defense evidence. But is it not the fact that in the Continental system the evidence for the prosecution is called for and then thereafter evidence for the defense is called,

and if that is the system you follow, why not an article setting out the order in which things are to be done? Should we not set out the order in which the evidence is to be called?

PROFESSOR TRAININ. We have no objection to saying that the prosecution shall offer its evidence and then the defense.

JUDGE FALCO. Should we not say something like this: "After evidence is offered by the prosecutor, the defendant will have time to offer evidence and offer rebuttal evidence"? We always abide by this—the accused must have the last word and be allowed to answer the prosecution.

MR. JUSTICE JACKSON. May I make a suggestion? In (*d*) we have the provision that after the prosecution makes the opening statement the Tribunal shall ask the prosecution what evidence they wish to offer and shall rule on it. Suppose we leave the defendant out at this point—until the prosecution finishes—and the court says, "What evidence do you want to submit?" and they rule on it. Then if we put in as (*e*) that "the Tribunal shall ask the defendant . . . and rule upon admissibility of the defendant's evidence", and then put a provision that thereafter the appropriate rebuttal evidence by either party may be heard and go on as we are here—we are all right. We have settled the point and it does provide in (*i*) that the defendant make a statement to the Tribunal which follows the address of the prosecution. That would not be our order, as the prosecution always closes the argument.

GENERAL NIKITCHENKO. That is, we would have two paragraphs, (*d*) and (*e*); in the first it would be the prosecution and in the second the defense.

LORD CHANCELLOR. Yes. Article (*d*) would read, "The Tribunal shall ask the prosecution what evidence, if any, they wish to submit to the Tribunal and the Tribunal shall rule upon the admissibility of any such evidence."

SIR THOMAS BARNES. Before we get to (*e*), don't we want to say that "That evidence shall then be called"?

LORD CHANCELLOR. Yes, that is right. [Here the Lord Chancellor repeated the text of 24 (*d*) and (*e*).] Then they would have another clause, (*f*)—"thereafter appropriate rebuttal evidence by either party may be called." I don't know whether we ought to define "appropriate", Mr. Justice Jackson—such rebuttal evidence as is held by the Tribunal to be admissible.

PROFESSOR TRAININ. We prefer to agree to the formula proposed by Mr. Justice Jackson, but this additional sentence that such evidence will then be called would seem unwelcome to us because this would change the course of the trial. It is quite true that first of all witnesses of the prosecution should be heard, then witnesses for the de-

fense, but as for other evidence, it might come in any order. This would seem to us too mechanical a division between evidence of the prosecution and the defense. For instance, supposing a witness of the prosecution is giving testimony and at that time the defense might wish to offer to submit some document which would have bearing on this testimony. We think the defense should have the right to do that.

LORD CHANCELLOR. I tell you what would happen in the English courts, and, I take it, in American courts also. The witness would give his evidence, he would be examined by the counsel for the prosecution, then the counsel for defense would get up to cross-examine, and in the course of his examination would produce the document and from the mouth of that witness the document would be proved; but it would be proved by reason of the cross-examination.

PROFESSOR TRAININ. It seems to us that our views are not very different in this respect really. We might take the formula proposed by Mr. Justice Jackson without that additional phrase, and then say in another clause, "The witnesses for the prosecution shall be examined before witnesses of the defense", or something like that.

LORD CHANCELLOR. All agreed to that?

SIR THOMAS BARNES. We could add it at the end of the new (*d*)—"The witnesses for the prosecution shall then be called." Then have (*e*) exactly the same, except substituting "the defense" for "the prosecution".

PROFESSOR TRAININ. It would seem better for us if we left article (*d*) as it stands and then add something like, "The witnesses for the prosecution shall be called and after that the witnesses for the defense." That is, both sides would ask the prosecution about the evidence, and after that witnesses would be called.

LORD CHANCELLOR. I think that is not bad. But I would suggest this: You still have trouble about rebutting evidence, but I am not sure it is not safe under (*e*), Mr. Justice Jackson. It would be different from our system, but, if the question of rebutting evidence arose, the Tribunal would take the matter in hand. We might get that in under (*e*). The only difficulty I have is about this rebutting evidence. I don't want you to think rebutting evidence is a common thing in our countries. It might be in only one case in a hundred, but it does sometimes arise, and, if we simply say, "Witnesses for the prosecution shall be called and after that witnesses for the defense", we do not provide for the rare case of the prosecution coming along and having given evidence in rebuttal.

PROFESSOR TRAININ. Perhaps we might say, "The witnesses for the prosecution shall be heard" and, in case you need to, "The Tribunal may after that call upon any witnesses."

LORD CHANCELLOR. What do you say to this? Adopt Professor Trainin's words in effect and say, "The witnesses for the prosecution shall be called and after that the witnesses for the defense." Then add, "Thereafter such rebuttal evidence as may be held by the Tribunal to be admissible shall then be called by either the prosecution or the defense." That would come in, I think, after (d). We should leave (d) exactly as it is and make a new paragraph between the present (d) and the present (e).

MR. JUSTICE JACKSON. Let me suggest this defect which I think remains under this arrangement. Let us visualize a trial. We have reached the point of (c); the prosecution has made its opening statement. Then the Tribunal says to the prosecution, "What evidence do you wish to submit?" and rules on its admissibility. That will be a very long proceeding if the prosecution is required to make a complete statement of what it wants to prove, and you have to rule in advance on its admissibility. In our procedure the ruling would be made when it is offered. But suppose it is carried through as here set out and the prosecution states its case and has a ruling on admissibility. At that point the court is also required to ask the defendant what he wishes to submit and to rule upon its admissibility. The defendant is therefore asked to say what he wishes to prove before he has heard the prosecution's evidence. The formula I suggest is that, when the prosecution makes its statement of what it intends to prove, it must proceed with its case, and the defendant be asked after the prosecution's case is in what it wishes to prove, and then a ruling; otherwise I think we get into some confusion.

GENERAL NIKITCHENKO. We are quite agreed to the formula proposed by the Lord Chancellor.

LORD CHANCELLOR. Could we meet Mr. Justice Jackson's difficulty, which I think I follow, in this way? As (d) is drafted, the wording is, "The Tribunal shall ask the prosecution and the defense", and it is at that point after the opening statement. He says that at that stage in the proceeding the defense may not know what evidence they want to give. Would it not, therefore, be better instead of having "the Tribunal *shall* ask" to substitute the word "may" and put it this way: "The Tribunal may at any time they think convenient" ask the prosecution and defense? They need not do it unless they want to.

PROFESSOR TRAININ. Article 24, the procedure as set forth, is the result of a prolonged discussion and numerous compromises. If the new proposal is adopted, that would really change the whole thing, and it seems to us that this division would be too mechanical. The fact that the witnesses for the prosecution shall be called first and witnesses for the defense next really provides that the prosecution would

present all of its case or almost all at the same time. But at the present time we would not find it possible to accept the new solution as proposed by substituting the word "may" for the word "shall". Of course, we are quite prepared to accept the proposal of the Lord Chancellor as it was stated the first time, and we think that goes quite a long way to meet the objection but think the second proposal would change the whole procedure too much.

LORD CHANCELLOR. What would you do? In article 24 as drafted you have, after the opening statement by the prosecution, the provision that the Tribunal is obliged to ask both the prosecution and the defense. Suppose the defense said this: "I really don't know at the present time what evidence I shall submit; before I make up my mind about that I want to hear what evidence is against me. But you cannot ask what evidence I would submit until hearing what the prosecution has against me." What should the Tribunal do then?

PROFESSOR TRAININ. Perhaps then we could add another point, seeing the prosecution and the defense may at any time ask the Tribunal to offer additional evidence.

LORD CHANCELLOR. I would be content myself to leave it with the thought I suggested, that is to say, getting in somewhere "The witnesses for the prosecution shall be examined and after that the witnesses for the defense; thereafter such rebutting evidence as may be held admissible shall be called by either the prosecution or the defense."

MR. JUSTICE JACKSON. Well, I don't want to stand out against the judgment of all the other delegates about a matter in which our interests are identical. Our interest here, if we are going to have a trial, is to have one which will be creditable in the eyes of the world, and I must say this trial has danger of not becoming such if we enter into it without complete understanding. We, in the United States, try issues in courts that are somewhat appalling to other peoples in the length of our trials and the scope of our questions, and I have had some experience trying them. But this trial has a scope that is utterly beyond anything that ever has been attempted that I know of, in judicial history, and we must attempt to do it in four languages. I have been having a great deal to do with the preparation of the case for trial. This book, in my hand, of over a hundred pages, for example, is a mere outline, mere index, setting forth the documents in the case against Hermann Göring. It involves a decade of time. It involves operations, almost daily operations, which we could classify as criminal under any definition. Now if that has to be translated into four languages and then be the subject of examination in court, we are undertaking here a tremendous task and our professional reputations are at stake. I just tremble at the thought of not having this procedure clear and simple and somewhat mechanical, if I may say so. The fact is it is and should be mechanical, requiring the prosecution

to exhaust its case and then the defense take up its case and exhaust it. That does not disturb me, but, if we get into trial with counsel jumping up at all times and no agreed order of procedure, we are going to have an impossible situation. I would much rather see us agree that the trial is impossible than to demonstrate that the trial is impossible.

LORD CHANCELLOR. I think there is great force in that. This is going to be an extraordinarily lengthy business, but still we must do the best we can and by providing now that the witnesses for the prosecution shall be examined and then witnesses for the defense and then rebutting evidence, don't we provide there clearly enough what the order is going to be?

MR. JUSTICE JACKSON. I think it is, so far as the witnesses are concerned, but I am wondering what our Soviet colleagues contemplate under (d). It puzzles me to understand it because in our practice the prosecution's opening statement is supposed to outline the case and give the court—and jury, of course—the information as to what we propose to prove. Now when I am confronted with (d) and I think of the court saying to the prosecution, "Now, what evidence do you wish to submit to the Tribunal?" then I am confronted with reciting such a volume of stuff as to each of these defendants—much more than it is possible to have ready in an opening statement. It would take weeks of translations just to comply with (d) if you comply with it as I am afraid our Soviet colleagues think it should be complied with.

GENERAL NIKITCHENKO. We understand that we have reached agreement as to the fact that before the trial a certain amount of evidence would be lodged with the Tribunal together with the indictment. Now, in the opening statement the prosecution would outline the main charges against defendants; then under paragraph (d) the prosecution would state to the Tribunal what new evidence they had, evidence not lodged with the indictment, or any witnesses; and the Tribunal would pass judgment on that, whether that evidence was considered necessary and whether it was relevant to the case. In order to avoid disorder in the court we have a provision saying that the Tribunal may put a stop to attempts to cause delay and also that it may forbid the defendant or his counsel to be present at one or more sessions if he behaves in a disorderly manner. As a matter of fact the chairman would direct the course of the trial and do everything in his power not to cause delay. Furthermore, we have agreed in order to avoid discussion at the trial that witnesses for the prosecution shall be examined before those for the defense and, in addition to that, any evidence may be offered in rebuttal. All that taken together would seem in our opinion to be quite sufficient to avoid delay. With all these provisions the Tribunal would be in a position to expedite the trial and avoid delay and disorder.

MR. JUSTICE JACKSON. I am really fearful that we are getting the

delays of both systems into this trial. It will be impossible, I should say, if an indictment is to be a comprehensive statement of the evidence, to file it within anything like the time in which you, Lord Chancellor, or I would file the indictment in this case, because once the crimes are defined we could file an indictment within a very short time. It is a matter of specifying the charges. If we attempt the indictment with the particularity the Soviet system would require, it is a very considerable job, unless we are going to drop out of it a considerable amount of the case. Then, of course, reasonable time must elapse to give the defendants time to prepare.

LORD CHANCELLOR. Still, on this clause you know, Mr. Justice Jackson, that I agree with all you say about the dangers of delay. But can we do better than to put in the new clause after (d), "The witnesses for the prosecution shall be examined and after that the witnesses for the defense and thereafter such rebutting evidence as may be held admissible shall be called by either the prosecution or the defense"? Now haven't we provided for the order of things the article is attempting to do adequately?

MR. JUSTICE JACKSON. I don't know that we can do better if we are going to try for joint trials and embody parts of all procedure in it. I am satisfied that the Soviet Government could take these prisoners and try them in much less time than we all can; and we could take them also and try them in much less time. But our effort to combine systems, particularly when you take the four-language requirement, results in a proceeding that is so cumbersome as to be almost unworkable and to raise grave questions as to whether we ought to provide for a formal trial—whether we ought to have a joint executive commission, merely hear charges against these people and call them for an explanation and not go into a trial—make this a political decision. I think my worries are not more serious than the worries of the other delegations should be. We are all concerned equally.

LORD CHANCELLOR. But still, as far as the clause is concerned, I think that if we put this new clause in after (d) we have got about as much as we can. Judge Falco, how do you feel about this?

JUDGE FALCO. I agree with you. I find Judge Jackson is always optimistic. But I find him more pessimistic toward the end.

LORD CHANCELLOR. Well, let us put in the new clause after (d).

GENERAL NIKITCHENKO. We would like to know what Mr. Justice Jackson has in view when he says each party should try the criminals independently. As a matter of fact, we come here authorized to sign an agreement for the establishment of an international military tribunal. We have no powers to sign an agreement saying we do not need an international military tribunal.

LORD CHANCELLOR. No, I don't think Mr. Justice Jackson means

that. He merely is pointing out what we have to bear in mind. Unless we are careful we may make a procedure which involves such long delays and uncertainties that it really becomes impractical, and we may be driven to separate trials. But we hope very much that that will not arise because it would be a bad thing before the world, after having declared we should have a joint trial, if we should now declare we are not going to have it.

I don't think there is anything on article 25. Article 26—I am in this trouble. I don't know what it means. It means—with the greatest respect, I think it means nothing. It reads, "The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall be motivated by the reasons supporting its findings" Now that in the English language has no meaning, and, if my colleagues were to ask me what I meant by signing that, I should be obliged to say I didn't know. I think it means that the judgment of any tribunal as to guilt shall give the reasons upon which it is based and shall be final and not subject to review. If it means that, I would pray that in the English I might have it: "shall give the reason upon which it is based and shall be final and not subject to review".

PROFESSOR TRAININ. This is actually what we have in Russian—what you propose.

MR. JUSTICE JACKSON. As it stands, I would have to say I don't know what it means, but I would rely upon the Lord Chancellor's interpretation as a sensible one.

LORD CHANCELLOR. Very well. Let that be altered. Now, gentlemen, we have got article 6. Shall we start it or leave off here? It would be very good if we could finish it. I shall have to leave in about 15 minutes.

MR. JUSTICE JACKSON. Perhaps in 15 minutes we might get something to think about.

LORD CHANCELLOR. All right. Mr. Justice Jackson, you might tell us the difficulties in regard to article 6 which you have set out.

MR. JUSTICE JACKSON. I think our difficulties were set forth in memoranda [LV]. Our difficulties with the draft which had been approved by the British and Soviet Delegations are before the delegates, and I have submitted an alternative which meets our criticism [LVI]. Perhaps it would save time, since everyone is probably familiar with those, if we would hear the criticisms of our counterproposal, or the criticisms of our criticisms.

LORD CHANCELLOR. May I suggest that we look at your draft and take the first sentence first of all? So this is what the new draft says: "The Tribunal established by the Agreement referred to in Article 1 hereof shall have power and jurisdiction to try and determine charges of crime against individuals who and organizations which acted in aid

of the European Axis Powers and to impose punishment on those found guilty."

GENERAL NIKITCHENKO. As for the body of this article, paragraphs (a), (b), and (c), we have only one or two very minor drafting objections. But as for the first paragraph, we think that it could be made more precise. It seems to us that these words, "acted in aid", are rather indefinite and liable to misunderstanding. We might not reach the actual persons who organized and carried out the crimes, and that is why we would propose to follow this formula for the first paragraph: "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis Powers, whether as individuals or as members of organizations, committed any of the following crimes." Then we could repeat, "The following—"

LORD CHANCELLOR. I would be prepared to accept that.

MR. JUSTICE JACKSON. It sounds all right to me.

JUDGE FALCO. We agree.

LORD CHANCELLOR. Paragraphs (a), (b), and (c)—what alterations do you want?

GENERAL NIKITCHENKO. In all three articles we propose to leave out the headings, "The Crime of War" and other titles. The crime of war is, to be more precise, "the crime against peace", and we think the titles complicate things. We could just say "planning, initiating", et cetera, and then also say not of "any" international, but of "war in violation of international treaties".

LORD CHANCELLOR. Leave out "any" and—?

MR. TROYANOVSKY. And leave the general treaty for the renunciation of war.

LORD CHANCELLOR. I thought it rather convenient to have it in, but I don't think it matters a bit.

GENERAL NIKITCHENKO. We don't think that of great importance either.

PROFESSOR TRAININ. We think that from a theoretical point of view these titles are welcome, but to put them in a law would perhaps make it too vague.

MR. JUSTICE JACKSON. I think it is a very convenient designation. I may say it was suggested to me by an eminent scholar of international law. It would be a very convenient classification, and I think it would help the public understanding of what the difference is.

LORD CHANCELLOR. I think Professor Trainin's book treats aggression not as the crime of war but as a crime against peace, and I do think that if you do have a nomenclature it would be well to have a

nomenclature that comes from his book, and instead of calling it "crime of war", call it "crime against peace". I myself prefer to keep the nomenclature but to substitute for the "crime of war" the "crime against peace".

GENERAL NIKITCHENKO. We have no objections to that. Take out the word "any" and the reference to the general treaty.

LORD CHANCELLOR. That is all right with me.

MR. JUSTICE JACKSON. I don't think that is very serious impairment of the definition.

LORD CHANCELLOR. Then let us take (b).

GENERAL NIKITCHENKO. In this paragraph the words "but not be limited to" in our translation are very strange. I think they should be dropped and we should add "or deportation".

MR. JUSTICE JACKSON. The difficulty is in our rules for interpretation of statutes, and you will have at least one judge on the Tribunal who is accustomed to that interpretation. If you name a general category and then go on to specify, you are limited to your specifications. I would be quite willing to have it in translation in any way it makes sense to you, but I think it is quite important that you do make clear that the specifications are not the only things that you are reaching, because some of these crimes are quite unique and are not covered perhaps by general definition. Now, the deportation to slave labor—The reason I dropped "deportation to slave labor" was that there are other deportations that are just as objectionable as slave labor from my point of view, for example, deportations to compulsory prostitution, deportations just to get people out of the way to take their land, or deportations to concentration camps. It seemed to me that we limited the deportations. I would be quite willing to say "deportation to slave labor or for any other purpose".

GENERAL NIKITCHENKO. The words "but not be limited to" are not very important really to us. If you don't mind, we could drop them and I would in our translation say "and other crimes". As for your suggestion, "to slave labor and for any other purposes", that is all right.

LORD CHANCELLOR. I am afraid I must go to rehearse my part in the proceedings of the House of Lords at the opening of Parliament. Would you like to go on? You are so near agreement. If you want me to come again, I could be available this afternoon about 5:30 or tomorrow at 2:30; or perhaps, if the Attorney-General could go on representing us, you could get finished here.

The Lord Chancellor left and Sir David Maxwell Fyfe took the chair.

GENERAL NIKITCHENKO. We have just two more words here.

SIR DAVID MAXWELL FYFE. "Deportations to slave labor or for any other purpose"—and that is article (b). Article (c).

GENERAL NIKITCHENKO. Could we say "in order to accomplish" or something like that instead of "furtherance"?

JUDGE FALCO. I suggest "in execution".

MR. JUSTICE JACKSON. Is there objection in connection with that?

SIR DAVID MAXWELL FYFE. All agreed on "execution of"? What about the concluding paragraph?

MR. JUSTICE JACKSON. This concluding paragraph would take the place of article 9.

SIR DAVID MAXWELL FYFE. Article 9 is "organizers", and we go further now and say that they are not merely equal and responsible but are responsible for the acts of other persons.

MR. JUSTICE JACKSON. I think we shall have to do that in order to reach some of these things.

SIR DAVID MAXWELL FYFE. The only difference between the new draft and the old is that the new draft makes the point which Mr. Justice Jackson raises in the end of the discussion in his paper that we want to get to the leaders as well as to the rank and file.

GENERAL NIKITCHENKO. Could we say here also "execution" instead of "furtherance"?

SIR DAVID MAXWELL FYFE. That only leaves article 22. It is the one for which the Soviet Delegation had told us they would recommend Nürnberg and were awaiting instructions. Is there any word?

GENERAL NIKITCHENKO. We are prepared to agree to the first trial at Nürnberg, but we would like it considered that the administrative headquarters and the first meetings of the Tribunal and the prosecutors shall also take place in Berlin at a place to be designated by the Control Council. The first trial shall be held in Nürnberg and subsequent trials as we had it.

MR. JUSTICE JACKSON. That is the language we did agree on.

GENERAL NIKITCHENKO. "The Tribunal shall be located in Berlin—"

MR. JUSTICE JACKSON. We don't see just what you mean, as it is interpreted, in saying that "the Tribunal shall be located in Berlin" when it is going to sit elsewhere.

GENERAL NIKITCHENKO. We specify that the first trial would be in Nürnberg and subsequent trials in other places and that only the first meeting would take place in Berlin; so it does not limit us in any way.

MR. JUSTICE JACKSON. I agree, but I don't understand just how we can use the words "located in Berlin" if the judges are sitting in Nürnberg and other places. Perhaps we have a different idea.

PROFESSOR TRAININ. Because we do say that only the first meeting would take place there and we do say that the first trial would be in Nürnberg and subsequent trials in other cities, it seems to us that in Russian it would be quite clear that its permanent seat—its address—would be Berlin.

MR. JUSTICE JACKSON. If you use “permanent seat”, that would make clear that that is equivalent in our understanding to “headquarters”.

GENERAL NIKITCHENKO. Yes, the permanent seat of the Tribunal shall be at Berlin.

MR. JUSTICE JACKSON. We seem to have cleared up all points of difference now, and we need, next, to get the agreement in three languages so that we can execute it.

SIR THOMAS BARNES. Would it be best to have it run out as altered and checked by each delegation before it is translated?

GENERAL NIKITCHENKO. We have the technical work to do, and also in article 6 we took it upon our own personal responsibility to agree to Mr. Justice Jackson’s proposal. We still have to receive instructions on that score. Until we get the instructions, we could get going with the technical work of looking through the text.

MR. JUSTICE JACKSON. May I ask when you would expect instructions? I have been called to France and would not get back until Sunday night. Would you expect to be in a position to sign before Monday? If so, I shall forego the trip.

GENERAL NIKITCHENKO. We think we could get the text complete today and probably take a day to compare and have instructions tomorrow or the day after, Saturday.

MR. JUSTICE JACKSON. Since I have no Russian translator on my own staff, I would want our Embassy to check the translation.

SIR DAVID MAXWELL FYFE. Then we shall wait until Monday for signature.

Sir David then thanked his colleagues for their cooperation and friendship throughout the Conference while he was presiding officer and said that his connection with the work had been a very great pleasure.

The Conference was adjourned.

LX. Agreement and Charter, August 8, 1945

AGREEMENT by the Government of the UNITED STATES OF AMERICA, the Provisional Government of the FRENCH REPUBLIC, the Government of the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND and the Government of the UNION of SOVIET SOCIALIST REPUBLICS for the Prosecution and Punishment of the MAJOR WAR CRIMINALS of the EUROPEAN AXIS

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German Officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will 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 that will be created therein;

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

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

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

Article 6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

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

IN WITNESS WHEREOF the Undersigned have signed the present Agreement.

DONE in quadruplicate in London this 8th day of August 1945 each in English, French and Russian, and each text to have equal authenticity.

For the Government of the United States of America

ROBERT H. JACKSON

For the Provisional Government of the French Republic

ROBERT FALCO

For the Government of the United Kingdom of Great Britain
and Northern Ireland

JOWITT C.

For the Government of the Union of Soviet Socialist Re-
publics

I. NIKITCHENKO

A. TRAININ

Charter of the International Military Tribunal

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1. In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5. In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of

¹ See protocol [LXI] for correction of this paragraph.

State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III. COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes :

- (a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
- (b) to settle the final designation of major war criminals to be tried by the Tribunal,
- (c) to approve the Indictment and the documents to be submitted therewith,
- (d) to lodge the Indictment and the accompanying documents with the Tribunal,
- (e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation : provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties :

- (a) investigation, collection and production before or at the Trial of all necessary evidence,
- (b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
- (c) the preliminary examination of all necessary witnesses and of the Defendants,
- (d) to act as prosecutor at the Trial,
- (e) to appoint representatives to carry out such duties as may be assigned to them,
- (f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. FAIR TRIAL FOR DEFENDANTS

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed :

- (a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.
- (b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.
- (c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
- (d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.
- (e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17. The Tribunal shall have the power

- (a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,
- (b) to interrogate any Defendant,
- (c) to require the production of documents and other evidentiary material,
- (d) to administer oaths to witnesses,
- (e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18. The Tribunal shall

- (a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,
- (b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

- (c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24. The proceedings at the Trial shall take the following course:

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty".
- (c) The prosecution shall make an opening statement.
- (d) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

- (e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.
- (f) The Tribunal may put any question to any witness and to any Defendant, at any time.
- (g) The Prosecution and the Defense shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
- (h) The Defense shall address the court.
- (i) The Prosecution shall address the court.
- (j) Each Defendant may make a statement to the Tribunal.
- (k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. JUDGMENT AND SENTENCE

Article 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27. The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. EXPENSES

Article 30. The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

LXI. Protocol to Agreement and Charter,
October 6, 1945

PROTOCOL

Whereas an Agreement and Charter regarding the Prosecution of War Criminals was signed in London on the 8th August 1945, in the English, French, and Russian languages,

And whereas a discrepancy has been found to exist between the originals of Article 6, paragraph (c), of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, to wit, the semi-colon in Article 6, paragraph (c), of the Charter between the words "war" and "or", as carried in the English and French texts, is a comma in the Russian text,

And whereas it is desired to rectify this discrepancy:

Now, THEREFORE, the undersigned, signatories of the said Agreement on behalf of their respective Governments, duly authorized thereto, have agreed that Article 6, paragraph (c), of the Charter in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

- c) LES CRIMES CONTRE L'HUMANITE: c'est à dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.

IN WITNESS WHEREOF the Undersigned have signed the present Protocol.

DONE in quadruplicate in Berlin this 6th day of October, 1945, each in English, French, and Russian, and each text to have equal authenticity.

For the Government of the United States of America

ROBERT H. JACKSON

For the Provisional Government of the French Republic

F. DE MENTHON

For the Government of the United Kingdom of Great Britain and Northern Ireland

HARTLEY SHAWCROSS

For the Government of the Union of Soviet Socialist Republics

R. RUDENKO

LXII. Executive Order by President Truman, January 16, 1946

EXECUTIVE ORDER 9679: Amendment of EXECUTIVE ORDER No. 9547 of May 2, 1945, Entitled "PROVIDING FOR REPRESENTATION OF THE UNITED STATES in Preparing and PROSECUTING CHARGES OF ATROCITIES AND WAR CRIMES Against the Leaders of the EUROPEAN AXIS POWERS and THEIR PRINCIPAL AGENTS AND ACCESSORIES"

By virtue of the authority vested in me as President and Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, it is ordered as follows:

1. In addition to the authority vested in the Representative of the United States and its Chief of Counsel by Paragraph 1 of Executive Order No. 9547 of May 2, 1945, to prepare and prosecute charges of atrocities and war crimes against such of the leaders of the European Axis powers and their accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal, such Representative and Chief of Counsel shall have the authority to proceed before United States military or occupation tribunals, in proper cases, against other Axis adherents, including but not limited to cases against members of groups and organizations declared criminal by the said international military tribunal.

2. The present Representative and Chief of Counsel is authorized to designate a Deputy Chief of Counsel, to whom he may assign responsibility for organizing and planning the prosecution of charges of atrocities and war crimes, other than those now being prosecuted as Case No. 1 in the international military tribunal, and, as he may be directed by the Chief of Counsel, for conducting the prosecution of such charges of atrocities and war crimes.

3. Upon vacation of office by the present Representative and Chief of Counsel, the functions, duties, and powers of the Representative of the United States and its Chief of Counsel, as specified in the said Executive Order No. 9547 of May 2, 1945, as amended by this order, shall be vested in a Chief of Counsel for War Crimes to be appointed

by the United States Military Governor for Germany or by his successor.

4. The said Executive Order No. 9547 of May 2, 1945, is amended accordingly.

HARRY S. TRUMAN

The White House,
January 16, 1946.

LXIII. Report to the President by Mr. Justice Jackson, October 7, 1946

October 7, 1946.

THE PRESIDENT,
The White House,
Washington, D. C.

MY DEAR MR. PRESIDENT:

I have the honor to report as to the duties which you delegated to me on May 2, 1945 in connection with the prosecution of major Nazi war criminals.

The International Military Tribunal sitting at Nurnberg, Germany on 30 September and 1 October, 1946 rendered judgment in the first international criminal assizes in history. It found 19 of the 22 defendants guilty on one or more of the counts of the Indictment, and acquitted 3. It sentenced 12 to death by hanging, 3 to imprisonment for life, and the four others to terms of 10 to 20 years imprisonment.

The Tribunal also declared 4 Nazi organizations to have been criminal in character. These are: The Leadership Corps of the Nazi Party; Die Schutzstaffeln, known as the SS; Die Sicherheitsdienst, known as the SD; and Die Geheimstaatspolizie, known as the Gestapo, or Secret State Police. It declined to make that finding as to Die Sturmabteilungen, known as the SA; the Reichscabinet, and the General Staff and High Command. The latter was solely because the structure of the particular group was considered by the Tribunal to be too loose to constitute a coherent "group" or "organization," and was not because of any doubt of its criminality in war plotting. In its judgment the Tribunal condemned the officers who performed General Staff and High Command functions as "a ruthless military caste" and said they were "responsible in large measure for the miseries and suffering that have fallen on millions of men, women and children. They have been a disgrace to the honorable profession of arms." This finding should dispose of any fear that we were prosecuting soldiers just because they fought for their country and lost, but the failure to hold the General Staff to be a criminal organization is regrettable.

The magnitude of the task which, with this judgment, has been brought to conclusion may be suggested statistically: The trial began on November 20, 1945 and occupied 216 days of trial time. 33 witnesses were called and examined for the prosecution. 61 witnesses and 19 defendants testified for the defense; 143 additional witnesses gave testi-

mony by interrogatories for the defense. The proceedings were conducted and recorded in four languages—English, German, French, and Russian—and daily transcripts in the language of his choice was provided for each prosecuting staff and all counsel for defendants. The English transcript of the proceedings covers over 17,000 pages. All proceedings were sound-reported in the original language used.

In preparation for the trial over 100,000 captured German documents were screened or examined and about 10,000 were selected for intensive examination as having probable evidentiary value. Of these, about 4,000 were translated into four languages and used, in whole or in part, in the trial as exhibits. Millions of feet of captured moving picture film were examined and over 100,000 feet brought to Nurnberg. Relevant sections were prepared and introduced as exhibits. Over 25,000 captured still photographs were brought to Nurnberg, together with Hitler's personal photographer who took most of them. More than 1,800 were selected and prepared for use as exhibits. The Tribunal, in its judgment, states: "The case, therefore, against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases." The English translations of most of the documents are now being published by the Departments of State and War in eight volumes and will be a valuable and permanent source for the war history.¹ As soon as funds are available, additional volumes will be published so that the entire documentary aspect of the trial—prosecution and defense—will be readily available.

As authorized by your Executive Order, it was my policy to borrow professional help from Government Departments and agencies so far as possible. The War Department was the heaviest contributor, but many loans were also made by the State, Justice, and Navy Departments and, early, by the Office of Strategic Services. All have responded generously to my requests for assistance. The United States staff directly engaged on the case at Nurnberg, including lawyers, secretaries, interpreters, translators, and clerical help numbered at its peak 654, 365 being civilians and 289 military personnel. British, Soviet and French delegations aggregated approximately the same number. Nineteen adhering nations also sent representatives, which added thirty to fifty persons to those actively interested in the case. The press and radio had a maximum of 249 accredited representatives who reported the proceedings to all parts of the world. During the trial over 60,000 visitors' permits were issued, but there is a considerable and unknown amount of duplication as a visitor was required to have a separate permit for each session attended. Guests included

¹ *Nazi Conspiracy and Aggression*, vols. I-VIII, Supplements A and B, Washington, 1946-48.

leading statesmen, jurists, and lawyers, military and naval officers, writers, and invited representative Germans.

On the United States fell the obligations of host nation at Nurnberg. The staffs of all nations, the press, and visitors were provided for by the United States Army. It was done in a ruined city and among an enemy population. Utilities, communications, transport, and housing had been destroyed. The Courthouse was untenable until extensively repaired. The Army provided air and rail transportation, operated a motor pool for local transportation, set up local and long distance communications service for all delegations and the press, and billeted all engaged in the work. It operated messes and furnished food for all, the Courthouse cafeteria often serving as many as 1,500 lunches on Court days. The United States also provided security for prisoners, judges, and prosecution, furnished administrative services, and provided such facilities as photostat, mimeograph, and sound recording. Over 30,000 photostats, about fifty million pages of typed matter, and more than 4,000 record discs were produced. The Army also met indirect requirements such as dispensary and hospital, shipping, postal, post exchange, and other servicing. It was necessary to set up for this personnel every facility not only for working, but for living as well, for the community itself afforded nothing. The Theatre Commander and his staff, Military Government officials, area commanders and their staffs, and troops were cordially and tirelessly cooperative in meeting our heavy requirements under unusual difficulties and had the commendation, not only of the American staff, but of all others.

It is safe to say that no litigation approaching this in magnitude has ever been attempted. I trust my pride will be pardonable in pointing out that this gigantic trial was organized and ready to start the evidence on November 20, 1945—less than seven months after I was appointed and after the surrender of Germany. It was concluded in less time than many litigations in the regularly established Courts of this country which proceed in one language instead of four. If it were not that the comparison might be deemed invidious, I could cite many anti-trust actions, rate cases, original cases in the United States Supreme Court, and other large litigations that have taken much longer to try.

In this connection it should be noted that we decided to install facilities for simultaneous interpretation of the proceedings into four languages. This was done against the advice of professional interpreters of the old school that it "would not work." It does work, and without it the trial could not have been accomplished in this time, if at all. To have had three successive translations of each question, and then three of each answer, and to have had each speech redelivered three times in different languages after the first delivery finished,

would have been an intolerable waste of time. The system we used makes one almost unaware of the language barrier so rapidly is every word made available in each language.

II.

Although my personal undertaking is at an end, any report would be incomplete and misleading which failed to take account of the general war crimes work that remains undone and the heavy burden that falls to successors in this work. A very large number of Germans who have participated in the crimes remains unpunished. There are many industrialists, militarists, politicians, diplomats, and police officials whose guilt does not differ from those who have been convicted except that their parts were at lower levels and have been less conspicuous.

Under your Executive Order of January 16, 1946, the war crimes functions devolve upon Military Government upon my retirement. At the time this order was signed it was agreed between Military Government and myself that I would at once name Brigadier General Telford Taylor as deputy in charge of preparing subsequent proceedings, and that upon my retirement he would be named to take over the war crimes prosecution on behalf of Military Government. He has assembled a staff and prepared a program of prosecutions against representatives of all the important segments of the Third Reich including a considerable number of industrialists and financiers, leading cabinet ministers, top SS and police officials, and militarists. Careful analysis is being made of the Tribunal's decision to determine any effects of the acquittal of Schacht and Von Papen upon this plan of prosecution of industrialists and financiers who are clearly subject to prosecution on such specific charges as the use of slave labor.

The unsettled question is by what method these should be tried. The most expeditious method of trial and the one that will cost the United States the least in money and in manpower is that each of the occupying powers assume responsibility for the trial within its own zone of the prisoners in its own custody. Most of these defendants can be charged with single and specific crimes which will not involve a repetition of the whole history of the Nazi conspiracy. The trials can be conducted in two languages instead of four, and since all of the judges in any one trial would be of a single legal system no time would be lost adjusting different systems of procedure.

A four-power, four-language international trial is inevitably the slowest and most costly method of procedure. The chief purposes of this extraordinary and difficult method of trial have been largely accomplished, as I shall later point out.

There is neither moral nor legal obligation on the United States to undertake another trial of this character. While the International

Agreement makes provision for a second trial, minutes of the negotiations will show that I was at all times candid to the point of being blunt in telling the conference that the United States would expect one trial of the top criminals to suffice to document the war and to establish the principles for which we contended, and that we would make no commitment to engage in another.

It has been suggested by some of our Allies that another international trial of industrialists be held. The United States proposed to try in the first trial not only Alfried Krupp, but several other industrialists and cartel officials. Our proposal was defeated by the unanimous vote of our three Allies. After indictment, when it appeared that the elder Krupp was too ill to be tried, the United States immediately moved that Alfried Krupp be added as a defendant and tried for the crimes which he had committed as chief owner and president of the Krupp armament works. This was likewise defeated by the combined vote of all our Allies. Later, the Soviet and French joined in a motion to include Krupp, but it was denied by the Tribunal. This is not recited in criticism of my associates; it was their view that the number of defendants was already sufficiently large and that to add others would delay or prolong the trial. However if they were unwilling to take the additional time necessary to try industrialists in this case, it does not create an obligation on the United States to assume the burdens of a second international trial.

The quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out in the event that such is your decision. Of course, appropriate notifications should be given to the nations associated with us in the first trial.²

Another item of unfinished business concerns the permanent custody of captured documents. In the hands of the prosecution and of various agencies there are large numbers of documents in addition to those that have been used which have not been examined or translated but which probably contain much valuable information. These are the property of the United States. They should be collected, classified, and indexed. Some of them may hold special interest for particular agencies; all of them should be available ultimately to the public. Unless some one qualified agency, such as the Library of Congress, is made responsible for this work and authorized to take custody on behalf of the United States, there is considerable danger that these documents will become scattered, destroyed, or buried in specialized archives. The matter is of such importance as to warrant calling it to your attention.

² This recommendation was carried into effect by informal notification to other signatories on or about Jan. 22, 1947.

III.

The vital question in which you and the country are interested is whether the results of this trial justify this heavy expenditure of effort. While the sentences imposed upon individuals hold dramatic interest, and while the acquittals, especially of Schacht and Von Papen, are regrettable, the importance of this case is not measurable in terms of the personal fate of any of the defendants who were already broken and discredited men. We are too close to the trial to appraise its long-range effects. The only criterion of success presently applicable is the short-range test as to whether we have done what we set out to do. This was outlined in my report to you on June 7, 1945. By this standard we have succeeded.

The importance of the trial lies in the principles to which the Four Powers became committed by the Agreement, by their participation in the prosecution, and by the judgment rendered by the Tribunal. What has been accomplished may be summarized as follows:

1. We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible. This agreement also won the adherence of nineteen additional nations and represents the combined judgments of the overwhelming majority of civilized people. It is a basic charter in the International Law of the future.

2. We have also incorporated its principles into a judicial precedent. "The power of the precedent," Mr. Justice Cardozo said, "is the power of the beaten path." One of the chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction.

3. The Agreement devised a workable procedure for the trial of crimes which reconciled the basic conflicts in Anglo-American, French, and Soviet procedures. In matters of procedure, legal systems differ more than in substantive law. But the Charter set up a few simple rules which assured all of the elements of fair and full hearing, including counsel for the defense. Representatives of the Four Pow-

ers, both on the Bench and at the Prosecutors' tables, have had to carry out that Agreement in day-to-day cooperation for more than a year. The law is a contentious profession and a litigation offers countless occasions for differences even among lawyers who represent the same clients and are trained in a single system of law. When we add the diversities of interests that exist among our four nations, and the differences in tradition, viewpoint and language, it will be seen that our cooperation was beset with real difficulties. My colleagues, representing the United Kingdom, France, and the Soviet Union, exemplified the best professional tradition of their countries and have earned our gratitude for the patience, generosity, good will and professional ability which they brought to the task. It would be idle to pretend that we have not had moments of difference and vexation, but the steadfast purpose of all delegations that this first international trial should prove the possibility of successful international cooperation in use of the litigation process, always overcame transient irritations.

4. In a world torn with hatreds and suspicions where passions are stirred by the "frantic boast and foolish word," the Four Powers have given the example of submitting their grievances against these men to a dispassionate inquiry on legal evidence. The atmosphere of the Tribunal never failed to make a strong and favorable impression on visitors from all parts of the world because of its calmness and the patience and attentiveness of every Member and Alternate on the Tribunal. The nations have given the example of leaving punishment of individuals to the determination of independent judges, guided by principles of law, after hearing all of the evidence for the defense as well as the prosecution. It is not too much to hope that this example of full and fair hearing, and tranquil and discriminating judgment will do something toward strengthening the processes of justice in many countries.

5. We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people. No history of this era can be entitled to authority which fails to take into account the record of Nurnberg. While an effort was made by Goering and others to portray themselves as "glowing patriots," their admitted crimes of violence and meanness, of greed and graft, leave no ground for future admiration of their characters and their fate leaves no incentive to emulation of their examples.

6. It has been well said that this trial is the world's first post mortem examination of a totalitarian regime. In this trial, the Nazis themselves with Machiavellian shamelessness exposed their methods of

subverting people's liberties and establishing their dictatorship. The record is a merciless expose of the cruel and sordid methods by which a militant minority seized power, suppressed opposition, set up secret political police and concentration camps. They resorted to legal devices such as "protective custody," which Goering frankly said meant the arrest of people not because they had committed any crime but because of acts it was suspected they might commit if left at liberty. They destroyed all judicial remedies for the citizen and all protections against terrorism. The record discloses the early symptoms of dictatorship and shows that it is only in its incipient stages that it can be brought under control. And the testimony records the German example that the destruction of opposition produces eventual deterioration in the government that does it. By progressive intolerance a dictatorship by its very nature becomes so arbitrary that it cannot tolerate opposition, even when it consists merely of the correction of misinformation or the communication to its highest officers of unwelcome intelligence. It was really the recoil of the Nazi blows at liberty that destroyed the Nazi regime. They struck down freedom of speech and press and other freedoms which pass as ordinary civil rights with us, so thoroughly that not even its highest officers dared to warn the people or the Fuehrer that they were taking the road to destruction. The Nurnberg trial has put that handwriting on the wall for the oppressor as well as the oppressed to read.

Of course, it would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, just as it would be extravagant to claim that our federal laws make federal crime impossible. But we cannot doubt that they strengthen the bulwarks of peace and tolerance. The four nations through their prosecutors and through their representatives on the Tribunal, have enunciated standards of conduct which bring new hope to men of good will and from which future statesmen will not lightly depart. These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them.

By the Agreement and this trial we have put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution. In the present depressing world outlook it is possible that the Nurnberg trial may constitute the most important moral advance to grow out of this war. The trial and decision by which the four nations have forfeited the lives of some of the most powerful political and military leaders of Germany because they have violated fundamental International Law, does more than anything in our time to give to International Law what Woodrow Wilson described as "the kind of vitality it can only have if it is a real expression of our moral judgment."

I hereby resign my commission as your representative and Chief of Counsel for the United States. In its execution I have had the help of many able men and women, too many to mention individually, who have made personal sacrifice to carry on a work in which they earnestly believed. I also want to express deep personal appreciation for this opportunity to do what I believe to be a constructive work for the peace of the world and for the better protection of persecuted peoples. It was, perhaps, the greatest opportunity ever presented to an American lawyer. In pursuit of it many mistakes have been made and many inadequacies must be confessed. I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future.

Respectfully submitted,

ROBERT H. JACKSON

ROSTER OF REPRESENTATIVES AND ASSISTANTS

International Conference on Military Trials, London, 1945

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Representative: Sir David Maxwell Fyfe, Attorney-General
Lord Jowitt, Lord Chancellor¹

Assistants: G. D. Roberts, K.C.

Sir Thomas Barnes, Treasury-Solicitor
Gen. Lord Robert Clive Bridgeman, War Office
Sir Basil Newton, Foreign Office
Patrick Dean, Foreign Office
Robert Scott Fox, Foreign Office
George Coldstream, Lord Chancellor's Office
R. A. Clyde, Secretary, Law Officer's Department
E. G. Robey, Department of Director of Public Prosecutions
E. J. Passant, Foreign Office
M. E. Reed, Law Officer's Department

PROVISIONAL GOVERNMENT OF FRANCE

Representative: Robert Falco, Judge, Cour de Cassation

Assistants: André Gros, United Nations War Crimes Commission
Mrs. Stella Mackenzie, Secretary to Professor Gros

UNION OF SOVIET SOCIALIST REPUBLICS

Representatives: Gen. I. T. Nikitchenko, Vice President, Supreme Court
A. N. Trainin, Member, Soviet Academy of Sciences

Assistants: Constantine Koukin, Minister Plenipotentiary and Counsellor of Embassy of Soviet Union in Great Britain
O. A. Troyanovsky, Interpreter

UNITED STATES OF AMERICA

Representative: Robert H. Jackson, Associate Justice, Supreme Court

Assistants: Maj. Gen. William J. Donovan, Director, Office of Strategic Services
Col. Murray C. Bernays, United States Army
Sidney S. Alderman, Associate Counsel
Francis Shea, Assistant Attorney General
William Dwight Whitney, Associate Counsel
Lt. Gordon Dean, United States Navy
Lt. James Donovan, United States Navy
Ens. William E. Jackson, United States Navy
Maj. Lawrence Coleman, United States Army
Mrs. Elsie L. Douglas, Secretary to Mr. Justice Jackson

¹ Sir David was the British Representative for all but the closing session. With the change in the British Government, he was replaced by the Lord Chancellor for the session of Aug. 2.