UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

THE QUESTION OF THE JURISDICTION OF THE
UNITED NATIONS WAR CRIMES COMMISSION
ON CRIMES COMMITTED IN ETHIOPIA DURING THE ITALIAN-ABYSSINIAN WAR
(Referred to Committee III by the Commission on 19th July, 1946.)

Note by the Secretary to Committee III.

(1) The original terms of reference of the Commission agreed upon at the meeting of the Allied and Dominions representatives, held at the Foreign Office, London, on 20th October, 1943, provided that the Commission should serve two primary purposes:

(i) It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible,

(ii) It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.

The Lord Chancellor (Lord Simon) proposed that the meeting should take a decision to set up the Commission forthwith but that the question of the possible expansion of the scope of these investigations and functions should be reserved for future consideration. This was unanimously agreed.

During the debate preceding this decision, the Chinese Ambassador said that, while his government were in full agreement with the proposal to establish the Commission, they wished to make it clear that they reserved the right after the Commission has been set up to raise the question of the period of time which its investigations should cover in so far as war crimes committed in China were concerned. In this connection Dr. Wellington Koo pointed out that China had suffered the consequences of enemy invasion for a longer period than the other Governments represented at the meeting. The meeting took note of this statement.

(2) From the terms of reference, in connection with the statement by the Chinese Ambassador, which was taken note of, it appears that although the Governments who set up the Commission had, no doubt, in their minds crimes committed during the war, which was then raging, no express limitation to the effect that crimes committed prior to the beginning of the second World War should be excluded from the Commission's jurisdiction was made.

The question appears to be still open for decision by the members of the Commission.
With regard to Italian crimes committed in Ethiopia in 1935/1936, two questions therefore arise:

(a) Are the terms of reference of the Commission to be construed to the effect that they only cover war crimes committed during the war which was raging in 1943, the Second World War, or are the terms of reference of the Commission not so restricted?

(b) In case the terms of reference are restricted to war crimes committed during the Second World War; is the Italian-Abyssinian War of 1935/36 a war different from the Second World War or does it, like the Japanese-Chinese "incident", form part of the Second World War, having been merged into it?

The first of the two questions posed in the preceding paragraph appears to be not a question of law, but of policy. The position as to the period of time which the Commission's investigations should cover, was expressly left over for a later decision by the Commission or its member governments.

With regard to the second question raised in paragraph 3 of this paper, viz. whether the Italian-Abyssinian war was a war different from the Second World War, this writer has not had an opportunity of examining all the relevant documents for the purpose of this preliminary report. He submits, therefore, as a provisional basis for further discussions by Committee III, the following:

Before 1939, it was generally understood that the Italian-Abyssinian War had been concluded by the declaration of Ethiopia and by the annexation of Ethiopia by Italy. The question arose at the time whether the Italian Proclamation of Annexation of 9th May 1936 was premature, but, eventually, the Great Powers acquiesced in the conquest of Abyssinia and it was recognised by most governments de jure and by all governments de facto.

In, say, 1938 or 1939, the question whether the Italian-Abyssinian war had come to an end would unambiguously have had to be answered in the affirmative.

The question remains whether later events have with retrospective effect, brought about a change in this position.

In the Agreement between the United Kingdom and Ethiopia of 31st January 1942, the government of the United Kingdom recognised that Ethiopia was then a free and independent State. ("Whereas the Government of the United Kingdom recognise that Ethiopia is now a free and independent State and His Majesty the Emperor, Haile Sellassié I, is its lawful Ruler, and, the reconquest of Ethiopia being now complete, wish to help His Majesty the Emperor to re-establish His Government and to assist in providing for the immediate needs of the country") (Preamble)

Diplomatic relations between the United Kingdom and Ethiopia were re-established (Art.I), the Emperor of Ethiopia agreed to enact laws against trading with the enemy (Art.VI), he agreed that all prisoners of war shall be handed over to the custody of the British Military Authorities (Art.VII). The Government of the United Kingdom promised to use their best endeavours:
(a) To secure the return of Ethiopians in Italian hands, and
(b) To secure the return of artistic works, religious property
and the like removed to Italy and belonging to His
Majesty the Emperor, the Ethiopian State, or local or
religious bodies. (Art.VIII).

Simultaneously, a Military Convention was concluded "to provide for
certain matters relating to mutual assistance as Allies in the struggle
against the common enemy". In the Military Convention, it was agreed,
inter alia, that the appropriate British authority will, on receipt of an
application signed by the appropriate official of the Ethiopian Ministry
of Justice, surrender any person not being a member of the British Forces
who is within any British cantonment or reserved area, and against whom
a warrant of arrest has been issued, in respect of any offence triable by
an Ethiopian Court. (Art.16 of the Military Convention).

The 1942 Agreement and Military Convention were superseded by an
Agreement concluded on 19th December 1944. In this agreement the
Ethiopian government agreed to certain provisions "in order as an Ally to
contribute to the effective prosecution of the war and without prejudice
to their underlying sovereignty". (Art.VII). The contracting parties
undertook to collaborate in arrangements for the internment or expulsion
of enemy aliens or ex-enemy aliens (Art.X.)

The quoted provisions of the 1942 and 1944 Agreements between the
United Kingdom and Ethiopia did not, in this writer's opinion, amount to
a complete and unqualified reversal, with retrospective effect, of the
position brought about in 1936. The position at the time prior to 1942
was left where it was and the British Government only recognised that
Ethiopia was then, namely in 1942, a free and independent State waging
war against "a common enemy".

The 1942 and 1944 Agreements are, therefore, not irreconcilable with
the proposition that the 1935/1936 war between Italy and Abyssinia was
and has remained a war different from the Second World War.

From the Ethiopian point of view the situation is probably different
because the Ethiopian government has not recognised the annexation of
Ethiopia by Italy and the Ethiopian Emperor in the Preamble to the 1942
Agreement recites his coronation pledges "not to surrender his sovereignty
or the independence of his people".

It therefore appears that also the second question, (b), contained
in paragraph 3 of this paper is not a question of law stricto sensu, but a
question governed by a political decision.

It was indicated by a member of the Commission, (Dr. Zivkovic) in the
Commission meeting held on 19th July 1946, that the thesis that the whole
war against the "Axis" is one war, has been adopted by the Great Powers
in the London Agreement of 8th August 1945, which deals with the prosecu-
tion and punishment of the major war criminals of the European Axis.
It should be added that the use of the term "Axis" is more a pronounce-
ment of a political view than the laying down of a rule of law. As a
legal notion, the "Axis" did not exist in 1935/36. The tripartite pact
of Germany, Italy and Japan was formally concluded in 1939. But it
must, on the other hand, be admitted, that the use of the term "European
Axis" indicates the intention to treat the Axis and the criminal
activities of its representatives as one whole, at least as far as the
task of retribution is concerned.

The question dealt with in this paper, namely whether crimes
committed by Italians in Abyssinia in 1935/36 fall under the jurisdiction
of the Commission may also be approached from a slightly different angle,
namely by analysing the term "war crimes" which is used both in the

terms of reference of the Commission and in a great number of other international documents, e.g. in the Charter of the International Military Tribunal.

In the meeting of the Commission held on 30th January 1946, (M.93), a motion was approved by 9 votes, with 6 abstentions, and accordingly carried, to the effect that crimes against peace and against humanity, as referred to in the Four-Power Agreement of 8th August 1945, are war crimes within the jurisdiction of the Commission. The term "crimes against humanity" (Article 6(c) of the Charter) comprises murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war. For this it follows that crimes against humanity, even if committed before the war, fall within the jurisdiction of the Commission. This does not necessarily mean that crimes against humanity committed during another war are also within the jurisdiction of the Commission, although a conclusion to this effect would not appear to be illogical.

It must be admitted, however, that this line of thought is to a certain extent, artificial. Nor would the consequences be satisfactory. Crimes against humanity committed against the Abyssinian civilian population would be subject to the Commission's jurisdiction, violations of the laws and customs of war, which are not simultaneously crimes against humanity, would remain outside its terms of reference. In other words: war crimes in the narrower sense would be excluded from the Commission's jurisdiction, while war crimes in the wider sense would fall under it.

The practical application would also show unsatisfactory features. The Commission would have to list persons accused of having committed crimes against Abyssinian civilians, but it would have to reject charges regarding similar crimes committed against members of the Abyssinian Armed Forces.

Finally, attention may be drawn to a provision, issued by the four Great Powers, for the territory of Germany under the jurisdiction of the Allied Control Council. This provision, (Law No.10 published in Military Government Gazette (Germany) No.5), makes the Moscow Declaration and the Four Power Agreement part of the territorial law of Germany and may certainly be regarded as a document explanatory of the Four Power Agreement. Article II paragraph 5 of this Law provides that in any trial or prosecution for a crime therein referred to (which includes war crimes in the narrower sense, as well as crimes against peace and crimes against humanity) the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30th January 1933 to 1st July 1945. This provision obviously implies that war crimes in the wider sense, including crimes against peace and crimes against humanity, committed even before the 30th January 1933, are within the scope of the retributive action of the Allied Nations.