UNITED NATIONS

REPORT OF THE 1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

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NOTE

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TABLE OF CONTENTS

REPORT OF THE 1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION[1]

Chapter I

INTRODUCTION

Background of the establishment of the Committee

1. The General Assembly, on 12 December 1950, adopted resolution 489 (V) which reads as follows:

"*The General Assembly,*

"*Recalling* that, in its resolution 260 B (III) of 9 December 1948, it considered 'that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law', and that, in the same resolution, it invited the International Law Commission 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions',

"*Having given* preliminary consideration to part IV of the report of the International Law Commission on the work of its second session,[2]

"*Bearing in mind* article VI of the Convention on the Prevention and Punishment of the Crime of Genocide,[3]

"*Bearing in mind,* further, that a final decision regarding the setting up of such an international penal tribunal cannot be taken except on the basis of concrete proposals,

"1. *Decides* that a committee composed of the representatives of the following seventeen Member States, namely, Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay, shall meet in Geneva on 1 August 1951 for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court;

"2. *Requests* the Secretary-General to prepare and submit to the committee referred to above one or more preliminary draft conventions and proposals regarding such a court;

"3. *Requests* the Secretary-General to make all necessary arrangements for the convening of the committee and for its meetings;

"4. *Requests* the Secretary-General to communicate the report of the committee to the governments of Member States so that their observations may be submitted not later than 1 June 1952, and to place the question on the agenda of the seventh session of the General Assembly."

2. In pursuance of the above resolution, the Committee on International Criminal Jurisdiction (hereafter referred to as the Geneva Committee) convened at Geneva on 1 August 1951. Within the time limits set for its work the Geneva Committee formulated proposals regarding some of the more important questions to which the creation of an international criminal court gives rise, and gave in its report[4] (hereafter referred to as the Geneva report) a general survey of the opinions expressed by members of the Committee.[5] It did not wish to give these proposals any appearance of finality. They were offered as a contribution to a study which, in the opinion of the Geneva Committee, had yet to be carried several steps forward before the problem of an international criminal jurisdiction, with all its implications of a political as well as a juridical character, was ripe for decision (Geneva report, paragraph 17). The report of the Geneva Committee was transmitted to the governments of Member States for their comments.

3. During the seventh session of the General Assembly the Geneva report was discussed in the Sixth Committee[6] and at a plenary meeting of the General Assembly[7]. On 5 December 1952, the General Assembly adopted resolution 687 (VII) which reads as follows:

"*The General Assembly,*

"*Bearing in mind* that, by resolution 489 (V) of 12 December 1950, the General Assembly established a Committee on International Criminal Jurisdiction, consisting of representatives of seventeen Member States, charged with the task of preparing one or more preliminary draft conventions and proposals relating to the establishment of an international criminal court,

"*Recalling* that, by the same resolution, the General Assembly requested the Secretary-General to communicate the report of the Committee to the governments of Member States so that their observations could be submitted not later than 1 June 1952,

[1] Previously distributed as document A/AC.65/L.13, dated 24 August 1953.

[2] See *Official Records of the General Assembly, Fifth Session, Supplement No. 12,* document A/1316.

[3] See General Assembly resolution 260 A (III) of 9 December 1948, annex.

[4] See *Official Records of the General Assembly, Seventh Session, Supplement No. 11,* document A/2136.

[5] The summary records of the proceedings of the Geneva Committee bear the symbol number A/AC.48.

[6] See *Official Records of the General Assembly, Seventh Session, Sixth Committee,* 321st to 328th meetings.

[7] *Ibid., Plenary Meetings,* 400th meeting.

and to place the question on the agenda of the seventh session of the General Assembly,

"*Noting* that the Committee, meeting in August 1951, has prepared a report containing a draft statute for an international criminal court and that the Secretary-General, by a letter of 13 November 1951, has transmitted the Committee's report to the governments of Member States requesting their observations thereon,

"*Considering,* however, that the number of States which have given their comments and suggestions is very small,

"*Considering* that there is need for further study of problems relating to an international criminal jurisdiction,

"1. *Expresses* to the Committee on International Criminal Jurisdiction its appreciation for its valuable work on the draft statute;

"2. *Urges* the Member States which have not yet done so to make their comments and suggestions on the draft statute, in particular if they are of the opinion that further action should be taken by the General Assembly with a view to the establishing of an international criminal court;

"3. *Decides* to appoint a Committee composed of one representative each of seventeen Member States, which States shall be designated by the President of the General Assembly in consultation with the Chairman of the Sixth Committee, and directs that this Committee shall meet at the Headquarters of the United Nations in 1953, the exact date to be determined by the Secretary-General, with the following terms of reference:

"(*a*) In the light of the comments[8] and suggestions on the draft statute submitted by governments, as well as of those made during the debates in the Sixth Committee,

"(i) To explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done;

"(ii) To study the relationship between such a court and the United Nations and its organs;

"(iii) To re-examine the draft statute;

"(*b*) To submit a report to be considered by the General Assembly at its ninth session;

"4. *Requests* the Secretary-General to provide all necessary services and facilities for the meetings of the Committee."

4. In pursuance of the above resolution, the 1953 Committee on International Criminal Jurisdiction (hereafter referred to as the Committee) convened at New York on 27 July 1953. It held twenty-three meetings and concluded its work on 20 August 1953.

5. With the exception of Pakistan, which did not send a representative, all the Member States designated by the President of the General Assembly, in consultation with the Chairman of the Sixth Committee, under the resolution quoted above, were represented on the Committee. The following is a list of their representatives and alternate representatives:

Argentina: Mr. Fernando García Olano, Mr. Raúl A. Laurel
Australia: Mr. Allan H. Loomes
Belgium: Mr. J. Y. Dautricourt
China: Mr. Hua-Cheng Wang
Denmark: Mr. Birger Dons-Moeller
Egypt: Mr. Yehia Sami
France: Mr. Marcel Merle
Israel: Mr. Jacob Robinson, Mr. David I. Marmor
Netherlands: Mr. B. V. A. Röling
Panama: Mr. Ernesto de la Ossa
Peru: Mr. Manuel Feliz Maúrtua
Philippines: Mr. Mauro Méndez
United Kingdom of Great Britain and Northern Ireland: Mr. Francis A. Vallat
United States of America: Mr. George Maurice Morris, Mr. John Maktos
Venezuela: Mr. Victor M. Pérez Perozo
Yugoslavia: Mr. Djuro Nincic, Mr. Aleksander Bozovic.

6. At the first meeting, the Committee elected the following officers:

Chairman: Mr. George Maurice Morris, United States of America
Vice-Chairman: Mr. Victor M. Pérez Perozo, Venezuela
Rapporteur: Mr. B. V. A. Röling, Netherlands.

7. At its eighth meeting, the Committee elected a Standing Drafting Sub-Committee, consisting of the Chairman and the Rapporteur of the Committee and the representatives of Argentina, Australia, Belgium and the Philippines. Under the chairmanship of the Rapporteur, the drafting sub-committee held two meetings and, on the basis of decisions of principle taken by the full Committee, prepared drafts for the consideration of the Committee.

8. The Committee had before it the report of the Geneva Committee (A/2136), containing as annex I the draft statute for an international criminal court (hereafter referred to as the Geneva draft statute). It also considered a "Compilation of Comments and Suggestions relating to the Draft Statute for an International Criminal Court" (A/AC.65/1), prepared by the Secretariat, containing, under nine sections, a compilation of the comments and suggestions on the Geneva report and the annexed draft statute which were submitted in writing by eleven governments (A/2186 and Add.1) or were made orally during the seventh session of the General Assembly. During the course of the Committee's work the Government of Belgium placed written comments on the subject before the Committee (A/AC.65/3).

9. In addition, a memorandum entitled "Historical Survey of the Question of International Criminal Jurisdiction" (A/CN.4/7/Rev.1), originally prepared by the Secretary-General for the International Law Commission, was also made available to the Committee for its information.

10. In the course of its discussions, the Committee dealt with the main problems relating to the establishment of an international criminal court and re-

[8] See *Official Records of the General Assembly, Seventh Session, Annexes* agenda item 52, document A/2186 and Add.1.

examined the Geneva draft statute. The views of the members of the Committee are contained in the summary records of the plenary meetings (A/AC.65/SR.1-23 inclusive).[9] The present report contains a summary of the discussions, the proposals made during the debate, and the results of the voting upon these proposals. For the sake of brevity, and to avoid repetition, it does not contain the opinions expressed during the debates in the Geneva Committee. It will refer to the Geneva report when appropriate, and will contain only such references where no new viewpoints transpired during the discussions in the present Committee. Consequently, to grasp the intention of the drafters, it will be necessary to rely not only on the present report, but also on the Geneva report.

Terms of reference

11. At the very beginning of its deliberations, the Committee examined the scope and nature of the task which the General Assembly had entrusted to it under resolution 687 (VII) of 5 December 1952.

12. Some members expressed the conviction that, in the present stage of international relations and international organization, any attempt to establish an international criminal jurisdiction would meet with insurmountable obstacles. As an ultimate objective an international criminal court would be desirable, but its establishment at the present time would do more harm than good. The rigid maintenance of criminal justice was likely to endanger the maintenance of peace. Since the Committee consisted of representatives of governments the members should express themselves as to whether or not they considered the creation of an international criminal court possible and desirable. It was mentioned that under paragraph 3 (*a*) (i) of resolution 687 (VII) the Committee was entrusted with the task of exploring "the implications and consequences of establishing an international criminal court". Such a task presupposed that the Committee would decide on its attitude as to the problem of international criminal jurisdiction.

13. Other members felt that the General Assembly had not instructed the Committee to express an opinion as to the advisability of creating an international criminal court. The task of the Committee was to explore the implications and consequences of establishing an international criminal court, indicating advantages and disadvantages. Its further task was to explore the implications and consequences of the various methods by which this might be done, and in so doing, demonstrate clearly the advantages and disadvantages of each method. Its next task was to study the relationship between an international criminal court and the United Nations and its organs, and from such a study again would transpire advantages and disadvantages of the different kind of relations which could exist between a court and the United Nations. By so doing, the Committee would enable the General Assembly to appreciate the full scope of the problems involved, and to judge upon the issues with full knowledge of them.

14. The opinion that the Committee had the function of studying the matters involved, and of submitting the results of its study to the General Assembly for final judgment, was shared by the majority of the members, and the Committee proceeded on that understanding of its task. All members expressed their willingness to co-operate in the task in order to furnish the Assembly with the most thorough studies and the best draft statute possible. It was understood that no member would be debarred from expressing his opinion as to the desirability of setting up an international criminal court, and it was furthermore understood that no member, by participating in the deliberations of the Committee and by voting on any principle or draft text, would commit his government to any of the decisions which might eventually be adopted.

15. On this understanding of its terms of reference, the Committee adopted, at the first meeting, the following agenda:

(1) Consideration of the implications and consequences of establishing an international criminal court

(2) Methods by which an international criminal court might be established

(3) Relationship between an international criminal court and the United Nations and its organs

(4) Re-examination of the Geneva draft statute

(5) Further consideration of the implications and consequences of establishing an international criminal court

(6) Adoption of the report of the Committee.

16. During the re-examination of the Geneva draft statute, it became apparent that the method of establishment of the international criminal court and the question whether or not close relations should be established between the court and the United Nations had some bearing upon the content of specific articles. The members agreed that the General Assembly would not be assisted by the formulation of numerous statutes, covering all possibilities. Considering that its report would contain the proposals made by members, the Committee decided that it should draft one statute, this statute being the result of the re-examination of the Geneva draft statute. The latter draft statute was based on the establishment of a court by a convention concluded under the auspices of the United Nations. In reviewing the Geneva draft statute the Committee had in mind an international criminal court functioning almost completely separately from the United Nations. In order, however, to indicate another possibility, the Committee decided to draft, where appropriate, alternative texts on the basis of a court linked by closer ties to the United Nations, which basis, in the opinion of some members, would find expression in the establishment of the court by the United Nations (see also paragraph 69 below).

[9] An index of the summary records, the present report and the draft statute will be issued as document A/AC.65/4.

Chapter II

GENERAL PRINCIPLES

International criminal jurisdiction and the present stage of international law and international relations

17. Some members, though considering the establishment of an international criminal court an important and ultimately highly desirable development in world affairs, expressed the conviction that at the present stage any attempt to establish an international criminal jurisdiction would put a strain on international good feeling and co-operation, and would meet with insurmountable obstacles. Present international law was based on relations among States. The Charter of the United Nations was also based thereon. International criminal jurisdiction over individuals, therefore, did not fit in with the present set-up of the United Nations. An international criminal court presupposed an international community with the power necessary to operate the court, and such power did not exist. A surrender of some present State sovereignty would be the condition for the establishment of the court, and such surrender was highly unlikely. Therefore, the court would be powerless, and its establishment would be an empty gesture. It would be improper to establish the court before international criminal law had been defined in generally adopted conventions. Moreover, this establishment, it was said by one member, would interfere with the principle of universality in the prosecution of such crimes as piracy, and would interfere with existing extradition treaties. For these and other reasons, some members felt that the General Assembly should be advised not to proceed further in this field for the time being.

18. Other members, although realizing the rather primitive stage of inter-State relations—a primitive stage which, in the field of international criminal jurisdiction, had led to the establishment of *ad hoc* tribunals such as those of Nürnberg and Tokyo and to the regional development of international criminal jurisdiction, e.g., jurisdiction over economic crimes in the European Coal and Steel Community—emphasized the point that modern international law was beginning to recognize the individual as a subject possessing rights (for instance, in the Universal Declaration of Human Rights), and also possessing duties. In the judgment of Nürnberg, it was decided that those duties transcended even obligations to the national State. The moral obligation of living up to the principles of the post-war judgments, and the undeniable fact of the existence of a common standard of norms to be applied, e.g., the unanimously affirmed principles of Nürnberg, made international criminal jurisdiction desirable, and it should be promoted by establishing the possibility of such international criminal jurisdiction as far as present inter-State relations would permit. Consequently, those members favoured the establishment of a court, the jurisdiction of which would depend on voluntary submission to that jurisdiction by the States willing so to submit. They were aware of the intricacy of the problems involved, and were willing to proceed only with the utmost caution.

Necessary characteristics of an international criminal court

19. As to the kind of court to be created, some members believed it indispensable that it should have five qualities: stability, permanence, independence, effectiveness and universality. In their view, it was useless and even dangerous to create a court of inferior quality, which would not have an adequate measure of any of these characteristics. They thought it was better to have no international criminal court than a second-rate one.

20. Other members, however, thought it unrealistic to insist upon perfection at the outset. In the present rather primitive stage of inter-State relations, an international criminal jurisdiction which would not reach the level of present domestic jurisdiction would be adequate. All legal institutions needed time to grow and develop. Therefore, they maintained, international criminal jurisdiction, on the basis of a very modest beginning, should be given a chance to grow. It was better to create a court with imperfect powers and limited competence than to create none at all.

Relations between an international criminal court and the United Nations

21. Some members of the Committee believed that the question of the relations between an international criminal court and the United Nations had some bearing upon the question of the method by which such a court was to be created, so that the closer the desired relations the greater the role of the United Nations in the creation of the court would tend to be. But there was no necessary logical connexion between the two questions. Thus, for example, it would be possible that a court would have close links with the United Nations though established by multilateral conventions, or that a court set up by General Assembly resolution would function almost completely independently of the Organization.

22. All members were in accord that there should be some degree of sponsorship by the United Nations for the creation of the court, if it were ultimately found desirable and possible to create one. The various forms which the members believed this sponsorship should take are discussed in the section of the present report dealing with the methods of establishment. There was less agreement, however, as to the relations which should exist between the court, after its establishment, and the United Nations.

23. One view was that it was desirable that the court and the United Nations should operate as separately as possible. A close relationship would, under this view, be prejudicial both to the court and to the United Nations, as it would impair the necessary independence of the court and would involve the United Nations in a hazardous new enterprise which would only increase existing tensions and divisions within the Organization. Undue political interference was especially feared if close ties between the court and the United Nations should exist. Above all, the court should be independent, and independence was impos-

sible if the United Nations could bring influence to bear upon the court.

24. Other members thought that the United Nations, after having assisted at the birth of the court, should provide it with services which it could not efficiently perform for itself, especially in the early steps of its development, and should co-operate with the court. "Though the United Nations", as the member from Israel put it, "might not be the parent body proper of the new-born court, it would be the midwife and the nurse and would always remain its guide and friend" (A/AC.65/SR.4, page 9).

25. Still other members envisaged closer ties, and desired that an international criminal court should be an organ of the United Nations, or at least a body set up and functioning within its framework. The community of which the United Nations constituted the organized form needed a criminal court to pronounce upon acts considered crimes within that community. Although present State sovereignty prevented the setting up of a court with obligatory jurisdiction, this fact did not prevent the establishment of the court within the framework of the United Nations, even though the court would only have jurisdiction on the basis of voluntary submission by States to that jurisdiction. The establishment of the court within the United Nations would clearly express the recognition of the principles of individual criminal responsibility towards the world community, would grant the court the desired authority, would open the road to universal acceptance of its jurisdiction, and would be a guarantee of its functioning for the common good.

26. Specific points concerning the relationship between the court and the United Nations—for example, the question who should nominate and elect the judges and the members of the board of clemency, and who should bear the expenses of the operation of the court —were discussed in greater detail in connexion with particular articles of the draft statute. For certain articles, the Committee adopted alternative texts, which indicate some of the consequences of closer or less close relations between the court and the United Nations.

Relations between the maintenance of international criminal justice and the maintenance of peace

27. Most of the members recognized international criminal justice as a positive factor in the maintenance of peace. The recognition of international criminal law as binding upon individuals, whether private individuals or State officials, had been a step forward in the development of international relations. However, the application of that law by national courts or *ad hoc* international courts had certain defects. The functioning of a permanent international criminal court would guarantee a more general interpretation of international law and, above all, would express with more authority the opinion of the world about the criminal nature of specific acts. By so doing it would strengthen world opinion, and in this way promote better international relations, for it would be made more difficult to lure peoples into consenting to a criminal policy. Generally, therefore, international criminal jurisdiction was a factor contributing to the maintenance of peace.

28. However, some members recognized that in exceptional cases the maintenance of international criminal justice might interfere with the maintenance of peace. The Charter of the United Nations provided for United Nations activity for the maintenance of peace, and it might well be that in a particular case the settlement of a delicate and dangerous dispute would be imperilled by a criminal trial. Consequently, there was need for a kind of political screening, of such a nature that the United Nations, in the interest of peace, could prevent a case from being brought before the court. It was recognized that the court would base its judgment solely on the principles of justice. Therefore, the appropriate moment for political considerations to be brought up was when the question had to be decided whether or not a case should be submitted to the court. Some members felt, however, that to give the United Nations this screening power, and thereby the power to prevent the access of States to the court, would violate the sovereign rights of those States. Such a power would be contrary to the spirit of the Charter.

29. Some members considered that no conflict was possible between the functioning of international criminal justice and the maintenance of peace. The punishment of criminals could never interfere with the maintenance of peace. Consequently, no special provision for any political screening before a case could be brought before the court was desirable. Such provision could only lead to improper concessions to expediency in international affairs.

Methods by which an international criminal court might be established

30. It was agreed that there were three main methods by which an international criminal court might be established; various combinations among these three methods were also possible. Those methods were the establishment of the court through amendment of the Charter; establishment by a multilateral convention; and establishment by a resolution of the General Assembly. The Committee also examined in some detail the method of creating the court by a General Assembly resolution, followed by multilateral conventions conferring jurisdiction.

A. *Establishment of the court by amendment of the Charter*

31. The Committee distinguished four possible ways in which this method could be applied, as follows:

(i) The Charter of the United Nations and the Statute of the International Court of Justice could be amended so as to create a criminal chamber of that Court. This method was described in a working paper submitted by Panama (A/AC.65/L.3). In the view of Panama, the crimes to be punished by the criminal chamber should be defined in duly ratified conventions, and the chamber's jurisdiction should be defined at the same time as it was established.

(ii) The Charter could be amended to establish an international criminal court as a new principal organ; its statute would be annexed to the Charter in the same way as the Statute of the International Court of Justice.

(iii) An article similar to article 14 of the Covenant of the League of Nations could be introduced into the Charter. Such an article would empower the General Assembly to draw up the statute of an international criminal court and submit it to States for ratification and acceptance of jurisdiction.

(iv) The Charter could be amended simply to remove certain constitutional difficulties which some members of the Committee felt now stood in the way of the creation of an international criminal court by the General Assembly.

32. The majority of the Committee was sceptical of the possibility of establishing the court in any of these ways in the near future. In the view of many members, however, the method presented many advantages of stability, independence, effectiveness, permanence and universality, and should not be entirely ruled out.

33. Members favouring the creation of a criminal chamber of the International Court of Justice believed it better to build on the basis of that Court's experience and existing structure than to make a completely fresh start. The great majority, however, were very reluctant to impose so new and unfamiliar a task on the Court, and perhaps thereby to prejudice its past success. Other members thought that the establishment of an international criminal court by Charter amendment would entail so fundamental a change in the nature of the United Nations that at the present moment it would not be desirable even if it were possible.

34. Some members pointed out that at present, when international criminal jurisdiction was only in the first step of its development, the establishment of the court by Charter amendment was not advisable. However, they considered that whatever means of creation might be chosen at the present time, it was desirable to have a provision in the Charter enabling the United Nations to put the court on a more solid and permanent footing. These members were of the opinion that such a provision might well be considered if revision of the Charter in conformity with Article 109 were contemplated.

B. *Establishment of the court by multilateral convention*

35. A majority of the members thought that this method, which had been supported by the Geneva Committee, was the best and most feasible method for some time to come. The drafting of the multilateral convention could either be left entirely to interested States, or it could be carried out under the auspices of the United Nations. If it was to be concluded under United Nations auspices, the convention could either be drafted by the General Assembly or by a conference of interested States. Suggestions as to how the latter might be done were contained in a working paper submitted by Israel (A/AC.65/L.4/Rev.1). The Committee was of the opinion that this working paper should be inserted in its report. It reads as follows:

"1. The establishment of the international criminal court on the initiative of the United Nations would imply:

"A. Preparation of a preliminary draft of a statute of an international criminal court under General Assembly resolutions 489 (V) and 687 (VII) and proposals relating to the establishment and the statute of an international criminal court.

"B. A resolution of the General Assembly determining the desirability of the establishment of the type of international criminal court provided for in the preliminary draft, and empowering the Secretary-General to convene, under the auspices of the United Nations, a conference of plenipotentiaries for the purpose of completing the drafting of a statute of the court, the drafting of other instruments imposing duties on States in regard to the competence of the court and its proper functioning, and for formulating requests to the General Assembly to assume certain responsibilities in regard to the court:

"(*a*) Such a recommendation shall be made by a two-thirds majority;

"(*b*) The diplomatic conference shall be requested to take into consideration the preliminary draft statute;

"(*c*) The conference shall not convene before half of the membership of the United Nations has agreed to participate; and

"(*d*) The conference shall be accessible to non-Member States and to observers from Member States.

"2. The diplomatic conference may request the General Assembly to empower the Secretary-General to assume depository functions in regard to the convention establishing the statute and other international instruments incidental thereto, and to assume the responsibilities listed under articles 8, 9, paragraph 1 of article 11, paragraphs 2 and 4 of article 12, paragraph 2 of article 18, and paragraph 1 of article 19 of the Geneva draft statute.

"3. The diplomatic conference may request the General Assembly to charge one of its subsidiary organs (the Peace Observation Commission established under the 'Uniting for Peace' resolution) with political screening of trials before the court in view of their possible incompatibility with the maintenance of peace."

36. It was argued that, apart from all objective arguments, concerning the possibility and desirability of the creation of an international criminal court, the main question was the subjective willingness of States to create such a court and to confer jurisdiction upon it; the best method of testing that willingness was to ascertain whether a substantial number of States was willing to take part in a conference called for the purpose. Some members believed that positions taken by plenipotentiaries in a diplomatic conference were a better indication of the attitudes of governments than votes in the General Assembly in favour of a resolution, which would commit States to a lesser extent. Another advantage of a diplomatic conference, it was said, was that it would entrust the preparation of the statute to specially well-qualified delegates of States which were seriously interested in bringing the court into being, and would avoid any adverse effect from the participation in the drafting of States which were opposed to the court's existence.

37. On the other hand, it was said that there were disadvantages in the convention method. There were difficulties in establishing the close links which a number of members thought desirable between the United Nations and an international criminal court established by a convention concluded between some of its Members and some non-Members. The suggestions of the working paper of Israel would go far toward eliminating these difficulties; however, the requirements of the working paper of a two-thirds vote in the General Assembly and then of participation in the conference by half the Members of the United Nations would mean the almost indefinite postponement of the creation of the court. It was unwise to adopt so difficult and complicated a method, which gave so little prospect of success. Moreover, drafting in a conference was less desirable than drafting in the General Assembly, where a large number of States could make a contribution to the text. A court established by a multilateral convention would, in the view of these members, have less prestige and universality than a court established by the United Nations.

C. *Establishment of the court by General Assembly resolution*

38. It was stated that this method could offer the advantage of bringing the court into being at once. The court would then be ready whenever States wished to confer jurisdiction on it by convention or unilateral declaration, and, some members believed, the existence of the court would stimulate the granting of jurisdiction. Moreover, the court would adopt rules for carrying out its functions (article 24 of the draft statute); the kind of trial provided for in the statute and rules of the court might set an example for any international criminal trial. It was desirable to have the court in existence and its methods of operation laid down, so that if the need for such a court arose States would be spared the necessity of creating an *ad hoc* tribunal.

39. Others, however, believed that it was useless to create the court as an empty shell, before it was reasonably certain that jurisdiction would be given it and that it would be called upon to decide cases. Furthermore, they believed that the legal powers of the General Assembly under the Charter were not sufficient to enable it to establish a court by resolution. Under article 22 of the Charter, the General Assembly might establish only such subsidiary organs as it deemed necessary for the performance of its functions, and to try individuals was not a function of the Assembly. Moreover, since international criminal jurisdiction, far from being a factor in the maintenance of peace, might often impair the possibilities of peace by interfering with the process of political conciliation, Article 22 in juxtaposition with Article 11 did not apply. A more appropriate basis in the Charter was Article 13, which gave the General Assembly the power to make studies and recommendations concerning the development of international law. The tribunals already established by the General Assembly which were considered by some members as constituting useful precedents for an international court (the Administrative Tribunal and the United Nations Tribunals in Libya and Eritrea), furnished no adequate precedent. The creation of these tribunals was based either on the Assembly's powers under the Charter as regards the Secretariat staff, or on the very exceptional and very broad powers given it by the Italian Peace Treaty.

40. In favour of the power of the General Assembly to establish the court by resolution, it was said that, under Article 22 of the Charter, the Assembly could establish subsidiary organs to assist it in performing its functions; under Article 11, the Assembly was given functions with regard to the maintenance of international peace and security. The existence of an international criminal jurisdiction would be a factor in the maintenance of peace, since it would strengthen the moral opinion of the world against international crimes. Therefore, nothing in the Charter prevented the General Assembly from creating an international criminal court as a subsidiary organ. Such a subsidiary organ might well be entitled to do things which the General Assembly itself could never perform, provided that its activity was in the interest of the maintenance of peace.

41. Some members felt that there would be a serious loss of independence and stability if the court were set up by a resolution, which could always be repealed or modified later by the General Assembly. The same argument applied if the court were a subsidiary organ the budget of which would have to be debated each year. Those who favoured the resolution method took the view that the stability, permanence and independence of the court would be adequately safeguarded, since the General Assembly would not reverse a decision taken on so important a subject. Further, this method would facilitate the avoidance of conflicts between judicial proceedings before the court and political conciliation by the organs of the United Nations. According to other members, the possibility of conflict with political conciliation carried on in the United Nations could equally well be avoided if other methods of creation were used.

42. In favour of the establishment of the court by General Assembly resolution it was argued that this method would have the advantage of a world-wide approach rather than a small-scale approach by a few States only. Opponents of the method contended, however, that the adoption of a statute in the General Assembly by a small majority, perhaps with a large number of abstentions—and this at best would be the result on so controversial a subject—would be far from indicating world support.

D. *Establishment of the court by General Assembly resolution to be followed by conventions*

43. This method was proposed in a working paper submitted by the United States of America (A/AC.65/L.2). Under this method, the General Assembly would adopt a resolution to which the statute of the international criminal court would be annexed. The resolution would provide, however, that the court would not come into existence until a certain number of States had conferred jurisdiction upon it by convention, special agreement or unilateral declaration (though not all such States would have to confer jurisdiction with respect to the same crimes). Any such instrument

conferring jurisdiction would define the crimes over which jurisdiction was conferred, and would also provide that the State or States parties to that instrument agreed to the provisions of the statute. The instrument conferring jurisdiction would also include certain obligations concerning assistance to the court in the performance of its duties and in the exercise of its powers conferred by the statute, concerning participation in the election of the judges and in other elections provided for by the statute, concerning financial contributions, and concerning the giving of full faith and credit to the court's decisions and judgments.

44. Some delegations considered that this method would obviate the constitutional difficulties which they believed were inherent in the creation of the court merely by resolution since, under the suggestion of the United States, the court would come into existence as a result of the actions of States in conferring jurisdiction rather than simply by action of the General Assembly. Other delegations, however, believed that the constitutional difficulties were not eliminated.

45. In favour of the combined method it was argued that it was much easier and more realistic than the convention method, while it avoided the possibility, which would exist if the court were set up purely by resolution, of a long period of inactivity which would impair the court's prestige. The combined method, it was said, represented the greatest step forward which could be taken without running the risk that the progress made would be illusory. It ensured that the court would have a dignity not possible where the convention method was used, and it gave assurance in advance that the United Nations would perform its essential functions in relation to the court.

46. On the other hand, it was argued that there would be a delay and uncertainty about the creation of the court, which would not exist if the pure resolution method were used; this disadvantage would be especially serious if a State conferred jurisdiction by unilateral declaration, but could not use the court because the requisite number of States had not yet conferred jurisdiction. Those who favoured the convention method believed that the combined method did not eliminate the disadvantages they found in the creation of the court by a resolution. Moreover, they thought it anomalous for the General Assembly to adopt a resolution which would be completely void of effect unless later brought into force by the will of States. Further, they criticized the feature of the United States suggestion by which the fifteen or so States whose acceptance of jurisdiction would bring the court into being would not have to accept jurisdiction with respect to the same crimes.

47. Against the combined method it was also contended that since the existence of the court depended on the conclusion of conventions, there was no reason why the statute of the court should also not be embodied in a convention, instead of being adopted by resolution. States would be much more likely to accept the jurisdiction of a court the statute of which they had helped to draft at a conference with like-minded States than a statute offered them ready-made by the General Assembly. Furthermore, there was great difficulty in making reservations to a statute adopted by General Assembly resolution, and the impossibility of reservations, or a prohibition on them, would lessen the acceptability of the statute to States considering whether to confer jurisdiction on the court.

48. It was explained by the representative of the United States that, while some articles of the statute relating to the organization of the court would clearly have to be accepted by all States participating, other articles could be expressly declared in the resolution to be subject to reservations formulated in the instruments conferring jurisdiction.

E. *Decisions of the Committee*

49. By 8 votes to 2, with 3 abstentions, the Committee decided that the best method of establishing an international criminal court would be by means of a convention prepared by an international diplomatic conference convened under the auspices of the United Nations.

50. By 6 votes to one, with 8 abstentions, the Committee decided to recommend to the General Assembly that the court should not come into existence until jurisdiction had been conferred upon it by a certain number of States (the precise number to be decided later).

51. By 5 votes to 4, with 6 abstentions, the Committee decided to recommend to the General Assembly that the court should not come into existence until a certain number of States (the precise number to be decided later) had ratified the convention containing the statute of the court.

Purpose of the court

(Article 1 of the revised draft statute)

52. The Committee discussed at length the nature of the crimes which it was to be the purpose of the court to try. It was recognized that the precise limits of jurisdiction, the methods by which it could be conferred, and the conditions under which it could be exercised were provided for in chapter III of the draft statute. But it was desired in the first article to announce the essential purpose of the court and thereby lay down certain broad limitations, based on that purpose, beyond which the court could not act and States could not confer jurisdiction on it. The Committee felt that article 1, though of course it did not operate to confer any jurisdiction on the court, was nevertheless of fundamental importance.

53. The first problem which confronted the Committee was whether the court should be competent, if it were given such jurisdiction by States, to try crimes under national law which were of international concern. This problem was also dealt with by the Geneva Committee (paragraphs 30 to 34 of its report). The present Committee had before it an oral amendment to the Geneva text, submitted by Belgium and France, which proposed to add a provision that the purpose of the Court would be to try not only crimes under international law but also crimes under national law which were of international concern, as provided in conventions or special agreements among States parties to the statute, or by unilateral declaration. It was argued that it would be useful to provide expressly

that a State could, if it deemed it appropriate in certain cases of great legal and political complexity, give the international court the jurisdiction which would normally be exercised by domestic courts. The amendment did not contemplate bringing before the court ordinary crimes under domestic law, but crimes under international law at present provided for in national law. Therefore, the insertion of these crimes would encourage the development of international criminal law.

54. Against the amendment it was argued that the nature of "crimes under national law which are of international concern" was extremely vague; that the amendment ran counter to the basic purpose of the court, which was to deal with international crimes; and that to give the court power to deal with crimes under national law would make the statute less acceptable to States which were susceptible on the subject of their domestic jurisdiction. The Committee rejected the Belgian-French amendment by 10 votes to 4, with 2 abstentions.

55. The question then arose whether the purpose of the court to try crimes under international law, if jurisdiction were conferred upon it by States, should be left quite general, or whether certain further restrictions should be imposed. An oral amendment submitted by the Netherlands proposed to delete the words "as may be provided in conventions or special agreements among States parties to the present Statute" from the text adopted by the Geneva Committee. It was argued that, in view of the provisions of article 26, concerning the attribution of jurisdiction, these words were redundant. Furthermore, it was stated that the reason given by the Geneva Committee (Geneva report, paragraph 35), viz. that these words were needed in fairness to the accused, was incomprehensible, because specific instruments indicating the pertinent crimes were needed under article 26.

56. Other members thought that the words were not redundant, and that their deletion would make the statute less acceptable to States. The Committee rejected the Netherlands amendment by 6 votes to 4, with 5 abstentions.

57. It was recognized that the expression "crimes under international law" was a rather vague one at the present stage of development of the law, and some members felt that a more specific formulation was necessary. Some also expressed the view that a method should be found for ensuring that the court would not be given jurisdiction to try offences which only one State or a few States considered to be international crimes. Some members strongly insisted that the court should only try crimes under international law which were defined in conventions, customary international criminal law being not sufficiently developed to be applied by the court. They believed that only this restriction could ensure that the court would serve its proper function of trying offences which could not better be brought before national courts. If the court were given the possibility of having broader competence conferred on it, they felt that States would be very averse to creating the court and that, if created, it would be likely to be drawn into dangerous and controversial fields where the law was insufficiently developed.

58. Other representatives found such restrictions unnecessary. They pointed out that all jurisdiction would be conferred by States, as provided in article 26, and that conferment of jurisdiction on the court was a surrender of sovereignty which would not be made lightly or in fields where the law was not developed. Moreover, the court itself could be trusted to determine whether cases brought before it did or did not involve international crimes. They thought that it would contribute to the progress of the law and to the usefulness of the court if it were not made impossible for States to give it jurisdiction over crimes under international law, not necessarily defined in conventions.

59. A French amendment to the Geneva text to delete the phrase "as may be provided in conventions or special agreements among States parties to the present Statute" and to insert a statement that the competence of the court was defined by chapter III of the statute was rejected by 5 votes to 2, with 7 abstentions. Israel proposed the text which now appears in the revised draft statute. It was stated that "generally recognized" should be taken in its present meaning in international law; that law made a distinction between rules which were "generally" recognized and rules which were "universally" recognized. A sub-amendment by Denmark to the text proposed by Israel to delete the words "generally recognized" was rejected by 4 votes to one, with 10 abstentions. The text proposed by Israel was adopted by 5 votes to 2, with 9 abstentions.

Law to be applied by the court

(Article 2 of the revised draft statute)

60. An amendment to the Geneva text submitted by Australia and the Netherlands proposed to delete the words "including international criminal law, and where appropriate, national law", leaving only the provision that the court would apply international law. It was argued that the reference to international criminal law was redundant; further, the reference to national law was misleading, for although the court would obviously have to consider it when international law referred to domestic law, the court would not "apply" national law in the same sense as it would international law.

61. In favour of the original text of the article, it was argued that in some cases the court would directly apply national law. For example, under the Convention on the Prevention and Punishment of the Crime of Genocide, the penalties to be imposed were those of domestic law; also, States accepting the court's jurisdiction by unilateral declaration might request it to apply their own law. The Committee rejected the amendment of Australia and the Netherlands by 7 votes to 4, with 5 abstentions.

Permanent nature of the court

(Article 3 of the revised draft statute)

62. Article 3 of the Geneva draft statute was criticized on the ground that the second sentence was too obvious to require stating. It was explained, however,

that it had been desired to give an assurance that the court would not meet when it had no work to do, but would come together only when there were cases or matters of internal organization and procedure which required its attention. Thus, the permanence of the court should be understood as organizational but not operational. No amendments to the Geneva text were submitted.

Chapter III

ORGANIZATION OF THE COURT

Qualifications of judges

(Article 4 of the revised draft statute)

63. Some members thought there was a contradiction between the provision of article 4 that judges should be elected regardless of their nationality, and the provision of article 6, paragraph 2, that no two judges might be nationals of the same State. It was explained that article 4 merely indicated that, in principle, nationality was not a qualification to be considered in elections, even stateless persons being capable of serving; the only limitation on the principle was article 6, paragraph 2. The general view was that on this point the Statute of the International Court of Justice should be followed. No amendments to the Geneva text were submitted.

Number of judges

(Article 5 of the revised draft statute)

64. It was suggested that the number of nine judges provided in the Geneva draft statute was too small, particularly in view of the provision of article 45 for a quorum of seven, so that the court could be paralysed by the illness or incapacity of three of its members. On the other hand, it was stated that experience had shown the difficulty of conducting an international criminal trial with a large number of judges. The adoption of a new article 33 providing for a committing chamber composed of judges, however, required an increase in the number, especially since it was considered necessary, for the sake of fairness, that the chamber should be composed of at least five judges who could not sit in the trial of a case they had dealt with in the chamber. By 5 votes to 3, with 3 abstentions, the Committee rejected a proposal by Israel that there should be eleven judges, a quorum of five, and a committing chamber of three. Belgium proposed that there should be fifteen judges, a quorum of seven, and a committing chamber of five. These Belgian proposals were adopted respectively by 4 votes to 2, with 5 abstentions; 10 votes to one, with one abstention; and unanimously.

Ad hoc judges

65. A French proposal to provide for alternate judges was withdrawn. In opposition to another French proposal to provide for the appointment of special *ad hoc* judges like those envisaged by article 31 of the Statute of the International Court of Justice, it was argued that criminal cases were so different from those before the International Court of Justice that it was inappropriate to follow the provisions of the Statute of the latter Court in this regard. Furthermore, it was considered possible that so many defendants of different nationalities might be tried at the same time that the permanent judges would form a minority. Thirdly, experience had proved that *ad hoc* judges in the International Court of Justice showed less independence and impartiality than permanent judges.

66. In favour of the proposal, it was stated that States traditionally submitted to an international judicial body on condition that they were represented on it. The presence of *ad hoc* judges was an important safeguard for States, and it was desirable that those judges should be heard, even if they were frequently as much advocates as judges. No formal proposal was made regarding *ad hoc* judges.

Nationality of judges

(Article 6 of the revised draft statute)

67. While the Committee agreed that stateless persons should be eligible to serve as judges, some members thought that the matter was adequately taken care of by the provision of article 4 that judges should be elected regardless of nationality, and that it was stressing the point unduly to make special reference to it in article 6, paragraph 1. Others, however, thought it desirable to retain the express provision. An oral amendment by Yugoslavia to delete paragraph 1 of article 6 of the Geneva text was rejected by 6 votes to 3, with 7 abstentions.

Nomination of candidates and election of judges

(Articles 7, 8, 9 and 11 of the revised draft statute)

68. The United States of America submitted an amendment to the Geneva text providing that the judges should be nominated and elected "by the Members of the United Nations and by those non-Member States which shall have accepted the jurisdiction of the Court". It was proposed to substitute a reference to these States for the reference to "the States parties to the present Statute" in article 7, paragraph 1, concerning nominations, article 8, paragraph 2, concerning requests by the Secretary-General for nominations, article 9 concerning submission of the list of candidates, and article 11, paragraph 1, concerning the meetings of States for the purpose of election. The United States amendment was not linked with any particular method of creation of the court; it was proposed to apply equally whether the court was established by convention, by General Assembly resolution, or by General Assembly resolution followed by conventions. This system of election, it was urged, would furnish

a broad basis for the selection of judges, which would increase the prestige of the court. As to the mechanics of the system, it was explained that the election could be held either in the General Assembly, which would invite non-Member States to send representatives, or at a separate meeting. The member from the Philippines expressed the view that it was desirable that non-Member States should be permitted to send their votes to the Secretary-General by letter.

69. The majority of the Committee did not wish to adopt the amendments in place of the texts drafted by the Geneva Committee, but thought it desirable to submit both texts in the alternative to the General Assembly; the new texts would be appropriate if it were decided that the court should be closely linked with the United Nations, while the texts of the Geneva Committee could be used if less close connexion with the United Nations were preferred. Argentina proposed that the United States amendments should be set out in the Committee's report as alternatives to the texts of articles 7, paragraph 1, 8, paragraph 2, 9 and 11, paragraph 1. The proposal was adopted as to article 7, by 10 votes to 3, with 3 abstentions, as to article 8 by 9 votes to 3, with 3 abstentions, as to article 9 by 9 votes to 3, with 3 abstentions, and as to article 11 by 8 votes to 3, with 4 abstentions. By these votes the majority did not imply that it favoured the provisions contained in the alternative articles.

70. In the Geneva draft statute "the States parties to the present Statute" were called upon to perform the functions mentioned in articles 7, 8, 9, and 11. As a matter of drafting it was proposed to replace the words "the States parties to the present Statute" by the words "The States which have conferred jurisdiction upon the Court". Some members pointed out that the alteration was not one of drafting but was one of substance. According to the proposal, States which had ratified the statute but had not conferred jurisdiction would be excluded from the functions mentioned. But it was felt that only States which had conferred jurisdiction should be entitled to nominate and elect the judges. The Committee decided, by 3 votes to 2, with 5 abstentions, to replace in article 7, Alternative A, the words "States parties to the present Statute" by the words "States which have conferred jurisdiction upon the Court", and to amend articles 8, 9 and 11 accordingly.

Representative character of the court

(Article 10 of the revised draft statute)

71. The member from the Netherlands proposed that alternative texts of this article should be given, one being the text adopted by the Geneva Committee and the other, which would be appropriate in case the system of election in the new alternative texts of articles 7, 8, 9 and 11 were adopted, being identical with the Geneva text except for the omission of the words "as far as possible". The words "as far as possible", it was argued, had been based on the assumptions that the statute would be embodied in a convention to which only a limited number of States might become parties, and that only those States would participate in elections.

72. Other members, however, considered it superfluous to provide an alternative text in this case. The fear was also expressed that if the words "as far as possible" were deleted, an opportunity might be afforded to defence counsel to argue that the court was not properly constituted if it happened that one or more of the main forms of civilization or of the principal legal systems of the world were not represented on the court. Against this fear it was submitted that the provision only instructed the electors to "bear in mind" that the judges, as a body, should be representative, and that the right was nowhere given to parties to raise the issue whether or not there was proper representation. The Committee decided, by 10 votes to 3, with 3 abstentions, to submit only a single text of the article, and by 8 votes to none, with 7 abstentions, to retain the text approved by the Geneva Committee.

Terms of office

(Article 12 of the revised draft statute)

73. The member from the Philippines proposed that paragraph 2 of article 12 of the Geneva text should be modified so that after the first election the judges whose terms would be three years or six years would be chosen, not by lot, but according to the number of votes, so that the judges with the longest terms would be those who had received the most votes; in the event of ties, the eldest judges would receive the longest terms. It was contended that the introduction of an element of lottery in this matter would impair the dignity of the court.

74. Against this proposal it was contended that there was no reason to depart from the precedent of article 13 of the Statute of the International Court of Justice, which had worked satisfactorily, and that establishing different classes of judges according to the number of votes they received would damage the international criminal court's prestige. For these reasons, the Committee rejected the Philippines proposal by 10 votes to one, with 3 abstentions.

75. It was also pointed out by the member from the Philippines that it was desirable to prevent any conflict between paragraph 3, concerning the obligation of judges to discharge their duties until their places had been filled and to finish cases they had begun, with article 18 on the dismissal of judges. Accordingly, alterations in article 12, paragraph 3, and article 18 were adopted by 11 votes to none, with one abstention.

76. In consequence of the increase of the number of judges from nine to fifteen, paragraph 1 was amended to provide that, after the first election, the terms of five judges should expire at the end of three years and those of five more at the end of six years.

Privileges and immunities

(Article 14 of the revised draft statute)

77. The member from Belgium proposed that article 14 of the Geneva text should be amended to provide that each judge, when engaged on the business of the court, should enjoy "the privileges and immunities recognized for diplomats". It was contended that the

change was desirable in order to indicate that the judges were not diplomats and did not represent governments. On the other hand, it was argued that the expression "diplomatic privileges and immunities" was a familiar one in the practice of international organizations, and did not imply that persons enjoying such privileges and immunities were diplomats; there was no reason to change the text of the article. The Belgian amendment was rejected by 8 votes to 3, with 3 abstentions.

78. It was proposed that the article should be amended to provide that "The members of the Court", rather than "Each judge", should enjoy privileges and immunities, so as to include the registrar and his staff. Some representatives opposed the granting of diplomatic privileges to the registrar and registry staff, or thought it unnecessary to make any provision on the subject; others doubted, in view of paragraph 4(*a*) of General Assembly resolution 90 (I) of 11 December 1946, that the amendment was adequately drafted to attain its purpose. The amendment was not adopted, 5 votes being cast in favour and 5 against, with 5 abstentions.

79. The Committee also discussed a question raised by the member from the Philippines whether diplomatic privileges and immunities should be granted to the prosecuting attorney. It was agreed that it was undesirable to give rights to one party without also giving them to the other, but that it was difficult to give diplomatic privileges to defence counsels, who might be very numerous. On the other hand, both the prosecuting attorney and defence counsel might have a real need of privileges and immunities. The Committee made no decision on the matter, but wished that attention should be called to the problem in its report.

Disability and disqualification of judges

(Articles 16 and 17 of the revised draft statute)

80. The member from China thought it desirable to indicate in greater detail the kind of previous participation in a case which would prevent a judge from sitting on that case, and proposed that the article should be referred to the Standing Drafting Sub-Committee for clarification. Other members thought, however, that the provisions of articles 16, paragraph 2, and 17, paragraph 4, for decisions by the court in case of objection by a party to a proceeding or other difficulty were sufficient. The Chinese proposal was rejected by 8 votes to 2, with 4 abstentions, and the articles in the Geneva draft were left unchanged.

Dismissal of judges

(Article 18 of the revised draft statute)

81. During the consideration of article 12, paragraph 3, of the Geneva text, the member from the Philippines called attention to a possible conflict between that provision and article 18 on the dismissal of judges. By 11 votes to none, with one abstention, the Committee adopted an amendment to article 18, paragraph 3, to the effect that after a dismissal a dismissed judge should immediately cease to perform all functions as a member of the court.

Emoluments

(Article 22 of the revised draft statute)

82. The member from Belgium thought it undesirable that judges should be paid when not actually considering cases, and consequently proposed the deletion from the Geneva text of the sentence "Each judge shall be paid an annual remuneration". It was explained that it had always been intended that the annual remuneration of judges should be a more or less nominal figure, and that election as a judge might involve the sacrifice of other activities in accordance with article 15 of the draft statute; some small annual remuneration might assist in the obtaining of qualified candidates. The Belgian proposal was rejected by 5 votes to one, with 7 abstentions.

Finances

(Article 23 of the revised draft statute)

83. The member from the Netherlands proposed an alternative text for this article providing that the expenses of the court should be borne by the United Nations. Alternative texts of other articles had been prepared to cover the possibility that it would be decided that close links between the United Nations and the court were desirable, and it was argued that the same should be done in this case. The expenses of the court would be small, it was stated, and if the United Nations was to have great powers with respect to the court—if, for example, the judges were to be elected by the Members of the Organization—it was only reasonable that the United Nations should bear those expenses.

84. Other members, however, felt that whatever the method of establishment of the court and whatever the links with the United Nations, the possibility of having its expenses borne by the United Nations should not be envisaged. They thought that it was fair that the expenses should be borne by States which were interested in creating and using the court, and that to propose the imposition of a financial burden on States which did not want a court or were indifferent to it might raise a fatal obstacle to its creation. A United States proposal to delete an alternative text, proposed by the Standing Drafting Sub-Committee, providing that the United Nations should bear the expenses, was adopted by 8 votes to one, with 2 abstentions. Article 23 of the Geneva draft statute, as amended in accordance with other alterations made to that statute, was then adopted as the sole text in the new draft statute by 9 votes to none, with one abstention. In view of the substitution in article 7, Alternative A, for the words "States parties to the present Statute", of the words "States which have conferred jurisdiction upon the Court", article 23 was accordingly amended in the same way.

Chapter IV

JURISDICTION OF THE COURT

JURISDICTION AS TO PERSONS

(Article 25 of the revised draft statute)

85. Two main problems concerning jurisdiction as to persons were discussed by the Committee. One was whether the court should be competent to judge corporations—that is, juridical persons—as well as natural persons, and the other concerned jurisdiction over heads of States. The member from Australia proposed that the court should be competent to judge juridical persons. It was argued that the criminal responsibility of corporations was not excluded either by doctrine or by jurisprudence, and that the mere fact that the responsibility of corporations under existing international criminal law was not entirely clear should not mean that all possibility of conferring jurisdiction over them should be denied. On the other hand, in opposition to such competence of the court, it was urged that the idea of giving such competence to the court had been rejected by the Geneva Committee (paragraphs 88 and 89 of its report). In view of the experience at the Nürnberg and Tokyo trials, it was undesirable to include so novel a principle as corporate criminal responsibility in the draft statute. The Committee rejected the Australian proposal by 11 votes to one, with 4 abstentions.

86. With respect to the Geneva draft of article 25, it was objected that, under the constitutions of a number of countries, the Head of State enjoyed complete immunity, and that consequently this text would be unacceptable to those countries. Furthermore, it was stated that in constitutional monarchies based on the principle "The King can do no wrong", the legal and factual position of the Head of State was such that there could be no question of his criminal responsibility. Other members, however, thought it desirable to make it possible to subject to the jurisdiction of the court not only persons who "have acted" as Head of State but also persons who at the time were filling that position. It was also argued that express provision should be made for the competence of the court over persons who were or had been *de facto* Heads of State.

87. In voting on the proposals before it, the Committee first rejected, by 5 votes to 4, with 3 abstentions, a proposal by China that the article should provide that the court would be competent to judge natural persons only, including those who were or had been Heads of State, members or agents of governments. The Committee then, by 4 votes to 4, with 4 abstentions, failed to adopt an Argentine proposal that "The Court shall be competent to judge all natural persons without exception". The Committee then rejected, by 7 votes to 3, with 3 abstentions, a Belgian proposal to provide that "The Court shall be competent to judge natural persons including persons who have acted as rulers constitutionally or effectively responsible, as well as persons who have acted in the performance of their official duties". The Committee, then adopted, by 8 votes to one, with 4 abstentions, a Netherlands proposal which became the present text of article 25. The question was raised whether this new text, which was based on article 4 of the Convention on Genocide, would cover dictators. The Committee was of the opinion that, whether or not dictators could be considered constitutionally responsible rulers, they could be subject to the jurisdiction of the court as either public officials or private individuals.

88. Some members desired that the statute should expressly declare that criminal proceedings against individuals in the international criminal court did not in any way affect actions for damages against either officials or collective entities, including States. Consequently, the members from Belgium and France proposed the addition of a phrase at the beginning of article 25 stating that that provision was without prejudice to civil actions which might be brought either against individual or collective entities. The Committee was in agreement that a criminal case before the court should not prejudice the civil responsibility of an individual or collective entity, or the responsibility of a State under the classical principles of international law. The majority of the Committee felt, however, that since the statute was exclusively concerned with the criminal responsibility of individuals, it was unnecessary to make any reference to civil actions. Consequently, the amendment of Belgium and France was rejected by 7 votes to 3, with 5 abstentions.

ATTRIBUTION OF JURISDICTION

(Article 26 of the revised draft statute)

89. Having laid down in article 1 the general limits within which jurisdiction could be conferred on the court, the Committee turned to the problem of the methods by which jurisdiction should be conferred by States if they wished to do so. It was agreed that the court, once created, would have no jurisdiction whatever unless States should confer that jurisdiction by means of an appropriate indication of intent. To embody the principle that no State would be bound without its consent, the Committee, by 7 votes to 2, with 6 abstentions, adopted a new paragraph 1 for article 26, proposed by Israel, providing that the jurisdiction of the court was not to be presumed.

90. The Committee then examined the questions whether the article should enumerate the various types of instruments by which jurisdiction could be conferred, and whether any of these types should be restricted to *post factum* conferment of jurisdiction over a particular case. The draft article proposed by the Geneva Committee stated that jurisdiction could be conferred by convention, special agreement or unilateral declaration but that the two latter types of instruments might only confer jurisdiction "with respect to a particular case".

91. It was argued that it was unnecessary to state that only those three types of instruments could be used by States to confer jurisdiction; a maximum of flexibility should be allowed, and the possibility of the

development of other types of instruments should be left open. Other members, however, felt that it was necessary to be precise in a technical article of this kind and that, unless the types of instruments were specified, there would be no indication in the statute of the procedure for acceptance of jurisdiction.

92. Some members thought it desirable to retain the provision in the Geneva draft statute that jurisdiction could be accepted generally as to future cases only by means of a convention, and that special agreements and unilateral declarations could be used only to accept jurisdiction *post factum* in a particular case. It was argued that, since the requirement that crimes should be provided for in conventions had been eliminated from article 1, it was necessary to provide in article 26 that conventions were the sole means for the general acceptance of jurisdiction *ante factum* over particular types of crimes.

93. Other members, however, believed that there should be no distinction between the various types of instruments. There would be no real difference, they thought, if jurisdiction were conferred by a bilateral convention or by two unilateral declarations. Further, it was desirable to follow the example of Article 36 of the Statute of the International Court of Justice and to make it possible to use a unilateral declaration to accept the court's jurisdiction generally over future cases.

94. In the voting on the paragraph, the Committee first rejected, by 6 votes to 4, with 4 abstentions, the first part of an oral amendment by the United Kingdom providing that a State might confer jurisdiction on the court by convention. The Committee then adopted, by 6 votes to 2, with 6 abstentions, an amendment by Argentina and France providing that no State should be bound by the jurisdiction of the court unless that State had conferred jurisdiction upon the court by convention, by special agreement or by unilateral declaration. It was then decided, by 9 votes to one, with one abstention, to take a further vote on whether the article should be left in the negative form adopted or should be redrafted in the positive. The article as it now appears in the revised draft statute was then adopted, on the proposal of Australia, by 6 votes to none, with 7 abstentions. It was understood that this paragraph referred only to future conventions, special agreements and unilateral declarations.

95. The Committee then, by 11 votes to none, with 2 abstentions, adopted a new paragraph 3 on the meaning of conferment of jurisdiction. It was felt necessary to insert this paragraph because the significance of conferment of jurisdiction might easily be misunderstood. The paragraph adopted made it clear that, by conferring jurisdiction upon the court, a State was not bound to bring specific cases before the court. Such a State had the right to do so, but it might well choose to bring cases before its own national courts according to the laws determining national criminal jurisdiction (article 26, paragraph 4) or before special international tribunals (article 53). Unless otherwise provided in the instrument, the only duty following from the conferment of jurisdiction would be passively to allow persons to be tried. It was said that, by special provision in the instrument conferring jurisdiction, the international criminal court could, if a State so desired, be given exclusive jurisdiction over a particular kind of crime; but the mere conferment of jurisdiction would not have this result. In order to make this clear, the Committee changed the wording of paragraph 2. The wording provisionally adopted at a certain stage of the discussion was to the effect that no State should be bound by the court's jurisdiction unless that State had conferred such jurisdiction. This phrasing was changed from a negative to a positive form in order to avoid any implication that if a State conferred jurisdiction on the court, that jurisdiction would have to be exclusive rather than concurrent.

96. To make it clear that mere conferment of jurisdiction did not affect the law determining national criminal jurisdiction, and that this national criminal jurisdiction still remained intact unless otherwise provided in instruments conferring jurisdiction, the present paragraph 4 of article 26, proposed by Israel, was adopted by the Committee, by 10 votes to none, with 4 abstentions. Originally, the proposal of Israel was offered and discussed as paragraph 2 of article 27. After having been adopted as part of article 27, it was later transferred to article 26.

Recognition of jurisdiction

(Article 27 of the revised draft statute)

97. Some members of the Committee believed that article 27 of the Geneva draft statute covered two quite different problems. The first part of the article, which provided that no national of a State should be tried by the court unless that State had conferred jurisdiction, was a protection of the sovereignty of States and an assurance to them that no trial which might involve discussion of their national policy would take place without their consent. The second part of the article, which provided that jurisdiction also must be conferred by the State or States in which the crime was alleged to have been committed, had the purpose of preventing conflicts of jurisdiction between the international criminal court and national courts.

98. As to the first part, requiring the consent of the State of which the defendant was a national, it was argued that the formulation in the Geneva draft statute was too general, and that the article should begin with the phrase "subject to the international law of war". It could be expected that the court would be used most after a war, when the consent of the defeated State might be impossible to obtain because its government was overthrown and the State completely occupied. To require in such circumstances the consent of the State of which the defendant was a national would therefore largely destroy the usefulness of the court; further, this requirement might be interpreted as a criticism of the work of international tribunals after the Second World War. A reference to the law of war, it was believed, was necessary to make it possible for victorious Powers occupying a State to bring its nationals before the international criminal court.

99. Other members of the Committee considered that a reference to the international law of war was unnecessary and undesirable. In their view, an uncon-

ditional surrender by a State included consent to trial of its nationals before the court on the complaint of the victors. Further, occupying Powers would enjoy all their rights under the law of war whether or not any specific provision was made in the statute of the court. Reference to the law of war would also render the statute less acceptable to States, as it would add a condition of uncertain scope to a right upon which they would insist. It was also doubted that the proposed amendment was adequately drafted to achieve its intended purpose. For these reasons, the Committee rejected, by 4 votes to 3, with 6 abstentions, the proposal to add the phrase "subject to the international law of war". Consequently, the provision that no person could be tried unless the State of which he was a national had conferred jurisdiction on the court was left unchanged.

100. The second problem discussed was that of the prevention of conflicts between the jurisdiction of the international criminal court and that of national courts. It was argued that the statute did not need to make any provision for the prevention of such conflicts, and that the requirement of article 27 of the Geneva draft statute that no trial could be held unless jurisdiction had been conferred by the State or States where the crime was alleged to have been committed was an unnecessary and undesirable limitation on the activity of the court. The practical situation in which the court would be called upon to try an alleged criminal was one where the complainant State would have both custody of and jurisdiction over the accused. No other State would have any right to object if the complainant State tried the accused in its own courts and, consequently, no greater right of objection (except the right of the State of nationality, for the specific reasons given above) should exist if instead the complainant State brought the case before the international criminal court. If the State where the crime was committed did not have custody of the accused, there was no reason to ask its consent to the trial; if it did have such custody, the other articles of the statute made it clear that that State would have no obligation to allow the case to be tried by the court unless it had undertaken such an obligation. Consequently, the Netherlands proposed to delete in article 27 the words "and by the State or States in which the crime is alleged to have been committed".

101. Other members of the Committee contended that the requirement of conferment of jurisdiction by the State where the crime was committed was more than a mere matter of avoidance of conflict between national and international jurisdictions, and was an essential safeguard without which the statute was unlikely to be acceptable to States. The State where the crime was committed had a primary interest in the punishment of that crime, since it was that State's peace and order which had been violated; that State's consent was therefore a necessary condition, from the practical standpoint, of the trial of an accused by the international criminal court. These members believed that, after the adoption of the paragraph which was now paragraph 4 of article 26, it was still just as essential to retain the words which the Netherlands proposed to delete. This was the view which prevailed in the Committee. The proposal of the Netherlands was rejected by 5 votes to one, with 7 abstentions.

Approval of jurisdiction by the United Nations

102. Article 28 of the Geneva draft statute provided that no jurisdiction might be conferred upon the court without the approval of the General Assembly of the United Nations. Some members believed it essential that the General Assembly should have power over the conferment of jurisdiction; article 28 was, in their view, an essential safeguard if the court was to be created. Only thus, they believed, was it possible to prevent a State or a small number of States from bringing before the court cases which involved acts not generally recognized as international crimes, and to prevent international criminal jurisdiction from venturing into unexplored fields. Others, however, thought it unnecessary to provide for any control as to the conferment of jurisdiction, especially since the court could try only crimes generally recognized under international law. Others, again, considered it inappropriate for the General Assembly to have any rights in the matter. Interference by the Assembly, they believed, would introduce an element of uncertainty and also a political element into the conferment of jurisdiction. Moreover, it was contrary to the spirit of the Charter to give the Assembly a power of decision in matters relating to individuals. Control by the Assembly over the conferment of jurisdiction would mean an impairment of the sovereign freedom of action of States, which could be relied on not to act unwisely in so serious a matter. The International Court of Justice had operated successfully even though no control was exercised by any other United Nations organ over the conferment of jurisdiction by States. The Committee, by 8 votes to 2, with 4 abstentions, adopted a proposal by China to delete any provision by which the General Assembly was given control over the conferment of jurisdiction.

Appellate jurisdiction

103. The view was expressed that it was desirable to put an express provision in the statute concerning conferment on the court of appellate jurisdiction to review the decisions of national courts on international crimes. It was stated that, after the Second World War, the need had been felt for an international court to resolve conflicts in the decisions of national courts on points of the international law of war. It would be useful in the interests of uniform application of international law if important legal questions could be submitted to the court for review. Moreover, it was suggested that States should have the possibility of requesting a binding opinion from the international criminal court on a point of international criminal law which arose in a domestic trial.

104. In opposition to the inclusion of such a provision it was argued that there was no reason why States should not submit cases to the court in the first instance, rather than on appeal. Further, appeals from the highest national courts would be unlikely to be acceptable to States, since the decisions of those courts were regarded as final. If appeals to the international criminal court were to be allowed, the difficult

question arose whether the prosecution as well as the accused should be allowed such an appeal.

105. The viewpoint prevailed that it was unnecessary to include special provisions, since every kind of jurisdiction mentioned could be conferred under the present provisions of the statute. A proposal by the Netherlands to include a specific provision enabling a State to confer appellate jurisdiction on the court to review a decision made by a national court of that State was rejected by 6 votes to 3, with 4 abstentions.

Withdrawal of jurisdiction

(Article 28 of the revised draft statute)

106. The Geneva draft statute contained no provision on the withdrawal of jurisdiction, and many members of the Committee felt that a provision on the subject was necessary to stimulate the conferment of jurisdiction. A text which became article 28, providing that a State might withdraw its conferment of jurisdiction, such withdrawal to take effect one year after the delivery of notice to the Secretary-General, was adopted by 8 votes to none, with 2 abstentions.

Access to the court

(Article 29 of the revised draft statute)

107. The first question dealt with by the Committee was whether, as provided in the Geneva draft statute, the General Assembly and any organization of States authorized by the General Assembly should have the right to institute proceedings before the international criminal court. One viewpoint expressed in the Committee was that the right of access of the General Assembly to the court would in some measure depend upon the method by which the court was to be created, and could best be decided at the time the court was established. It was desirable, however, to make it possible for some international bodies to have access to the court; there were several which were greatly interested in the development of international criminal law, for instance, the International Red Cross, and they might wish to bring cases before the court, not for the purpose of securing the punishment of offenders, but for that of clarifying legal rules.

108. Another view was that it was impossible at the present stage to decide whether the General Assembly should have this right. Other members of the Committee thought it anomalous to give the right of access to the General Assembly or to any other international body. If the States Members of the General Assembly had accepted the jurisdiction of the court, there was no reason why they should not submit cases to it directly rather than indirectly through the Assembly; if they had not accepted jurisdiction, it would be improper to give them an indirect right of access. To give the Assembly the power to bring cases would invite a kind of pre-trial in a political body not subject to judicial safeguards. Some of the objections against a right of access by the General Assembly were considered even stronger in the case of other international bodies.

109. The Committee first, by 8 votes to 2, with 4 abstentions, deleted the phrase giving the General Assembly the right of access, and then, by 9 votes to none, with 5 abstentions, deleted the phrase in the Geneva draft statute giving that right to any organization of States authorized by the General Assembly. It then, by 11 votes to one, with 2 abstentions, rejected a Netherlands proposal to give the right to any international body authorized by the General Assembly.

110. The next problem discussed by the Committee was that of the political screening of cases to ensure that no case would be brought before the court if its trial would prejudice the maintenance of international peace and security. This problem has already been touched on in the section of chapter II of the present report dealing with the relations between the maintenance of international criminal justice and the maintenance of international peace. Members of the Committee who believed that conflicts could arise between the maintenance of justice and the maintenance of peace were anxious that some organ of the United Nations, which could be chosen later if the stage of final drafting of the statute were reached, should have the power to stop trials before the court if it were necessary to do so in the interests of peace. They believed that it was vital to the success of the court to provide for a political screening, as in exceptional cases a trial might cause harm to international relations.

111. Those who did not believe that the maintenance of justice could conflict with the maintenance of peace opposed any provision for political screening. They believed that the same considerations which had led to the deletion of article 28 of the Geneva draft statute relating to approval by the General Assembly of conferment of jurisdiction were applicable here. It was pointed out that no power of political screening existed with respect to the International Court of Justice, though cases before that Court might involve questions which were extremely serious for States; that example, they believed, should be followed with respect to the international criminal court.

112. With regard to the extent of the power over proceedings before the court, some thought that that power should be a complete right to stop a trial, while others thought it should be a mere right to recommend discontinuance to the complainant. Some thought that there was no need to provide in the statute for a mere right of recommendation; the Security Council and the General Assembly already possessed the power to make recommendations concerning the maintenance of international peace and security.

113. Another view expressed was that no provision for political screening should be included in the statute at this stage, as it was impossible to tell, in the absence of all information as to what States would give jurisdiction to the court, whether such screening was necessary or desirable. Other members thought that the answer to the question whether the United Nations should have such a right depended on whether it was ultimately decided that very close relations between the court and the United Nations were desirable; therefore, as in the case of other provisions depending on such a decision, the Committee should submit alternative texts on the matter, one based on the hypothesis of very close relations with the United Nations and the other on that of less close relations. This was the view which prevailed in the Committee.

114. In the voting, the Committee, by 6 votes to 4, with 4 abstentions, rejected a proposal by the member from the Netherlands to have only a single text which provided that, in the interest of the maintenance of peace, a United Nations organ might stop the presentation or prosecution of a case before the court. It then, by 5 votes to 3, with 5 abstentions, adopted a proposal that alternative texts should be given; the second alternative, which would be appropriate in case very close relations between the court and the United Nations were considered desirable, contains the new paragraph proposed by the member from the Netherlands.

Challenge of jurisdiction

(Article 30 of the revised draft statute)

115. Some members of the Committee felt that the drafting of article 30 of the Geneva draft statute was ambiguous, and that some clarification was required. A few changes in wording were consequently made. The main change in substance from the Geneva text was in paragraph 2, where the Committee decided, by 7 votes to 2, with 2 abstentions, on the proposal of the member from the Philippines, to provide that challenges to the jurisdiction made at the beginning of a trial should be decided at once. Some members thought that it was impracticable to require immediate decisions on challenges, since questions of jurisdiction would often involve difficult issues of fact such as the nationality of the accused or the place where the alleged crime was committed. The majority of the Committee, however, considered it desirable that objections to jurisdiction which were raised at the beginning of the trial should be decided at the outset; this would prevent charges from being made and evidence adduced in public unless it was certain that the court had jurisdiction.

Assistance of States

(Article 31 of the revised draft statute)

116. Two points concerning this article were discussed by the Committee. The first was whether, as provided in the Geneva text, the court should be able to request assistance from States even though those States were not obligated to render such assistance. It was agreed that this power of the court was a useful one; States which had not accepted its jurisdiction nor any obligation to assist it might be willing to give assistance if they were requested to do so.

117. The second point was whether it should be provided that any State which conferred jurisdiction on the court should thereby automatically undertake to render assistance, or whether the two obligations should remain independent, as in the Geneva draft statute. It was agreed that there was no obstacle, if States so desired, to including in the instrument conferring jurisdiction an obligation to render assistance; provisions concerning assistance could also be included in other instruments. On the question whether conferment of jurisdiction should *ipso facto* involve a duty of assistance, The Committee concluded that it was unwise to make the conferment of jurisdiction too onerous. Consequently, it decided, by 7 votes to 3, with 3 abstentions, to retain the Geneva text of the article. The text was later altered, by 10 votes to none, with 4 abstentions, to make it explicit that the committing chamber would have the same rights as the court.

Penalties

(Article 32 of the revised draft statute)

118. The Geneva text of article 32 was considered defective by some members of the Committee on the ground that the court was left free to determine penalties, and that this freedom was not consistent with the principle *nulla poena sine lege*. It was recognized that the statute could not contain a complete international criminal code providing penalties for crimes, but some members thought it desirable that national law—the law of the nationality of the accused, or possibly the law of the place of the crime—should be referred to wherever possible, in order to fix penalties. Against such a reference it was argued that, according to present international law, penalties up to and including the death sentence could be imposed for crimes against humanity, crimes against peace and war crimes, and therefore the Geneva text could not be objected to on the ground of *nulla poena sine lege*. Further, a national law might contain no penalty whatever for an international crime; in any case, a reference to that law would mean a difference in the punishments of defendants who had committed identical acts, and such a difference, based on arbitrary and accidental factors, was very undesirable in any system of justice. The Committee decided, by 5 votes to 3, with 6 abstentions, not to alter the Geneva text of the article, but to include in its report an expression of the view that it would be desirable that the court, in exercising its power to fix penalties, should take into account the penalties provided in applicable national law to serve as some guidance for its decision.

Chapter V

COMMITTING CHAMBER AND PROSECUTING ATTORNEY

Committing chamber

(Article 33 of the revised draft statute)

119. Several members of the Committee considered the commitment procedure in the Geneva draft statute excessively cumbersome. That procedure was so elaborate that in practice it would amount to a preliminary trial, which was likely to consume a very long time. Therefore, the view was expressed that the provisions of the Geneva text concerning a committing authority should be deleted, and there should be no separate procedure for the determination whether the evidence was sufficient to support the complaint. The danger of frivolous prosecutions could best be

avoided by making available to the accused a summary procedure before the court itself, or before a small committee thereof. Other members, however, believed that some preliminary examination of the evidence to determine whether it warranted the prosecution of an accused was an essential feature of a just procedure. They stressed that the authority making that examination should be different from the court which tried the case, so that opinions formed for a limited purpose in the preliminary proceeding would not impair the open-mindedness of judges called upon to make a decision.

120. The Belgian member of the Committee suggested that a useful analogy might be found in procedures in his country, whereby the preliminary examination of the evidence was carried out by a chamber of the court itself; judges who were members of the chamber did not afterwards participate in the trial. This solution was supported by a large majority of the Committee, and it was adopted in principle by 11 votes to one, with 3 abstentions. The member opposing the change expressed the view that the committing authority provided in the Geneva draft statute was preferable, since it separated commitment from trial more completely.

121. As to the organization and procedure of the committing chamber, it was thought difficult for a very small number of persons to act in cases of great international importance. Consequently, it was deemed preferable to have a chamber composed of five members. A further question was whether the accused should be allowed to present evidence in the proceedings before the chamber. The view was expressed that such a right was essential to fairness. Other members of the Committee, however, referred to the procedure in common law countries before grand juries and committing magistrates, in which the accused was not allowed to present evidence and the purpose of the proceeding was only to determine whether the evidence for the prosecution was sufficient to warrant a trial. Those members feared that giving the accused the right to present evidence in preliminary proceedings would mean that those proceedings would be as elaborate as the trial. The member from the United Kingdom proposed a compromise solution, in which the accused would have the right to be heard by the committing chamber, but would not have the right to adduce evidence. This solution was adopted by 7 votes to 4, with 4 abstentions.

122. With regard to the powers of the chamber, there was some disagreement on whether it should have the purely passive role of considering evidence presented by the complainant, or whether, on the other hand, it should be able to order further inquiry and investigation. One view was that the complainant should be required to make out a *prima facie* case and should not expect the committing chamber on its own motion to investigate. Other members, however, thought it desirable that the chamber should have powers similar to those of a *juge d'instruction* in continental systems of law. By 8 votes to one, with 6 abstentions, the Committee adopted a proposal giving the chamber, in order to insure that the accused should have a fair trial, the power to order further inquiry or the investigation of specific matters.

Prosecuting attorney

(Article 34 of the revised draft statute)

123. Some members of the Committee believed that the system of election of the prosecuting attorney provided in the Geneva text was excessively cumbersome. To simplify the selection of that officer, the Belgian member suggested that he should be appointed by the complainant State or States. It was argued that this was the simplest and most practicable method of selection, and that experience had shown that it created no serious difficulty. It was also argued that, since proceedings before the court were instituted by States, it was natural to give them also the right to appoint the prosecuting attorney. This method of appointment would ensure the presentation before the court of the information in the possession of the complainants and of their point of view. Further, it was maintained that at the present time an individual, the national of a particular State, could not enjoy the general confidence which was required if he was to be entrusted with the task of representing the community and of acting in its interests.

124. Other members believed that it would be possible to establish a less cumbersome method of selecting the prosecuting attorney without giving the complainants the power to appoint him. They believed it was undesirable to have such a method of appointment, since the prosecuting attorney must be an impartial official, who might even withdraw the case if it appeared not to be well founded. Another point of view was that the prosecuting attorney should not be elected for each case, but should be a permanent official of the court. This system would be most in accord with the permanency given to other organs of the court by the draft statute; any difficulties which might arise with respect to a permanent prosecuting attorney could be solved by a procedure of challenge like that established for judges in article 17, paragraph 2. The whole statute was based on the assumption that the court itself and its organs could represent the whole community of States, and there was no reason to depart from this assumption in the case of the prosecuting attorney.

125. A Belgian amendment providing that a jurisconsult appointed by the complainant or complainants should assume the functions of prosecuting attorney was adopted by 6 votes to 5, with 3 abstentions.

Chapter VI

PROCEDURE OF THE COURT

NOTICE OF THE INDICTMENT

(Article 36 of the revised draft statute)

126. Article 36 of the Geneva draft statute provided that notice of an indictment should be given to the accused, to the State of which he was a national, and to the State in which the crime was alleged to have been committed. It was considered, however, that the States of which the victims of the crime were nationals would have a natural interest in being notified of proceedings before the court, so that those States could send observers. Consequently the Committee, by 3 votes to 2, with 7 abstentions, adopted a proposal by the Belgian member that notice should also be given to those States.

JURY

(Article 37 of the revised draft statute)

127. Some members of the Committee considered it desirable to enable States to provide, in the instruments by which they conferred jurisdiction upon the court, that trials with a jury might take place before the court. A number of States had constitutional provisions giving the right to jury trials, and would probably find it impossible to accept the court's jurisdiction unless there were a possibility of such trials. The details of the procedure of the court when a jury was used could be left to the instruments conferring jurisdiction.

128. Other members of the Committee considered that jury trials before the court were undesirable. The procedural difficulties of such trials were very great under the statute as at present drafted, and the introduction of a jury would mean the introduction of a new element in proceedings which was illogical and inconsistent with other provisions. Nevertheless, these members thought it wise not to vote against the proposal in order not to make conferment of jurisdiction impossible to a number of States. A United States amendment stating that provisions concerning trial by jury might be made in instruments conferring jurisdiction was adopted by 4 votes to none, with 10 abstentions. The Committee understood, as suggested by the member from the Philippines, that this provision also covered trials with lay assessors, such as existed in the domestic legal systems of some countries.

RIGHTS OF THE ACCUSED

(Article 38 of the revised draft statute)

129. Paragraph 2 (*a*) of article 38 of the Geneva draft statute provided that the accused should have the right to be present at all stages of the proceedings. It was suggested that an express provision should be made that the right of the accused to be present was subject to the necessity of maintaining order in the court, and that that right should not exist where the accused by his attitude hindered the course of justice. It was stated, however, that such an express provision was unnecessary, since article 42 of the draft statute gave the court the power to maintain order at the trial, and it was clear that the necessity of order could prevail over the right of the accused to be present. On this understanding, no amendment to the draft statute was put to a vote.

130. The Committee considered that it was desirable to clarify the language of paragraph 2 (*c*) of the article to indicate that only reasonable expenses of the defence (including counsel fees and other costs) would be chargeable to the fund referred to in article 23, and that their reasonableness would be subject to the decision of the court. It was possible that the fees of more than one advocate for the accused would be found reasonable. It was also possible that if an accused were able to pay for part of his defence only, a part of these expenses might be defrayed from the fund; also, all the expenses of the defence might be met if an accused, though having sufficient means to engage counsel, were unable to use his means for that purpose. Consequently, the Committee, by 10 votes to none, with 2 abstentions, adopted an amendment to paragraph 2 (*c*) proposed by Denmark in this sense.

131. Paragraph 3 of the Geneva draft of article 38 provided that the accused should not be compelled to "speak". It was proposed that the word "speak" should be changed to "testify". It was explained that the word "speak" was intended to cover written statements and had been chosen advisedly, since it was not desired to follow the procedure of any particular State and there were many States in which the defendant was not allowed to "testify" in the sense of giving evidence to the court as a witness under oath. An amendment submitted by the member from the Philippines was rejected by 10 votes to 4, with no abstentions, and the Geneva text was retained. Other members of the Committee desired to make it entirely clear in the text of paragraph 3 that the accused should not be compelled to take the oath. Some members thought that this right was implicit in the right not to speak at all, but the Committee decided, by 3 votes to one, with 10 abstentions, to add a final sentence to the paragraph making it explicit that there should be no compulsory oath. It was understood that, if an accused wished to take an oath, nothing would prevent his doing so.

132. A new paragraph (paragraph 4) was added by the Committee to article 38 as the result of its discussion of article 43 of the Geneva draft statute, which provided that the court, if satisfied that no fair trial could be had, could dismiss a case at any stage of the proceedings, and that, in the event of such dismissal, the court should discharge the accused and might also acquit him. It was stated that, since article 43 was in essence a sanction for failure to make a fair trial possible, its natural place in the statute was in article 38 concerning the rights of the accused, rather than in a separate article. The original wording of article 43 was also criticized on the ground that, as an acquittal would have the effect of preventing later trial in accordance with article 50, the court should not have the power to acquit a defendant unless the trial was completed. The Committee adopted the

first sentence of the new paragraph 4, proposed by Belgium, France and Israel, by 7 votes to 2, with one abstention. It provides for a suspension of the proceedings, and a subsequent dismissal if, within a time limit determined by the court, they are not resumed. The second sentence, which provides only that the accused shall be released if a case is dismissed, was adopted on the proposal of Peru by 6 votes to 3, with 2 abstentions.

133. Some members of the Committee thought that, in connexion with the provision for dismissal, it was essential to provide a period of limitation of ten or fifteen years, after which the prosecution could no longer be resumed. In their view, such a provision was an essential right of the accused. Other members, however, believed that the provision of a period of limitations, which did not exist in present international law, was a matter of substance on which the Committee could not decide, and which should not be dealt with in the statute establishing the court. An amendment providing for a fifteen-year period of prescription was rejected by 7 votes to 3, with one abstention.

Authority of the court

(Article 42 of the revised draft statute)

134. The Committee substituted the word "authority" for the word "powers" or "power" used in the Geneva draft statute. It was the understanding that this amendment did not alter the content of the article, and it was agreed that the French and Spanish texts would be maintained.

Withdrawal of prosecution

(Article 43 of the revised draft statute)

135. Article 43 is similar to article 44 of the Geneva draft statute; it restricts the right of the prosecution to withdraw cases and gives the Court power over such withdrawals. The present wording of the article, proposed by Belgium, France and Israel, was adopted by 5 votes to 2, with 3 abstentions.

Required majority

(Article 45 of the revised draft statute)

136. Article 45 is similar to article 46 of the Geneva draft statute. Its drafting was changed to follow Article 55 of the Statute of the International Court of Justice more closely. It was thought desirable to state expressly what some members thought was implied, that the judges should not only be present but should also have participated in the trial. The Committee agreed that the presiding judge should not have a casting vote in the case of the decision to impose the death penalty. The same provision with respect to life imprisonment, proposed by Venezuela, was adopted by 8 votes to none, with 4 abstentions, on the ground that this sentence was almost as severe as the death penalty, and therefore, like the death penalty, was rejected by some countries. The article, as amended, was adopted by 10 votes to one, with 2 abstentions.

Contents and signature of judgment

(Article 46 of the revised draft statute)

137. It was proposed by the member from the Philippines to state expressly that the judgment should be written. Many members of the Committee thought that this was clearly implied elsewhere in the draft statute, and the proposal was rejected by 6 votes to one, with 6 abstentions. It was also proposed to require expressly that the judgment should state the charges which had been recognized as established. Some members thought that the provisions of the Geneva draft statute (article 47) were sufficiently clear, and that it was not necessary to make any further provision for the statement of the facts or charges. The principle of *non bis in idem* (article 51 of the Geneva draft statute) merely prevented a second trial for the same offence, and did not prevent a trial for some other crime involving some of the acts alleged in the first trial. An amendment proposed by Belgium and Israel to require statement of the charges which had been recognized as established was not adopted, 3 votes being cast in favour and 3 against, with 7 abstentions.

Separate opinions

(Article 47 of the revised draft statute)

138. Some members of the Committee thought it undesirable to allow separate and dissenting opinions by judges of the court. It was especially undesirable, they believed, to have such opinions in criminal cases, where they might do serious harm to the authority of a judgment. Other members, however, thought that separate and dissenting opinions would contribute to the development of international criminal law. It had been found in countries where dissenting opinions were allowed that the development of the law was often much influenced by them. A Belgian proposal to delete the article was rejected by 7 votes to 3, with 2 abstentions.

No appeal

(Article 49 of the revised draft statute)

139. It was proposed to add a provision to article 49 to make it clear that the statement that the judgment was without appeal was not inconsistent with article 52 on the revision of judgments. The Committee believed, however, that there was a sharp distinction between revision and appeal, and that consequently there would be no danger of confusion. Therefore, the text of article 50 of the Geneva draft statute was left unchanged.

Double jeopardy

(Article 50 of the revised draft statute)

140. Article 50 (article 51 of the Geneva draft statute) was criticized on the ground that the expression "any State which has conferred jurisdiction upon the court with respect to such offence" might give rise to the impression that the rule did not apply when a State had conferred jurisdiction only with respect to a particular case. The Committee believed, however, that its intent that the rule should apply both where jurisdiction had been conferred generally and where it had been conferred in a particular case was sufficiently clear.

141. In order to indicate more clearly the significance of the article, the Committee, on the proposal of the member from the Philippines, replaced the title "Subsequent trial" by "Double jeopardy". It was under-

stood that the title in the French and Spanish texts would also be altered.

Execution of sentences

(Article 51 of the revised draft statute)

142. The second sentence of article 52 of the Geneva draft statute provided that, in the absence of conventions, arrangements for the execution of sentences might be made, upon motion of the court, by the Secretary-General of the United Nations with any State. This provision was criticized as being so unrealistic and impossible of execution that it was a mere dead letter. Its deletion would mean that if sentences were to be executed, States conferring jurisdiction on the court would have to conclude conventions for the purpose. The sentence was deleted by 10 votes to none, with 2 abstentions.

Revision of judgment

(Article 52 of the revised draft statute)

143. Some members of the Committee argued that a provision concerning revision of judgment should be omitted from the draft statute. Such revision of judgment was a common institution in domestic law, but the situation with respect to judgments of the international criminal court was quite different. There would be a danger that pressure might be brought upon the court in consequence of changes in the political relations between States. Any possibility of that danger should be excluded. The experience of the post-war trials had shown how eager States were to obtain the revision of judgments, and to what extent the fulfilment of this wish was made the condition of political co-operation. Further, it was maintained that the board of clemency could act where needed.

144. Other members, however, thought that the possibility of revision of judgment was a vital part of any judicial system. Without such a provision, they doubted whether the proceedings of the court would be regarded as fair, and whether the statute would be acceptable to States, the more so since revision could only be had under the special circumstances envisaged in the statute. After having first decided, by 4 votes to 3, with 6 abstentions, to delete the article, the Committee later restored the Geneva text by 8 votes to one, wih 5 abstentions.

Chapter VII

CLEMENCY AND PAROLE AND SPECIAL TRIBUNALS

Board of clemency and parole

(Article 53 of the revised draft statute)

145. It was proposed that the provisions of the draft statute concerning clemency and parole should be deleted. It was argued that in the international community there was no organ which was suitable to exercise the right of clemency which, in national systems, was one of the prerogatives of sovereignty. Further, the provision was inconsistent with the finality of judgments which was elsewhere provided, and would lead to repetition of the trial before the board of clemency and parole. Other members, however, considered that the possibility of clemency was a vital necessity for international justice, as it was for national justice; also, experience had shown that sentences imposed after a war were later considered too harsh, and the possibility of their reduction was desirable. A French proposal to delete the article was rejected by 9 votes to one, with 3 abstentions.

146. The Geneva draft on this subject (article 54) made no provision as to the details of the method by which the board of clemency should be elected, and it was thought desirable to add some clarification on that point by a reference to the method of election of judges provided in article 11. It was understood that this reference implied that on the board of clemency and parole, as on the court itself, no two members could be of the same nationality.

147. It was also considered appropriate with respect to this article, as with respect to several others in the draft statute, to furnish alternative texts, the second being based on the hypothesis of a very close relationship between the court and the United Nations. As to the first alternative, based on the hypothesis of a less close relationship, it was decided, by 9 votes to none, with 5 abstentions, that the members of the board, like the judges, should be elected only by the States which had conferred jurisdiction on the court rather than by all the States which were parties to the convention containing the statute.

148. As to the second alternative, it was urged that, for the sake of simplicity, no special organ should be created to perform the functions of clemency and parole, but that these functions should be entrusted to the United Nations organ which performed the function of political screening under article 29, paragraph 2, Alternative B. This proposal was criticized, however, on the ground that a single political organ which could prevent prosecutions, stop proceedings and overturn judgments by pardon would be the master of the court; the proposal was rejected by 4 votes to 2, with 8 abstentions. The Committee then, by 3 votes to 2, with 10 abstentions, accepted the principle that in the second alternative text of this article the board of clemency and parole should be elected by the Members of the United Nations and those non-Member States which had conferred jurisdiction on the court.

149. It was argued that the powers of suspension and reduction of sentence referred to in the Geneva draft statute were part of the power of clemency, so that the reference to them should be deleted, and that it was undesirable to give the board the power of alteration of sentence, also referred to in that draft. For these reasons, the Committee, by 10 votes to none,

with 5 abstentions, adopted a text stating only that the board should have the powers of clemency and parole.

150. The Committee also thought it desirable that, before acting on a petition for clemency and parole, the board should request the advice of the court. Such advice would not be binding on the board, but would be most useful to it if the court chose to give its opinion.

SPECIAL TRIBUNALS

(Article 54 of the revised draft statute)

151. It was contended that this article (article 55 of the Geneva draft statute) should be deleted on the ground that it was superfluous. Even without this provision, it was said, the statute would clearly not affect the right of States to set up special tribunals since, in the absence of an express provision to the contrary in an instrument conferring jurisdiction, the statute preserved the concurrent jurisdiction of national tribunals and of international tribunals other than the court. Another viewpoint, however, was that a failure expressly to preserve this right in the statute would lead to reservations by States each time jurisdiction was conferred, and that deletion of the article which had been adopted by the Geneva Committee might be interpreted as an oblique criticism of the post-war trials by *ad hoc* tribunals. For these reasons, the Committee, by 6 votes to 5, with 4 abstentions, rejected a United States proposal to delete the article.

Chapter VIII

CONCLUSION

152. There were several points which the Committee intentionally did not include in the draft statute, since they could best be decided at the time when the final text of the statute was being drawn up, or in one case perhaps at an even later stage. One question was the final clauses of a convention containing the statute and, in particular, a clause concerning further specifications of reservations which might be made to the statute and in instruments conferring jurisdiction on the court. Another was the question of what organ should have the authority to interpret the statute; the suggestion was made that this authority should be given to the court itself. There was also the problem of the official languages in which the statute should be drawn up.

153. A further point raised in the Committee's discussions was that of the language in which the proceedings of the court should be conducted; it was suggested that this matter might perhaps be left to be decided in the rules to be adopted by the court.

154. The Committee, like the Geneva Committee (paragraph 17 of the Geneva report), did not wish to give its proposals any appearance of finality.

155. The view was expressed that the most fundamental and serious problems—in particular those which had been stated by the United Kingdom delegation at the outset of the Geneva Committee's meetings (A/AC.48/SR.2, pages 3-11)—had not been answered either by the Geneva Committee or by the present Committee. There was no evidence that States wished to establish a court, or that, even if it were established, States would be willing to give it the measure of consent and co-operation which was vital to its functioning. The example which had been cited to show such willingness, namely, the criminal jurisdiction in the European Coal and Steel Community, was not a parallel case. In any event, the political situation existing between the six members of the Community bore no relation to that existing in the world community as a whole. The only close parallel was the tribunal under the 1937 Convention for the Prevention and Punishment of Terrorism[10] which had proved abortive.

156. Some members felt that at the present time it was still clear that the substantive law to be applied by the court was not sufficiently matured to make the creation of an international criminal jurisdiction practicable. Others were of the opinion that since *ad hoc* tribunals had tried and sentenced thousands of criminals on the basis of that law, an international criminal court could well be established to apply it, and that the lack of precision of that law was a further argument for entrusting its application, not to *ad hoc* courts established for each occasion, but rather to a permanent court set up in advance which would guarantee a more universal application.

157. On the questions of possibility, practicability and desirability of the creation of an organized international criminal jurisdiction the members of the Committee were divided. They agreed, however, that on the basis of the preparatory studies made by the General Assembly and both the special Committees on International Criminal Jurisdiction the moment had come for the General Assembly to decide what, if any, further steps should be taken toward the establishment of an international criminal court.

[10] See League of Nations, document C.546(1).M.383(L). 1937.V.

ANNEX

Revised draft statute for an international criminal court

CHAPTER I

GENERAL PRINCIPLES

Article 1

PURPOSE OF THE COURT

There is established an International Criminal Court to try natural persons accused of crimes generally recognized under international law.

Article 2

LAW TO BE APPLIED BY THE COURT

The Court shall apply international law, including international criminal law, and where appropriate, national law.

Article 3

PERMANENT NATURE OF THE COURT

The Court shall be a permanent body. Sessions shall be called only when matters before it require consideration.

CHAPTER II

ORGANIZATION OF THE COURT

Article 4

QUALIFICATIONS OF JUDGES

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law, especially in international criminal law.

Article 5

NUMBER OF JUDGES

The Court shall consist of fifteen judges.

Article 6

NATIONALITY OF JUDGES

1. Judges may be elected from candidates of any nationality or without nationality.

2. No two judges may be nationals of the same State. A person who, for the purpose of membership in the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 7

NOMINATION OF CANDIDATES

Alternative A

1. Judges shall be elected from a list of candidates nominated by the States which have conferred jurisdiction upon the Court.

Alternative B

1. Judges shall be elected from a list of candidates nominated by the Members of the United Nations and by those non-member States which have conferred jurisdiction upon the Court.

2. Each State may submit the names of not more than four candidates.

Article 8

INVITATION TO NOMINATE

1. The date of each election shall be fixed by the Secretary-General of the United Nations.

Alternative A

2. At least three months before this date, he shall address a written request to the States which have conferred jurisdiction upon the Court, inviting them to undertake, within a time specified, the nomination of qualified persons in a position to accept the duties of a judge.

Alternative B

2. At least three months before this date, he shall address a written request to the States referred to in article 7 [alternative B], inviting them to undertake, within a time specified, the nomination of qualified persons in a position to accept the duties of a judge.

Article 9

LIST OF CANDIDATES

Alternative A

The Secretary-General of the United Nations shall prepare a list, in alphabetical order, of all candidates. He shall submit the list to the States which have conferred jurisdiction upon the Court.

Alternative B

The Secretary-General of the United Nations shall prepare a list, in alphabetical order, of all candidates. He shall submit the list to the States referred to in article 7 [alternative B].

Article 10

REPRESENTATIVE CHARACTER OF THE COURT

The electors shall bear in mind that the judges, as a body, should, as far as possible, represent the main forms of civilization and the principal legal systems of the world.

Article 11

ELECTION OF JUDGES

Alternative A

1. The judges shall be elected, at meetings of representatives of the States which have conferred jurisdiction upon the Court, by an absolute majority of those present and voting. The Secretary-General of the United Nations shall, after due notice to each of such States, convene these meetings.

Alternative B

1. The judges shall be elected, at meetings of the States referred to in article 7 [alternative B], by an absolute majority of those present and voting. The Secretary-General of the United Nations shall, after due notice to each of such States, convene these meetings.

2. In the event of more than one national of the same State obtaining a sufficient number of votes for election, the one who obtains the greatest number of votes shall be considered as elected and if the votes are equally divided the elder or eldest candidate shall be considered as elected.

Article 12

TERMS OF OFFICE

1. The judges shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at

the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot drawn by the Secretary-General of the United Nations immediately after the first election has been completed.

3. Each judge whose term of office has expired shall continue to discharge his duties until his place has been filled. Though replaced, he shall finish any case which he may have begun.

4. In the case of the resignation of a judge, the resignation shall be addressed to the President of the Court, who shall transmit the resignation to the Secretary-General. This transmission shall make the place vacant.

Article 13

SOLEMN DECLARATION

Each judge shall, before taking up his duties, make a solemn declaration in open court that he will perform his functions impartially and conscientiously.

Article 14

PRIVILEGES AND IMMUNITIES

Each judge, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 15

OCCUPATIONS OF JUDGES

1. No judge shall engage in any occupation which interferes with his judicial function during sessions of the Court. Nor shall he engage in any occupation which is incompatible with his functions as a judge.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 16

DISABILITY OF JUDGES

1. No judge may participate in proceedings relating to any case in which he has previously taken part in any capacity whatsoever.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

DISQUALIFICATION OF JUDGES

1. If, for some special reason, a judge considers that he should not participate in a particular proceeding, he shall so inform the President.

2. Any party to a proceeding may submit that a judge should not participate in that proceeding. Such submission shall be addressed to the President.

3. If the President, upon receipt of such submission or of his own motion, considers that a judge should not participate in a particular proceeding, the President shall so advise the judge.

4. If the President and the judge disagree on the issue, the Court shall decide.

Article 18

DISMISSAL OF JUDGES

1. No judge shall be dismissed unless, in the unanimous opinion of the other judges, he has ceased to fulfil the conditions required for his continuance in office.

2. Formal notification of such unanimous opinion shall be made to the Secretary-General of the United Nations by the Registrar.

3. This notification shall make the place vacant, and thereupon the dismissed judge shall immediately cease to perform all functions as a member of the Court.

Article 19

VACANCIES

1. Vacancies shall be filled by the same method as that prescribed for the first election, except that the Secretary-General of the United Nations shall, within one month of the occurrence of a vacancy, issue the invitations provided for in article 8.

2. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 20

OFFICERS

1. The Court shall elect its President and Vice-President for three years; each may be re-elected.

2. The Court shall appoint its Registrar and shall provide for the appointment of such other officers as may be necessary.

Article 21

SEAT OF THE COURT

The permanent seat of the Court shall be established at ..... The Court may, however, sit and exercise its functions elsewhere whenever the Court considers it desirable.

Article 22

EMOLUMENTS

Each participating judge shall be paid travel expenses, and a daily allowance when the Court is in session. Each judge shall be paid an annual remuneration.

Article 23

FINANCES

The States which have conferred jurisdiction upon the Court shall create and maintain a fund to be collected and administered in accordance with regulations adopted by the parties. From this fund shall be paid the costs of maintaining and operating the Court and the Board of Clemency and Parole, and the expenses for the defence as provided in article 38, paragraph 2, sub-paragraph (*c*), and as approved by the Court.

Article 24

RULES OF THE COURT

1. The Court shall adopt rules for carrying out its functions. In particular, it shall prescribe rules of procedure and such general principles governing the admission of evidence as the Court may deem necessary.

2. These rules and any amendments thereto shall be published without delay and shall not be altered so as to affect pending proceedings.

CHAPTER III

COMPETENCE OF THE COURT

Article 25

JURISDICTION AS TO PERSONS

The Court shall be competent to judge natural persons, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 26

ATTRIBUTION OF JURISDICTION

1. Jurisdiction of the Court is not to be presumed.

2. A State may confer jurisdiction upon the Court by convention, by special agreement or by unilateral declaration.

3. Conferment of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the State or States have specified.

4. Unless otherwise provided for in the instrument conferring jurisdiction upon the Court, the laws of a State

determining national criminal jurisdiction shall not be affected by that conferment.

Article 27

RECOGNITION OF JURISDICTION

No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed.

Article 28

WITHDRAWAL OF JURISDICTION

A State may withdraw its conferment of jurisdiction. Such withdrawal shall take effect one year after the delivery of notice to that effect to the Secretary-General of the United Nations.

Article 29

ACCESS TO THE COURT

Alternative A

Proceedings before the Court may be instituted by a State which has conferred jurisdiction upon the Court over such offences as are involved in those proceedings.

Alternative B

1. Proceedings before the Court may be instituted by a State which has conferred jurisdiction upon the Court over such offences as are involved in those proceedings.

2. In the interest of the maintenance of peace, a United Nations organ to be designated by the United Nations may stop the presentation or prosecution of a particular case before the Court.

Article 30

CHALLENGE OF JURISDICTION

1. The jurisdiction of the Court may be challenged by the parties to any proceeding or by any State referred to in article 27.

2. Such challenge made at the beginning of trial shall be decided by the Court at once.

3. Such challenge made after the beginning of trial shall be decided by the Court at such time as the Court thinks fit.

Article 31

ASSISTANCE OF STATES

1. The Court, including the Committing Chamber, may request national authorities to assist it in the performance of its duties.

2. A State shall be obliged to render such assistance only in conformity with any convention or other instrument in which the State has accepted such obligation.

Article 32

PENALTIES

The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court.

CHAPTER IV

COMMITTING CHAMBER AND PROSECUTING ATTORNEY

Article 33

COMMITTING CHAMBER

1. The Committing Chamber shall be composed of five judges appointed annually for one year at a sitting of the whole Court by a majority of the members present. Retiring members of the Chamber shall not be eligible for immediate reappointment. No judge who has participated in committing a case may adjudicate on the substance thereof.

2. The function of the Chamber shall be to examine the evidence offered by the complainant to support the complaint.

3. The complainant shall designate an agent or agents who shall present the evidence before the Chamber.

4. If the Chamber is satisfied that the evidence is sufficient to support the complaint, the Chamber shall so certify to the Court and to the complainant.

5. Before issuing any such certificate, the Chamber shall give the accused reasonable opportunity to be heard. If necessary and, in particular, to ensure that the accused shall have a fair trial, the Chamber may order further inquiry or the investigation of specific matters.

6. The Court shall determine the rules of procedure of the Committing Chamber.

Article 34

PROSECUTING ATTORNEY

1. A jurisconsult appointed by the complainant or complainants shall assume the functions of Prosecuting Attorney.

2. The Prosecuting Attorney shall file with the Court an indictment of the accused based on the findings certified by the Committing Chamber and shall be responsible for conducting the prosecution before the Court.

CHAPTER V

PROCEDURE

Article 35

INDICTMENT

1. The indictment shall contain a concise statement of the facts which constitute each alleged offence and a specific reference to the law under which the accused is charged.

2. The Court may authorize amendment of the indictment.

Article 36

NOTICE OF THE INDICTMENT

1. The Court shall bring the indictment to the notice of the accused, of the State or States of which the accused is alleged to be a national, of the State in which the crime is alleged to have been committed and, as far as possible, of the States of which the victims are nationals.

2. The Court shall not proceed with the trial unless satisfied that the accused has had the indictment and any amendment thereof served upon him and has sufficient time to prepare his defence.

Article 37

JURY

Trials shall be without jury, except where otherwise provided in the instrument by which jurisdiction has been conferred upon the Court.

Article 38

RIGHTS OF THE ACCUSED

1. The accused shall be presumed innocent until proved guilty.

2. The accused shall have a fair trial and, in particular:

(*a*) The right to be present at all stages of the proceedings;

(*b*) The right to conduct his own defence or to be defended by counsel of his own choice, and to have his counsel present at all stages of the proceedings;

(*c*) The right to have reasonable expenses of his defence charged to the fund referred to in article 23 in so far as the Court is satisfied that the accused is unable to engage the services of counsel;

(*d*) The right to have the proceedings of the Court, including documentary evidence, translated into his own language;

(*e*) The right to interrogate, in person or by his counsel, any witness and to inspect any document or other evidence introduced during the trial;

(*f*) The right to adduce oral and other evidence in his defence;

(*g*) The right to the assistance of the Court in obtaining access to material which the Court is satisfied may be relevant to the issues before the Court.

3. The accused shall have the right to be heard by the Court but shall not be compelled to speak. His refusal to speak shall not be relevant to the determination of his guilt. Should he elect to speak, he shall be liable to questioning by the Court and by counsel. He shall not be compelled to take an oath.

4. If the Court considers it impossible to ensure a fair trial, the Court may, by a decision supported by reasons, suspend the proceedings and, if they are not resumed within a time limit determined by the Court, dismiss the case. If the case be dismissed, the accused shall be automatically released.

Article 39

PUBLICITY OF HEARINGS

1. The Court shall sit in public unless there are exceptional circumstances in which the Court finds that public sittings might prejudice the interests of justice.

2. The deliberations of the Court shall take place in private and shall not be disclosed.

Article 40

WARRANTS OF ARREST

The Court shall have power to issue warrants of arrest related to crimes over which the Court has jurisdiction.

Article 41

PROVISIONAL LIBERTY OF ACCUSED

The Court shall decide whether the accused shall remain in custody during the trial or be provisionally set at liberty, and the conditions under which such provisional liberty shall be granted.

Article 42

AUTHORITY OF THE COURT

The Court shall have the authority necessary to the proper conduct of the trial, including the authority to require the attendance of witnesses and the production of documents and other evidentiary material, to rule out irrelevant issues, evidence and statements, and to maintain order at the trial.

Article 43

WITHDRAWAL OF PROSECUTION

If the complainant State withdraws the complaint, the Court alone shall decide whether the accused shall be discharged; if the complaint is not substantiated, the Court shall acquit the accused.

Article 44

QUORUM

The participation of seven judges shall suffice to constitute the Court.

Article 45

REQUIRED MAJORITY

1. All questions shall be decided by a majority of votes of the judges participating in the trial.

2. With the exception of a decision to impose the death penalty or life imprisonment, in the event of an equality of votes, the presiding judge shall have a casting vote.

Article 46

CONTENTS AND SIGNATURE OF JUDGMENT

1. The judgment shall state, in relation to each accused, the reasons upon which it is based.

2. The judgment shall contain the names of the judges who have taken part in the decision. It shall be signed by the President and the Registrar.

Article 47

SEPARATE OPINIONS

If the judgment of the Court does not represent the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 48

DELIVERY OF JUDGMENT

The judgment shall be read in open Court.

Article 49

NO APPEAL

The judgment shall be final and without appeal.

Article 50

DOUBLE JEOPARDY

No person who has been tried and acquitted or convicted before the Court shall be subsequently tried for the same offence in any court within the jurisdiction of any State which has conferred jurisdiction upon the Court with respect to such offence.

Article 51

EXECUTION OF SENTENCES

Sentences shall be executed in accordance with conventions relating to the matter.

Article 52

REVISION OF JUDGMENT

1. An accused who has been found guilty may apply to the Court for revision of the judgment.

2. An application for revision shall not be entertained unless the Court is satisfied:

(*a*) That a fact was discovered of such a nature as to be a decisive factor; and

(*b*) That that fact was, when the judgment was given, unknown to the Court and the applicant.

3. Revision proceedings shall be opened by a judgment of the Court expressly recording the existence of the new fact and recognizing that it has such a character as to lay the case open to revision.

CHAPTER VI

CLEMENCY AND PAROLE

Article 53

BOARD OF CLEMENCY AND PAROLE

Alternative A

1. The States which have conferred jurisdiction upon the Court, shall, at the meetings and in the manner provided in article 11, elect a Board of Clemency and Parole consisting of five persons.

Alternative B

1. The States referred to in article 7 [alternative B] shall designate a Board of Clemency and Parole.

2. Subject to the provisions of the instruments by which States have conferred jurisdiction upon the Court, the Board shall have the powers of clemency and parole.

3. Before deciding on a petition for clemency or parole, the Board shall request the advice of the Court.

4. The Board shall adopt its own rules of procedure.

CHAPTER VII

FINAL PROVISIONS

Article 54

SPECIAL TRIBUNALS

Nothing in the present Statute shall be taken to prejudice the right of two or more States which have conferred jurisdiction upon the Court jointly to set up special tribunals to try the perpetrators of crimes over which each of such States has jurisdiction according to the general rules of international law.

INDEX TO THE REPORT AND DRAFT STATUTE

(References are to paragraphs of the report and articles of the draft statute; numbers in italics refer to articles of the draft statute.)