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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE TWENTY-NINTH MEETING

held at the Palais des Nations, Geneva,
on Thursday, 30 August 1951, at 9 a.m.

CONTENTS:

Draft statute for an international criminal court, prepared by the Drafting Sub-Committee (continued)

Present:

Chairman: Mr. MORRIS

Members:

Australia	Mr. WYNES
Brazil	Mr. AMADO
China	Mr. WANG
Cuba	Mr. del VALLE
Denmark	Mr. SÖRENSEN
France	Mr. PINTO
Iran	Mr. KHOSROVANI
Israel	Mr. COHN
Netherlands	Mr. RÖLING
Pakistan	Mr. MUNIR
Syria	Mr. TARAZI
United Kingdom of Great Britain and Northern Ireland	Mr. JONES
United States of America	Mr. MAKTOS
Uruguay	Mr. PINEYRO CHAIN

Secretariat:

Mr. Liang — Secretary to the Committee

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, PREPARED BY THE DRAFTING SUB-COMMITTEE (continued) (A/AC.48/1, A/AC.48/L.17, A/AC.48/L.21)

Chapter V: Procedure (continued)

Article 39 - Publicity of Hearings

1. The CHAIRMAN requested the Committee to resume its consideration of the draft statute (A/AC.48/L.17) for an international criminal court, prepared by the Drafting Sub-Committee.

2. There being no comment on article 39, the CHAIRMAN put it to the vote.

Article 39 was adopted by 8 votes to none with 1 abstention.

Article 40 - Warrants of Arrest

3. Mr. SØRENSEN (Denmark), Rapporteur, said that it had been considered desirable to broaden the provision in article 40 so as to cover the issue of warrants of arrest in respect not only of accused, but also of other persons for whom the issue of a warrant of arrest might be justified, as it might prove necessary in certain circumstances for the court to be able to do so in order to have brought before it not only witnesses, but also accused enjoying provisional liberty during the course of the trial.

4. Mr. WANG (China) proposed that article 40 should be amplified by the addition of a second sentence reading:

> "Such warrants shall be executed in accordance with conventions relating to the matter."

His proposal would have the effect of emphasizing exactly what was intended, and followed the wording used in article 50 dealing with the execution of sentences.

5. Mr. COHN (Israel) observed that the point made by the Chinese representative was already covered by paragraph 2 of article 31.

6. Mr. PINTO (France) saw no point in the addition proposed by the Chinese representative. Article 40 recognized in principle the power of the court to issue warrants of arrest. Any commentary on that statement would introduce an element of confusion.

The Chinese amendment to article 40 was rejected by 5 votes to 1 with 3 abstentions.

7. The CHAIRMAN put article 40, as it stood, to the vote.

Article 40 was unanimously adopted.

Article 41 - Provisional Liberty of Accused

8. There being no comment, the CHAIRMAN put article 41 to the vote.

Article 41 was unanimously adopted.

Article 42 - Powers of the Court

9. Mr. RÖLING (Netherlands) recalled that when the Committee had discussed the question of the powers of the court, he had proposed the inclusion of an article in the statute reading:

> "The Court may dismiss at any stage of the proceedings any case in which the Court is satisfied that no fair trial can be had."

That proposal had been rejected, 3 votes having been cast in its favour and 3 against, while 6 members had abstained.(1) Two members, in explaining their votes, had stated that they were not opposed to the underlying idea of such a provision, but considered that it might be possible to draft a comprehensive article providing guarantees for a fair trial.(2) The draft statute under consideration contained many rules relating to such guarantees, but no provision contained therein would enable the court to guarantee a fair trial if governments withheld evidence or if judges found it impossible, because of threats or of the activities of the Press, to ensure that the accused be given a fair trial. Consequently, he considered it necessary to give the court such discretionary powers as those envisaged in his proposal, and therefore reintroduced the latter for the Committee's consideration.

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(1) See Summary Record of the 19th meeting (A/AC.48/SR.19), paragraph 14.

(2) Ibid., paragraphs 16 and 17.

10. Replying to the CHAIRMAN, he said that he would have no objection to the inclusion of that provision under article 43 (Withdrawal of Prosecution).

11. The CHAIRMAN enquired whether the Netherlands representative had considered the question of dismissal of a case by the court, in the light of its being with or without prejudice to subsequent trials.

12. Mr. RÖLING (Netherlands) said that, in view of the Chairman's comment, he would add the following sentence to his proposal:

"Such a dismissal may be stated to be without prejudice to a future prosecution".

13. Mr. SÖRENSEN (Denmark) fully agreed with the substance of the Netherlands proposal, but believed that its underlying idea was already covered by the first phrase of article 42 which read: "The Court shall have the powers necessary to the proper conduct of the trial". He would, however, support the inclusion of a specific text such as that proposed by the Netherlands representative if the Committee generally considered that course desirable. In his view, however, such a provision would be more appropriately inserted in article 42 than in article 43, for the withdrawal of a prosecution was an entirely different matter.

14. Mr. COHN (Israel) said he would support the Netherlands proposal, but moved that it should form the subject of a separate article to be placed between articles 42 and 43.

15. Mr. PINTO (France) supported the Danish representative's remarks. The powers necessary to stop the trial, even in the circumstances mentioned by the Netherlands representative, were already given to the court under article 42. Hence the proposed addition seemed superfluous. Apart from that, it would be difficult to frame the provision and to find a suitable place for it in the draft statute.

16. Replying to a question put by Mr. WYNES (Australia), Mr. RÖLING (Netherlands) explained that at the Tokyo Trial, in some cases the cross-examination of witnesses who had testified by affidavit had been made impossible owing to the unwillingness of States which held them as prisoners of war, to bring them before the court. In his view, whether or not there was clear evidence of guilt, the accused must be given every opportunity of producing evidence to prove his innocence and the court should therefore be in a position to bring such limited pressure to bear upon governments, consisting in its power to dismiss a case if those governments failed to co-operate in ensuring a fair trial.

17. Replying to the CHAIRMAN, he confirmed that he had no objection to the inclusion of the word "then" before the word "had" in the first sentence of his proposal. He also accepted a suggestion by Mr. COHN (Israel) that the second sentence should be amended to read:

> "In the event of such dismissal, the Court shall discharge the accused and may also acquit him".

18. The CHAIRMAN put to the vote the Netherlands proposal that the following amended provision should be included in the statute, in order to emphasize that the court's opinion that no fair trial could be had, would not preclude the possibility of a fair trial later:

> "The Court may dismiss at any stage of the proceedings any case in which the Court is satisfied that no fair trial can then be had. In the event of such dismissal, the Court shall discharge the accused and may also acquit him".

The Netherlands proposal, in its amended form, was adopted by 7 votes to none with 5 abstentions.

19. The CHAIRMAN put to the vote the Israeli proposal that the text just adopted should be included in the draft statute as a separate article between articles 42 and 43.

The Israeli proposal was adopted by 7 votes to 1 with 3 abstentions.

20. The CHAIRMAN put article 42 as it stood to the vote.

Article 42 was adopted by 9 votes to none with 2 abstentions.

Article 43 - Withdrawal of Prosecution

Article 43 was unanimously adopted.

Article 44 - Quorum

Article 44 was adopted by 10 votes to none with 2 abstentions.

Article 45 - Required Majority

21. Mr. SÖRENSEN (Denmark), Rapporteur, said that the Committee had decided that in the event of an equality of votes, the case should be dismissed.(1) The Drafting Sub-Committee had respected that decision, but had found that it could be expressed in a general rule relating to all the decisions of the court.

22. The understanding under paragraph 1 was that judgments and rulings of the court must obtain a clear majority of the votes of the judges participating in the trial, so that in the event of an equality of votes on a conviction, there would be no conviction. He believed, therefore, that the Committee's decisions in the matter were properly reflected in article 45.

23. Mr. KHOSROVANI (Iran) observed that those accused before the international criminal court would most likely be outstanding figures and that the publicity surrounding trials of such persons would be immense. Any dissension in the court would reflect a difference of world opinion as a whole and he consequently felt that judgment pronounced on a simple majority vote would have an adverse moral effect. He therefore moved that the words "a majority vote" in paragraph 1 should be replaced by the words "an affirmative vote of two-thirds". Numerically, there would be little difference, but judgments pronounced by an affirmative vote

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(1) See Summary Record of the 20th meeting (A/AC.48/SR.20), paragraph 35.

of two-thirds of the judges participating in the trial would not be open to the objection he had mentioned. His amendment would, moreover, remove the other objection contemplated earlier by the United States representative, when he had urged that there should be no discrimination between the procedure relating to death sentences and other sentences.

24. Mr. TARAZI (Syria) supported the Iranian representative's proposal, although he thought that only the judgments of the court should require a two-thirds majority. He further drew the Committee's attention to an apparent discrepancy between the French and English texts of article 45.

25. Mr. SÖRENSEN (Denmark), Rapporteur, said that the Drafting Sub-Committee had considered the problem in relation to a proposal submitted by the Uruguayan representative that at least five judges should vote in favour of a conviction.(1) An affirmative vote of two-thirds of the judges participating in the trial was conceivable in the case of convictions, but in the view of the Drafting Sub-Committee such a rule was not feasible for other decisions of the court, for it might well have the effect of paralysing the court's action. Adoption of that rule might also entail serious difficulties when the court came to consider the severity of the penalty to be imposed. It would be remembered how forcibly it had been argued in the Committee that it would be difficult enough to secure a simple majority on the punishment to be imposed. Having considered all those aspects of the matter, the Drafting Sub-Committee had come to the conclusion that in all cases, with the exception of the death sentence, the rule of a simple majority vote should be observed. In his opinion, both the English and French texts conveyed that idea.

26. Mr. MUNIR (Pakistan) submitted that the article should prescribe for judgments only, and that the voting rule relating to rulings of the court - which

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(1) See Summary Record of the 23rd meeting (A/AC.48/SR.23), paragraph 126.

he interpreted as interim decisions taken by the court in the course of a trial - should be laid down in a separate article. He, too, preferred that a final judgment should require a simple majority of the judges participating in the trial.

27. Mr. MAKTOS (United States of America) thought it would be advisable for the Committee first to take a decision on paragraph 2 of article 45. So far as he was concerned, if that paragraph were adopted, he would favour the adoption of the rule of an affirmative vote of two-thirds of the judges participating in the trial, in respect of other judgments of the court.

28. Mr. MUNIR (Pakistan) proposed that article 45 be amended to read:

> "1. Final judgments of the Court shall require a majority vote of the judges participating in the trial.
>
> "2. The rulings of the Court on interim matters shall be according to the majority vote of the judges participating in the trial but, where judges are equally divided in opinion, the vote of the presiding officer shall decide."

29. He confirmed that he had no objection to a suggestion made by Mr. COHN (Israel) that the word "interim" in that text be replaced by the word "interlocutory".

30. Mr. SORENSEN (Denmark) wondered whether, in the interests of brevity, the Pakistani representative's purpose could not be more simply achieved by taking paragraph 1 of article 45 as it stood, and adding to it a sentence on the following lines:

> "In the event of a tied vote on interlocutory matters, the vote of the presiding officer shall decide".

31. Mr. MUNIR (Pakistan) had no serious objection to the Danish representative's suggestion. He did not much like the words "tied vote", which was scarcely a legal term, and preferred the phraseology used in his own country, namely: "where the judges are equally divided in opinion".

32. Mr. KHOSROVANI (Iran) said that, in the light of the discussion, he would withdraw his amendment to article 45 and replace it by an amendment to the Pakistani amendment, to the effect that the words "a majority vote" therein should be replaced by the words "an affirmative vote of two-thirds".

33. Mr. PINTO (France) suggested that the expressions "final judgments" and "other decisions" should be used in the Pakistani amendment, with a view to keeping closer to the wording of the Statute of the International Court of Justice.

It was so agreed.

34. Mr. PINEYRO CHAIN (Uruguay) pointed out that the two-thirds rule was justified in the case of verdicts of guilty, but should not be applicable in the case of verdicts of acquittal; if it were required for all judgments, the court might find itself crippled.

35. The drafting difficulty arose from the fact that in Article 44, the Committee had agreed that the participation of seven judges should suffice to constitute the court. If that provision had not been adopted, it would have been sufficient, instead of mentioning the proportion of votes, to specify the actual number of votes required. It might have been stipulated, for example, that judgments of the court should as a general rule require five votes, but death sentences seven votes. It was unfortunate that the decision already taken by the Committee made that course impossible.

36. In his opinion, there were several distinct cases. Decisions which were not final should be taken by a simple majority, the presiding judge having a casting vote, as suggested by the Pakistani representative. Judgments would as a general rule be taken by a simple majority, but in the case of a verdict of guilty by a two-thirds majority. If the Committee rejected the two-thirds rule in the case of verdicts of guilty, the rule should at least apply in the case of death sentences.

37. He urged that the various points be put to the vote separately.

38. Mr. KHOSROVANI (Iran) suggested that, in the light of the Uruguayan representative's observations, it would be preferable to use the words: "final and condemnatory judgments" in the Pakistani amendment.

39. The CHAIRMAN put to the vote the Iranian representative's amendment to the Pakistani amendment to article 45.

The Iranian amendment was rejected by 6 votes to 3 with 2 abstentions.

40. The CHAIRMAN said that he would put paragraph 1 of article 45 to the vote as amended by the Pakistani representative, to consist of two sentences, the first dealing with the judgments of the court and the second dealing with the court's interlocutory rulings, on the understanding that the Drafting Sub-Committee would work out a suitable text for the second sentence. He would then, as requested by the Uruguayan representative, take a separate vote on paragraph 2 of article 45.

Paragraph 1 of article 45, as amended, was adopted by 10 votes to none with 2 abstentions.

41. Mr. PINEYRO CHAIN (Uruguay) said that he had voted for the Pakistani amendment because he considered that it would not automatically involve the deletion of paragraph 2 of article 45.

42. In his view, the two-thirds majority rule should be retained for death sentences. A special majority was required, in the first place, on account of the gravity and irrevocable character of such a sentence, which could not be revised and from which there was to be no reprieve. So far as possible the correctness of such verdicts must not be left open to doubt. If they were arrived at by simple majority, and five judges decided in favour of the death penalty and four against it, the result would be to make it appear that there had been uncertainty as to the grounds for the sentence.

43. A still more cogent argument in favour of the two-thirds majority derived from the actual technique of the court having rejected the idea of greater numbers, the Committee had decided that there should be nine judges. Nine was therefore,

in its view, the minimum number consistent with the gravity of the cases with which the court would have to deal. It had been recognized, however, that as a result of a process, as it were of erosion, the number of judges participating in a trial might be reduced to seven. In that event seven judges would be trying a case, and if the rule of a simple majority were applied it would be possible for four of them, that was to say a minority of the total number of judges actually sitting on the bench, to pronounce the death sentence. Thus by calling for application of the two-thirds majority rule, the Committee would be merely providing for a simple majority in relation to the total number of judges.

44. It was proper to provide for a larger majority in the case of death sentences.

45. The CHAIRMAN suggested that a vote should be taken on whether paragraph 2 of article 45 should be retained.

46. Mr. SØRENSEN (Denmark), speaking to a point of order, observed that a tied vote on the retention of the paragraph would mean its deletion, whereas a tied vote on its deletion would mean its retention. The Drafting Sub-Committee had carried out the task entrusted to it of preparing a text to give effect to the previous decision of the Committee, which had decided by 7 votes to 3 with 4 abstentions that a death sentence should require the affirmative vote of two-thirds of the judges participating in the trial. In the circumstances, he suggested that the Committee should vote on the deletion of paragraph 2, which was implicit in the Pakistani amendment.

47. Mr. PINTO (France) saw no objection to that procedure.

48. Regarding the substance of the problem, the issue was, briefly, whether the life of the accused was of greater value than his honour. For his own part, he thought that honour was more precious than life.

49. Mr. PINEYRO CHAIN (Uruguay) agreed that honour was not less precious than life. The criterion which countries should apply in determining whether the death

penalty should appear in their codes, was social usefulness. He, for his part, held that it was a cruel penalty, and that society had no right to deprive a human being of his life.

50. Mr. PINTO (France), explaining his previous statement, said that, in his view, by requiring a larger majority for a sentence of death while allowing a simple majority in the case of other sentences, the Committee would be putting a higher value on the life of the accused than on his honour.

51. He was unable to accept that scale of values.

52. Mr. AMADO (Brazil), supported by Mr. RÖLING (Netherlands), observed that the Uruguayan representative had been right in stressing the irrevocable character of the death penalty. Any other penalty, however disgraceful, could be altered.

53. The CHAIRMAN requested the Committee to decide whether, on controversial texts such as paragraph 2 of article 45, the vote should be on the deletion or on the retention of the text.

A majority (eight) of the members of the Committee were in favour of voting on the deletion of such a text.

54. The CHAIRMAN put to the vote the proposal implicit in the Pakistani amendment to article 45, that paragraph 2 of article 45 be deleted.

The proposal was adopted by 6 votes to 4 with 3 abstentions.

Article 46 - Contents and Signature of Judgment

55. At the suggestion of Mr. WYNES (Australia), it was agreed to replace the words "as applied to" by the words "in relation to" in paragraph 1 of article 46.

Article 46, as amended, was adopted by 12 votes to none with 1 abstention.

Article 47 - Separate Opinions

56. Mr. SÖRENSEN (Denmark), Rapporteur, stated that the text of article 47 was in keeping with the Committee's decision.

57. Mr. PINTO (France) called the Committee's attention to the special disadvantages of dissenting opinions in criminal matters.

58. By dissenting opinions, the necessary collective responsibility of the court was replaced by the individual responsibility of the judges. They were liable to expose the judge to public criticism, and to have a disturbing effect by causing anxiety lest he might be personally blamed for his opinion, and even threatened with reprisals.

59. Moreover, the possibility of expressing dissenting opinions made it more difficult to secure within the court the majority required for the sentence. In criminal questions there were, in addition to divergences on points of law, differences in assessing how heavy the penalty should be. There was a risk of judges expressing a dissenting opinion on that point, if they were entitled to do so, whereas in the opposite case they would be obliged to seek a collective decision.

60. Dissenting opinions tended to undermine the authority of the judgment given by the court. Such judgments appeared to the convicted parties and to public opinion to have been disputed by a part of the court.

61. Finally, there was a risk that dissenting opinions might destroy the unity of the court, encourage antagonistic feelings, and perhaps create opposing factions within the court.

Article 47 was adopted by 9 votes to 2 with 1 abstention.

Article 48 - Delivery of Judgment

62. There being no comment, the CHAIRMAN put article 48 to the vote.

Article 48 was unanimously adopted.

Article 49 - No Appeal

63. At the suggestion of Mr. WYNES (Australia) it was agreed to replace the word "is" by the words "shall be".

Article 49, as amended, was adopted by 10 votes to none with 3 abstentions.

Article proposed by the Syrian delegation for insertion between articles 49 and 50 (A/AC.48/L.21)

64. The CHAIRMAN called upon the Syrian representative to introduce his delegation's proposal (A/AC.48/L.21).

65. Mr. TARAZI (Syria) recalled, in support of his proposal, that under national criminal law, all judgments had the force of res judicata. That principle was also expressed by the saying non bis in idem. A person who had once been convicted or acquitted could not be brought to trial before another court on the same charge.

66. The Charter of the Nuremberg Tribunal, had, nevertheless, provided that judgments of that international military tribunal would not prevent judged persons from being arraigned before national courts.(1) It was under that provision that Dr. Schacht, after having been acquitted at Nuremberg, had, subsequently, been brought before a German denazification court. Such a procedure was contrary to the general principles of law.

67. In order to safeguard the defence, it was therefore necessary to state that a person tried by the court could not be arraigned before a national tribunal. States signatories to conventions conferring jurisdiction on the court should undertake in advance to abide by the court's decision. The judgment would state what was the law in a given case, and it could not be impugned.

68. The CHAIRMAN wondered whether it would not more clearly express the Syrian representative's intention if the word "final" were inserted before the word "judgment" in his text.

69. Mr. COHN (Israel) considered that the translation of the French "chose jugée" by the phrase "a judgment at law" was inadequate, probably because there was

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(1) See Charter of the International Military Tribunal, article 11.

no concise English equivalent for that French term. In the circumstances, it seemed to him necessary to revise the whole of the English text to read somewhat along the following lines:

> "A judgment of the Court shall be a bar, in any State which has accepted the jurisdiction of the Court, to subsequent proceedings against the accused on any charge contained in the indictment."

70. His delegation would vote in favour of such a text without, however, accepting all that the Syrian representative had said with regard to the Nuremberg precedents.

71. Mr. SÖRENSEN (Denmark), Rapporteur, accepted the English text suggested by the Israeli representative. The French text of document A/AC.48/L.21 was itself perfectly clear.

72. Mr. MUNIR (Pakistan) agreed that a provision of the sort envisaged was necessary in the statute. It was a general principle that a person should be tried by a competent court or courts, but there were exceptions to that rule, for instance, the principle that a person who had been tried in one court could not be subsequently tried by another court for the same offence or on the basis of the facts on which he could have been tried by the first court. It was clear that unless a specific provision such as that proposed was incorporated in the statute national courts might be able to try again a person who had already appeared before the international criminal court.

73. He agreed with the Israeli representative that the English text, as it stood, was not sufficient to give effect to what the Syrian representative had in mind, and he wondered whether the idea could not be expressed in the following manner:

> "No person who has been acquitted or convicted by the Court shall be subsequently tried by any other court for the same offence or on the basis of the facts on which he could have been tried by that Court."

74. Mr. RÖLING (Netherlands) foresaw a certain amount of difficulty if such a text were adopted. The Syrian representative had illustrated his point by reference to the trial of Dr. Schacht by a German national court after his acquittal

by the Nuremberg Tribunal. In his view, there might well be justification for a second trial in such circumstances, for it was conceivable that national law might be more severe than international law; moreover, what was considered to be no crime under international law might well be a serious crime under national law. For instance, if a charge of genocide were brought before the international criminal court and the court decided that the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" had not been proved, and consequently acquitted the accused, the latter might still be guilty of murder under national law, and should be punished for that crime. He would therefore suggest that the phrase "or on the basis of the facts on which he could have been tried by that Court" be omitted from the text proposed by the Pakistani representative.

75. Mr. MAKTOS (United States of America) submitted that, however attractive such a provision as that proposed by the Syrian representative might appear at first sight, it had implications which could not be adequately considered in the time at the Committee's disposal. Such a provision might well be regarded as an unjustified limitation of national jurisdiction; but apart from that question, there were many other problems that required closer consideration. Again, such a provision, if included in the statute of the court, might prove to be a stumbling block to acceptance of the statute by States.

<u>The meeting was suspended at 11.15 a.m. and was resumed at 11.30 a.m.</u>

76. Mr. COHN (Israel) pointed out that there seemed to be one essential difference between the Pakistani representative's wording and the texts proposed by the Syrian representative and himself, namely: that the latter provided that the judgment of the court would debar from instituting subsequent proceedings, only such States as had conferred jurisdiction on the court.

77. Mr. MUNIR (Pakistan) explained that his text was intended to convey that principle.

78. Mr. MAKTOS (United States of America) felt that some additional wording was required, since the bare reference to States accepting the jurisdiction of the court might be open to different interpretations. It should be clearly understood that the whole problem would be covered in later conventions, and that the statute itself would not impose any obligations upon States. The main object of the Committee's work was to prepare the ground for the establishment of an international criminal court, and he regretted that any obstacles should be placed in the way of its creation. The suggested texts would constitute such an obstacle, unless they specifically stated that the matter would be covered in later conventions. The Committee should follow the same course of action as it had in the case of warrants of arrest (article 40).

79. Mr. COHN (Israel) suggested that the texts might be referred to the Drafting Sub-Committee for consideration.

80. The CHAIRMAN said that there were two possibilities: the individual could be protected against any second trial on the same issues by an express reference to that effect either in the statute, or in conventions to be concluded subsequently between States parties to the statute.

81. Mr. PINTO (France) expressed the opinion that if the Committee did not decide on the inclusion of the text submitted by the Syrian representative, it would be useless to adopt the United States representative's suggestion to leave the matter for settlement in subsequent conventions. In those circumstances, it would appear to be sufficient to deal with the question briefly in the Committee's report.

82. The CHAIRMAN put to the vote the principle that the individual should be protected against subsequent trails on the same issues by a specific provision to that effect in the statute.

The principle was approved by 9 votes to 1, with 1 abstention.

83. Mr. RÖLING (Netherlands) asked whether it was intended to protect the individual from subsequent trials based on the same facts, or on the same offences. It was a matter which called for a decision, and his personal opinion was that subsequent trials should be excluded only in respect of charges for the same offence.

84. The CHAIRMAN called for a vote on the principle that subsequent trial should be precluded only in respect of charges for the same offence.

The principle was approved by 10 votes to none, with 2 abstentions.

It was agreed that the Drafting Sub-Committee would prepare a draft article on the basis of the texts proposed and present it for consideration at the following meeting.

85. Mr. PINEYRO CHAIN (Uruguay) suggested that due consideration be given to the wise observations of the Netherlands and United States representatives, in defining the offence giving rise to a judgment having the force of *res judicata*, in terms of its international character. In that way, it would still be possible, for instance, to bring a person, acquitted by the court on a count of genocide, before a national court on a charge of collective homicide. States should be left free to judge the facts underlying the court's decisions, from the angle of domestic law.

Article 50 - Execution of Sentences

86. Mr. SÖRENSEN (Denmark), Rapporteur, explained that article 50 reproduced the principle which had been adopted by the Committee, the Drafting Sub-Committee having dealt with certain details. The latter had been of the opinion that, if there were no conventions providing for the execution of the sentence, the Secretary-General of the United Nations might arrange for it upon the motion of the court. The text originally adopted by the Committee had read: "Sentences shall be executed in a manner to be agreed upon between the court and the Secretary-General";[1] that wording had, however, been considered incompatible with the functions of the court.

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(1) See Summary Record of the 21st meeting (A/AC.48/SR.21), paragraphs 22 and 37.

87. Mr. MAKTOS (United States of America) pointed out that according to the original United States proposal(1) sentences were to be executed in accordance with "arrangements between the Court and the Secretary-General", the word "arrangements" being construed in the sense of "agreements". The present text apparently drew a clear distinction between arrangements and conventions and, if no conventions were to be concluded, there would be no obligations on States. He submitted that a sentence for the execution of which no-one was responsible would be pointless. Under the present text, the Secretary-General might be obliged to resort to the undignified procedure of requesting States to execute the sentence. He consequently proposed that separate votes should be taken on each of the two sentences in article 50.

88. Mr. SÖRENSEN (Denmark) indicated that he would vote in favour of the second sentence, since some provision was required to cover the possibility of no conventions being concluded. The execution of a sentence was an essential part of criminal jurisdiction, and a sentence impossible of execution would be detrimental to the authority of the court. It had therefore been left to the Secretary-General to arrange for the execution in an appropriate manner.

89. Mr. WANG (China) considered the expression "any State" unsatisfactory, since it might lead to some State having no connexion whatsoever with the crime, being called upon to execute a sentence.

90. Mr. SÖRENSEN (Denmark), Rapporteur, explained that it had been the intention of the Drafting Sub-Committee to give the Secretary-General complete freedom to ascertain which State was prepared to execute the sentence. It might be the State of which the complainant or the guilty person was a national, or the State within whose territories the crime had been committed; it might, again, as the Chinese representative had remarked, be one quite unconnected with the crime.

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(1) Document A/AC.48/L.9, article 45.

91. Mr. LIANG, Secretary to the Committee, remarked that previous drafts had implied that the arrangements would be of a rather formal nature, and he wondered whether the expression "s'entendre" now used in the French text adequately conveyed the idea intended.

92. He considered that, if the court were to be a United Nations organ, the Secretary-General would have many obligations to discharge. Similarly, if the court were established by an international convention approved by the General Assembly and containing certain definite directives, the Secretary-General would likewise have certain obligations. If, however, the court were to be a body completely independent of the United Nations, he failed to see how the Secretary-General could be required to assume any obligations until the court had been in some way recognized by the General Assembly.

93. Mr. SÖRENSEN (Denmark), Rapporteur, pointed out that the text of article 50 read in part: "arrangements .... may be made .... by the Secretary-General". The Secretary-General consequently had no obligations to fulfil, though he might well have certain moral responsibilities.

94. He explained that it had been the feeling in the Drafting Sub-Committee that the word "arrangement" in English covered both formal and informal measures. The French expression "s'entendre" likewise covered both ideas.

95. Mr. COHN (Israel) observed in connexion with the Secretary's statement, that article 50 was not the only one which placed obligations on the Secretary-General; many other articles did the same, and he had abstained from voting on them for that very reason.

96. Replying to the Chinese representative's remarks, he pointed out that the best example of a State unconnected with the crime was that in which the court had its seat; that State would, in fact, be the most suitable one to execute the sentence.

97. Mr. LIANG, Secretary to the Committee, replying to the Israeli representative, explained that it had not been his intention to amend article 50; he had merely made an explicit reservation applying to all articles in which reference was made to the Secretary-General.

98. The CHAIRMAN put the two sentences of article 50 to the vote separately.

The first sentence of article 50 was adopted by 10 votes to none, with 1 abstention.

The second sentence of article 50 was adopted by 4 votes to 2, with 5 abstentions.

Article 50 as a whole was adopted by 7 votes to 1, with 3 abstentions.

Article 51 - Revision of Judgment

Article 51 was adopted by 7 votes to 3, with 1 abstention.

Chapter VI: Clemency

Article 52 - Board of Clemency

99. Mr. SÖRENSEN (Denmark), Rapporteur, drew attention to the alternative texts submitted by the Drafting Sub-Committee, the first providing that the establishment of the board of clemency be effected by the General Assembly of the United Nations, the second providing that the States parties to the statute establish the board. It had been the intention of the original proposal (article 45 A of document A/AC.48/L.9) that the board of clemency should be established by the General Assembly, but the proposal had been introduced on the assumption that there would be a closer connexion between the General Assembly and the court than had finally been decided upon by the Committee. No recommendation on the matter had consequently been made by the Drafting Sub-Committee.

100. Mr. RÖLING (Netherlands) proposed that the issue be left undecided, since everything depended on the relationship to be established between the court and the United Nations. Should only a limited number of States establish the court, and consequently nominate and elect the judges, a board of clemency elected by the General Assembly might easily develop into an organ which would be considered as an instance of appeal.

101. Mr. SÖRENSEN (Denmark), Rapporteur, recognized that the relationship between the court and United Nations was subject to reconsideration and possible revision, but nevertheless would prefer the Committee to express an opinion on the matter. It had been decided that the States parties to the statute should elect the judges and prosecutors and establish the committing authority; and it would consequently be logical for them to establish the board of clemency as well, it being understood that if the General Assembly decided that the relationship between the court and the United Nations was to be different in principle from that which the Committee had assumed, the procedure would be subject to revision. A specific reservation to that effect relating to the procedure for the election of judges had been included in the Committee's report, and similar action might be taken in the present case.

102. The CHAIRMAN put to the vote the Netherlands proposal that no choice should be made between the two alternatives.

The Netherlands proposal was rejected by 5 votes to 3 with 2 abstentions.

103. Mr. MAKTOS (United States of America) recognized the validity of the Rapporteur's remarks, but felt that the more obstacles that were placed in the way of the United Nations participating in the activities of the court, the more it would assume the character of a local or limited institution. As many ties as possible should be created with the United Nations, if only because the statute called upon the Secretary-General to assume considerable responsibilities. He therefore proposed the adoption of the first alternative wording ("the General Assembly") for paragraph 1 of article 52.

The United States proposal was rejected by 6 votes to 2 with 3 abstentions.

The second alternative wording in article 52 was adopted.

104. Mr. COHN (Israel) suggested that the word "adopt" should be substituted for the word "establish" in paragraph 3 of article 52, in order to bring the wording into line with that of article 24.

It was agreed to use the word "adopt" in similar paragraphs throughout the draft statute.

Article 52, as amended, was adopted by 8 votes to none with 3 abstentions.

Chapter VII: Final Provisions

Article 53 - Special Tribunals

105. Mr. MAKTOS (United States of America) proposed the deletion of article 53.

The United States proposal was lost, 5 votes being cast in favour and 5 against, with 1 abstention.

Article 53 was adopted by 6 votes to 4, with 1 abstention.

Chapter II: Organization of the Court (resumed from the 26th meeting)

Amendment to Article 14 - Privileges and Immunities

106. Mr. WANG (China), introducing his amendment (A/AC.48/L.22), explained that the substance of his proposal was to be found in Article 105 of the Charter of the United Nations, but since it had been decided that the court would be established by international convention rather than by resolution of the General Assembly, the court would not be an organ of the United Nations, and Article 105 would not apply. The wording of his amendment was taken from Article 42 of the Statute of the International Court of Justice. Although the issue had been debated in the Drafting Sub-Committee and no decision had been reached, he nevertheless felt that it was necessary to face the problem squarely and come to a decision.

107. The CHAIRMAN explained that the question had been the subject of prolonged debate in the Drafting Sub-Committee. It had been pointed out there that if some more specific provision regarding privileges and immunities were desired, it could be included either in the statute or in subsequent conventions. Attention had been drawn to the practical difficulties which might well be

encountered in connexion with transit and exit visas. It had been argued that, if some wording such as that proposed by the representative of China were included in the statute, States might wish to know precisely what privileges and immunities were to be accorded, before they acceded to the statute. It had also been considered, on the other hand, that if such privileges and immunities were not accorded, the persons concerned might be prevented from carrying out their duties.

108. Mr. SORENSEN (Denmark), Rapporteur, pointed out that the matter had been discussed in the Committee itself, where it had been decided, by 5 votes to 1 with 6 abstentions, that no such provisions should be included in the statute, it being understood that the matter would be covered in subsequent conventions.(1)

109. Mr. COHN (Israel) observed that the Chinese representative's amendment went further than Article 42 in the Statute of the International Court of Justice, where no reference to the Registrar and other officers of the Court was made.

110. Mr. WANG (China) considered that, while problems of jurisdiction such as the apprehension of criminals were to be covered by subsequent conventions, it would not be wise to adopt a similar course of action with respect to privileges and immunities, which were merely part of the organization of the court. He recognized the practical difficulties to which the Chairman had referred, but felt that they applied equally to the United Nations and the International Court of Justice, which had made adequate provision for the granting of privileges and immunities in their Charter and Statute respectively.

111. Replying to the Israeli representative, he pointed out that the International Court of Justice was an organ of the United Nations, and its Registrar and other officers were consequently covered by Article 105 of the Charter of the United

(1) See Summary Record of the 26th meeting (A/AC.48/SR.26), paragraph 21.

Nations. The international criminal court, on the other hand, would be an independent body and specific reference to those officers would be necessary in its statute.

The Committee decided by 5 votes to 3, with 3 abstentions that the statute should contain a provision as envisaged in the Chinese amendment.

112. Mr. MAKTOS (United States of America) suggested adding, at the end of the Chinese amendment, the sentence "These provisions shall be executed in accordance with conventions relating to this matter".

113. Mr. WANG (China) could not agree to the United States amendment, which, he considered, was contrary to the spirit of his own proposal. In his view, no reference to conventions should be made.

The United States amendment was adopted by 6 votes to 3 with 3 abstentions.

114. Mr. MAKTOS (United States of America) suggested that the Chinese text be amended to read

> "The Registrar and other officers of the Court, the accused and their counsel, counsel for the prosecuting attorney, and for States intervening for the purposes of article 27, and witnesses shall enjoy such privileges and immunities ...."

115. Mr. WANG (China) could not agree to the United States amendment. The reference to the accused was particularly unsatisfactory; a paradoxical situation might arise if the accused were found guilty, and then claimed the right to certain privileges and immunities.

116. Mr. MAKTOS (United States of America) explained that his text was intended to cover special cases in which, for example, the accused might not be allowed transit through a given territory.

The United States amendment was rejected by 3 votes to 1 with 8 abstentions.

The Chinese amendment to article 14, as amended, was rejected by 4 votes to 2 with 6 abstentions.