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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE FOURTH MEETING

held at the Palais des Nations, Geneva,
on Monday, 6 August 1951, at 9.45 a.m.

CONTENTS:

Chapter II of annex II to the Secretary-General's
memorandum (continued).

Present:

Chairman:

Mr. MORRIS

Members

Australia	Mr. WYNES
Brazil	Mr. AMADO
China	Mr. WANG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. de LACHARRIERE
Iran	Mr. KHOSROVANI
Israel	Mr. ROBINSON
Netherlands	Mr. RÖLING
Pakistan	Mr. MUNIR
Syria	Mr. TARAZI
United Kingdom of Great Britain and Northern Ireland	Mr. GORDON
United States of America	Mr. MAKTOS
Uruguay	Mr. PINEYRO CHAIN

Secretariat:

Mr. Kerno	Assistant Secretary-General in charge of the Legal Department
Mr. Liang	Secretary to the Committee

CHAPTER II OF ANNEX II TO THE SECRETARY-GENERAL'S MEMORANDUM (continued)
(A/AC.48/1)

Article 24

1. The CHAIRMAN requested the Committee to continue its discussion on the jurisdiction to be given to an international criminal court, basing its deliberations on article 24 of the preliminary draft of a statute for an international criminal court as contained in annex II to the Secretary-General's memorandum (A/AC.48/1).

2. Mr. RÖLING (Netherlands) said that the scope of the jurisdiction to be given to an international criminal court was an important matter. The court's functions would be a decisive consideration when it came to discussing the organ to be set up to carry them out. Once those functions and the structure of the organ were known, the method by which the latter could be established would be easy to decide.

3. His observations would be personal, although he would endeavour to develop a point of view that he expected to be shared by the Netherlands Government which, by reason of the very late receipt of the Secretary-General's memorandum (A/AC.43/1), had found it impossible to consider the matter.

4. The Committee was not the first to be called upon to make proposals on the subject of international criminal jurisdiction. It would be remembered that in 1920 Committee of Jurists, when drafting the Statute of the Permanent Court of International Justice, had recommended that that Court should be "competent to try crimes constituting a breach of international public order or against the universal law of nations" and that that recommendation had been rejected by the Assembly of the League of Nations on the ground that there was "not yet any international penal law recognized by all nations".¹⁾

1) Manley O. Hudson, The Permanent Court of International Justice, New York, 1943, p. 85.

5. That argument could no longer be upheld, for an international criminal law did now in fact exist. Such law had been formulated in the Nuremberg and Tokio Charters, and had been applied in judgments, even involving penalty of death and loss of liberty. It had been unanimously confirmed by the United Nations and the International Law Commission, too, had just produced a further formulation of it. Last, but not least, it had been recognized in international instruments as, for example, the Convention Relating to the Status of Refugees signed at Geneva by thirteen States on 25 July, 1951. Thus, without any doubt there now existed rules of international criminal law binding on individuals. The individual had entered into the realm of international law and had thus acquired international rights and international duties, even duties which, according to the Nürnberg judgment, "transcended the national obligations of obedience imposed by the individual State".¹⁾ It might be difficult to define such duties and to indicate precisely where the mere violation of a duty became a criminal act; none the less, it could not be denied that international crimes did exist.

6. It could be asked whether international criminal law implied the existence of international criminal jurisdiction. In the event of an individual committing an international crime, such as the crime of genocide, it had been said that the offender's government should deal with him. The real problem arose when government officials committed international crimes in the execution of government policy. In that case, the national courts were powerless. If such persons were to be brought to trial - and he emphasized the hypothesis - that could only be done in an international court having jurisdiction over such crimes. The question was, whether it was desirable to have international jurisdiction in respect of crimes committed or aided and abetted by governments of sovereign nations. Such a jurisdiction would not be without its dangers. Under prevailing conditions, the dispensing of international justice would at times be destructive. In the cause of world peace it would not

1) Trial of the major War Criminals before the International Military Tribunal (Nuremberg, Germany, 1947), p. 223.

always be possible to apply strict laws of justice, because for justice to be done a disastrous war might have to be fought. Confronted by a choice between justice and peace, the world would sometimes be bound to prefer peace, and it was not without reason that the prime purpose of the United Nations was the maintenance of international peace and security. In the establishment of an international criminal court, therefore, it would be necessary to subordinate the execution of international criminal justice to political expediency; and that was one of the reasons for which several governments justifiably felt misgivings about international criminal jurisdiction.

7. There were, however, other reasons for such misgivings. It was fortunately true that many governments felt themselves bound by the rule of international law, including the rule of international criminal law. Any such readiness, however, on the part of a government to live up to the standards of international law was not at all the same thing as readiness to have its international actions judged by others. Many such governments took the view that they alone were entitled to decide what was required by the rules of international law. The reluctance then of many governments at the present juncture to recognize international criminal jurisdiction was due to a feeling that those who would be called upon to administer international jurisdiction might not be guided by the principles of international justice alone. It was open to question whether those nations which were prepared to abide honestly by the laws of international justice would be willing to leave representatives of other nations, even if they were independent judges, to decide whether their international policy had been in conformity with the frequently vague rules of international law. Such reluctance on their part did not imply any lack of faith in justice, but rather a lack of faith in man. The existence of such mistrust had to be faced, and the only conclusion seemed to be that, for the time being at least, a judgment by an international criminal court would only be valid provided its jurisdiction was freely accepted by the State whose national was to be tried. He thus endorsed the conclusion of the United States representative and supported his suggestions concerning article 24.¹⁾ Conventions giving jurisdiction to the

1) Summary Record of the 2nd meeting, paragraph 36.

court might be drawn up with regard to certain types of crimes and with regard to relations with other States specifically mentioned, and there could also be ad hoc instruments covering one specific case.

8. He was not quite clear as to the point of view taken by the Secretariat on the subject. According to the Secretary-General's memorandum (A/AC.48/1) it seemed that some organ of the United Nations, be it the Security Council or General Assembly, or both, could decide that a case should be brought before the court as soon as the latter was established. Article 28, in annex II to the memorandum laid down the obligations of the Contracting Parties with regard to the handing over of accused persons, the assistance to be given to the court and the apprehension of persons who had been sentenced. Incidentally, that seemed to presuppose a trial by default. There was no provision, however, for limiting the jurisdiction of the court to nationals of States which had recognized the jurisdiction of the court. A provision of that nature was, in his opinion, necessary, as had been suggested by the United States representative, at the previous meeting (paragraph 52).

9. Such were his observations on the scope of the Court's jurisdiction. He hoped to give an affirmative opinion later on the question of whether such limited jurisdiction would justify the creation of an international criminal court.

10. Mr. LIANG, Secretary to the Committee, stated that the Secretary-General's memorandum, in accordance with the directives of the General Assembly, was only intended to provide a survey of the problem and a presentation of the various possibilities, in its elaboration the study entitled "Historical Survey of the Question of International Criminal Jurisdiction" (A/CN.4/7/Rev.1) had served as a basic document. It had never been the Secretary-General's intention to take up a position in the sense of recommending particular methods and procedures. He (the Secretary) believed that the Netherlands representative had raised the question of the manner in which States would become bound in respect of any one of the provisions of the statute. In his view, the answer was to be found in the articles themselves, and particularly in article 24 of the draft.

11. Mr. ROBINSON (Israel) believed that at least two delegations present had agreed as to the jurisdiction to be given to the international penal court, upon the method of conferring jurisdiction on the court, upon the type of cases over which it should have jurisdiction and upon the exclusion from article 24 of the draft Statute of the words "crimes under international law".

12. Apart from a small matter of formulation, there would be no argument on the question of method.

13. Turning to the problem of the types of cases which might be submitted to the jurisdiction of the court, he recalled the emphasis placed by the French and United States delegations on minor international crimes among which were piracy, the slave trade, the traffic in women and children and the like, and on the right of States to surrender offenders to the court, thus enabling the latter to try persons accused of violations of national law that had certain international implications. His delegation was opposed to that sort of jurisdiction because, first, the need for it had not been demonstrated; second, it would make the choice of judges impossible; third, it was completely outside the field of activity of the United Nations; and lastly, it conflicted with the terms of reference of the United Nations organs which had dealt with or were still dealing with the problem.

14. There was no guarantee that those so-called minor international crimes would be suppressed by the establishment of an international court with jurisdiction in that field. Such crimes, which could not in any way be regarded legally as international, had been the concern of various governmental and inter-governmental bodies, and a high degree of international co-operation had been developed between the police of various States for their prevention and repression. So far as he knew, it had never been claimed that the campaign against such offences was rendered more difficult by the absence of an international criminal jurisdiction, or that its establishment would be effective in their suppression. Until evidence was adduced in support of such claims, such ideas might justifiably be regarded as purely speculative. While in the realm of speculation, he, too, might claim that the trial of

smugglers or forgers before an international tribunal would heighten their prestige and at the same time lower that of the court.

15. Consideration had to be given to the effect of any such procedure on human society, and especially on the young, and it was not difficult to imagine the reaction of educators and psychologists who already had sufficient cause for concern about the influence of criminal tribunals at national level on the impressionable minds of children and adolescents.

16. He could envisage even greater danger in giving States the unlimited right to refer to the court cases which they themselves for reasons of expediency did not wish to try. It was questionable whether States, if left full discretion in the matter of expediency would pay sufficient attention to the interests of the international community. Nor could it be known a priori that what was inexpedient for a State would not also be inexpedient for the court. In fact, the probability was that it might be much more inexpedient for the court than for a national tribunal to try certain cases. To transform an international penal court into a cloaca maxima would, to say the least of it, be a disservice to the cause of international criminal jurisdiction. What was more, there was no evidence that States would desire to rid themselves of unpleasant cases and to transfer them to the international penal court.

17. In his view, it would not be possible to constitute an international penal court that would be qualified to try those minor international crimes. The latter had one thing in common, namely, that they were well defined and that penalties were provided for them by national legislations. It would thus be reasonable to expect that, if they were brought before the international penal court, the judges on the bench should be thoroughly familiar with national criminal law, and consequently that there should be as many judges with a knowledge of the individual national criminal laws as there were States conferring jurisdiction on the court. Every new accession to the convention would necessitate the appointment of a new judge, and the notion of judges appointed on an ad hoc basis was hardly compatible with the basic conception of

international criminal jurisdiction. Moreover, only one of the judges would have the necessary knowledge of the particular national law applicable to a particular case, and there would therefore be a risk that he would be overruled by the others. Admittedly, knowledge of the law was not the only requisite, but a judge without such knowledge would be no judge at all.

18. One of the most important implications of that sort of competence would be the absence of any criterion for the election of judges. The Secretary-General's memorandum and its annexes had devoted considerable attention to the qualifications of judges, and rightly so, but those qualifications could only be established in the courts dealing with a particular branch of law. The Secretary-General had found some difficulty in arriving at a fair balance between experts in international law and experts in penal law. If jurisdiction were conferred upon the court in matters of national legislation, there would be no criterion by which to assess the qualifications of judges. Consequently, it was obvious that no court with a competent body of judges could be constituted.

19. Turning to the question of the relation between a court with such jurisdiction and the United Nations, he pointed out that the latter did not have unlimited competence. Admittedly, the competence of the United Nations was stated in broad terms in the Charter, and the general tendency was to favour the broadest possible interpretation. Yet how could it be claimed that it was within the jurisdiction of the United Nations to repress crimes in States, Members or non-members, and to create for that purpose an international penal court? The Social Commission of the Economic and Social Council had recently convened a meeting of experts to discuss on broad lines the social problems of the prevention of criminality, and the International Society of Criminology had been granted consultative status by the Council. But the establishment of an international criminal court was a far cry from the innocent exercise of meditations on the subject of the prevention of criminality.

20. As to his fourth argument against granting jurisdiction over minor international crimes, perusal of the records would bear out his contention that such jurisdiction had never been contemplated by the General Assembly. At its

third session, the latter had under its resolution 260 B(III) of 9 December 1948, 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". It would be recalled that while the two rapporteurs appointed by the Commission had come to diametrically opposed conclusions with regard to the task entrusted to them, they had nevertheless agreed on the interpretation of the words "other crimes" as used in that resolution. Mr. Alfaro, one of the rapporteurs, had said "It seems right to assume that the General Assembly had in mind those (crimes) which are the subject matter of the Charter of the Nurnberg Tribunal and its judgment, as well as those liable to be defined in a code of offences against the peace and security of mankind. The formulation of such principles and the drafting of such a code were entrusted to the International Law Commission by resolution 177 (II) of 21 November 1947. The inference is that the General Assembly had in mind, besides genocide, the crimes dealt with by the Nurnberg Tribunal and its judgment, to wit: crimes against peace; war crimes; crimes against humanity". (A/CN.4/15 page 3).

21. Mr. Sandström, the other rapporteur, had agreed with that interpretation of the term "other crimes", and in his report had said "... it may first be stated that after the experiences of mankind during the two world wars of this century, there undoubtedly is an urgent desire for such a jurisdiction. Few things could better satisfy the common craving for justice". (A/CN.4/20, page 9). There was not the slightest doubt that the reference was to those responsible for the two world wars.

22. According to the summary records of the second session of the International Law Commission¹⁾, that concept had been unanimously supported by all its members. In his original plan for an international penal court, Mr. Alfaro had included the crimes which were now under consideration, but had withdrawn his proposals in that connexion after the declaration of Mr. Hudson²⁾ of the findings of the

1) A/CN.4/SR.41 to 44.

2) A/CN.4/SR.42.

Harvard Research in International Law of which he was the Director, that neither piracy, slave trade, traffic in women, traffic in narcotics, counterfeiting, obscene publications or damage to submarine cables were international crimes, and that an international jurisdiction in respect thereof was therefore not called for. It would also be noted that there was no mention of conferring such jurisdiction upon the court in the report of the second session of the International Law Commission¹⁾ or in the debates²⁾ or report³⁾ of the Sixth Committee at the fifth session of the General Assembly, or in General Assembly resolution 489(V). Thus any attempt to include crimes punishable under national law would be a flagrant violation of the present Committee's terms of reference, a break in the continuity of the United Nations' efforts and a distortion of the original aims and purposes of international criminal jurisdiction.

23. It was for those reasons that his delegation firmly opposed such jurisdiction being conferred upon the international penal court. If after London, Nürnberg and Tokyo an international court was set up to deal with forgers and smugglers, the words of Horace would come true, parturiunt montes, nascitur ridiculus mus.

24. As to the notion of "crimes under international law", and the suggestion that that category of crimes should be deleted from article 24 of the draft statute because of its lack of precision, he would submit that that contention was scarcely justified. Existing international penal law took four different forms: customary international criminal law; international criminal law by convention; leading decisions of authoritative tribunals; and the teaching of the most highly qualified publicists.

25. To begin with, the International Military Tribunal of Nürnberg had ruled that

"The [London] Charter is not an arbitrary exercise of power on the part of victorious nations but in the view of the tribunal . . . it is the

1) A/1316, paragraphs 128 to 145

2) Official Records of the General Assembly, fifth session. Sixth Committee, 240th to 246th meetings.

3) A/1639, paragraphs 35 to 43.

expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law".¹⁾

26. The reference there was to three grave crimes: crimes against peace, war crimes and crimes against humanity. Although that matter was still a disputed issue, those who had concluded that there was no customary international criminal law should ask themselves whether any other institution of international law could be considered to be completely beyond dispute. Even such age-long institutions as privileges and immunities for the diplomatic corps were still open to variations in application and interpretation. With the addition of the two judgments of Nurnberg and Tokio, the argument that customary international penal law did exist became even stronger. It would not be surprising to hear it said that criminal law could be customary law, in other words, unwritten law. In fact, the whole of public international law was based on custom, a phenomenon common to all primitive societies, both national and international. Students of comparative law would know that only ten years previously a few of the Swiss cantons had still no criminal code. That had not meant that it had not been possible to commit crimes in those cantons, or that crimes had not been repressed there. According to high authority, those cantons had got along very well without a written criminal code.

27. International penal law was also enshrined in treaties, although such written law did not necessarily mean that it was new law, as was illustrated by the case of genocide. Besides the Convention on Genocide, the four Geneva Conventions of August 12, 1949 also contained norms of international penal law for war-time; and although no mention was made in the latter of international criminal jurisdiction that possibility was not excluded. In fact, the Rapporteur had made the following comment: "The diplomatic conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years". (Final Record of the Diplomatic Conference of Geneva, volume II - B, page 115)²⁾.

28. Finally, since international law was in the process of rapid development the opinions of renowned publicists, to which reference was made in article 38

1) The Trial of the major War Criminals before the International Military Tribunal (Nurnberg, January 1947), p. 218

2) Published by the International Committee of the Red Cross, Geneva, 1949.

of the Statute of the International Court of Justice, carried great weight. If that was true with regard to individual publicists, it was all the more so with regard to the collective wisdom of an eminent group of such publicists as the members of the International Law Commission which had only recently produced a draft Code of Offences against the Peace and Security of Mankind¹⁾, which was roughly speaking a restatement of the existing customary international penal law.

29. It would seem, therefore, to be an exaggeration to claim that there were no "crimes under international law". Such crimes did exist, and they alone should be the concern of an international penal court. It was also obvious that no such jurisdiction could be conferred upon the court without the agreement of sovereign States, and the latter should therefore be free to define such crimes in the conventions which they concluded.

30. As he had already stated, his delegation accepted the basic principle that the court should receive its competence from future conventions -- as was implied in General Assembly resolution 260 B (III) -, and was not unaware of the grave implications of such a solution which, nevertheless, under prevailing conditions might prove to be the best way out of a serious difficulty. That raised the immediate question of whether a special convention granting jurisdiction to the court was necessary in the case of genocide. The crime of genocide was expressly mentioned in General Assembly resolutions 260 B (III) and 489 (V). It would therefore seem appropriate to introduce into the convention on the creation of an international criminal court some clause conferring jurisdiction in respect of the crime of genocide. Subject to that reservation, his delegation would favour the following competence clause: "The court shall have jurisdiction over crimes under international law for the judgment of which the court has been given jurisdiction by conventions to which the States acceding to this convention are likewise parties."

1). A/CN.4/48. chapter IV.

31. Mr. MUNIR (Pakistan) said that as he had only received the Secretary-General's memorandum the day before the opening of the Committee's session, he had not sent it to his Government, because it would not have had time to examine it and send him instructions before the close of the session. He would therefore speak and put forward proposals in his personal capacity.

32. Article 24, as it stood, would invest the court with jurisdiction over all offences under international law and over certain offences under national law. The first paragraph, dealing with crimes under international law, had to be read together with paragraphs 1(a) and 1(b) of article 30. Read together those texts implied that the court would be competent to deal with all offences under international law, and that the applicable rules of international law would be developed from conventions and international custom. One group of offences enumerated in the draft Code of Offences against the Peace and Security of Mankind prepared by the International Law Commission was "acts in violation of the laws or customs of war" (A/CN.4/48, page 40). That appeared to him to be a confession that it was impossible to qualify all offences under international law. Thus, if all such offences were punishable by the court it would be necessary to apply international use and custom to particular cases. However, that would make the convention establishing the court less acceptable to States. He therefore supported suggestions of the United States representative concerning article 24 but he would propose the following amendment:

"The Court shall have jurisdiction to try persons charged with genocide or other crimes over which jurisdiction may be conferred on it by conventions to which the States acceding to this Convention are likewise parties."

33. He made that suggestion because it was clear from the first paragraph of the preamble to General Assembly resolution 489 (V) that it did not intend to confer jurisdiction on the court in respect of all offences under international law, as the International Law Commission had been invited "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". It would be seen that article 24 in its existing form went beyond the intention of the General Assembly, and hence beyond the Committee's terms of reference. All that the General Assembly expected of the Committee was that it should make it possible for the General Assembly to take a final decision on the recommendations of the International Law Commission, whose terms of reference had been limited by resolution 260 B (III).

34. He had definite instructions from his Government, as to the inclusion of a specific reference to genocide, which his Government still regarded as a live issue. One advantage of its inclusion would be that the court could begin to function without delay.

35. Mr. KERNO (Assistant Secretary-General) said the Committee might consider whether it would not be advisable to avoid drafting decisions in plenary meeting, but to leave them to the Rapporteur and perhaps, a drafting sub-committee. The Committee's work might be facilitated if it were to take decisions on questions of principle only; for instance, in the case of article 24, on the principle of whether jurisdiction should be conferred by the convention establishing the court or by subsequent conventions; or again as to the types of crimes to be specified in the statute.

36. The CHAIRMAN observed that after considerable discussion, the Committee was reaching the point when principles began to emerge and the suggestions on article 24 began to take shape, particularly in the Pakistani amendment. He recalled that the United States representative had not presented a formal proposal. He would therefore proceed on the assumption that, after a discussion of that amendment, formal action should be taken upon it, but that the vote would be provisional.

37. Mr. LIANG, Secretary to the Committee, referred again to the Netherlands representative's question as to the manner in which States would bind themselves to accept the jurisdiction of the court. That, he submitted, could be done by the insertion of a provision or provisions in the formal clauses of the convention; or a similar procedure might be followed to that employed when the Statute of the Permanent Court of International Justice had been adopted, namely, that States should accept the jurisdiction of the court by signing and ratifying a protocol of signature of the Statute.¹⁾ In the case of the International Court of Justice the situation had been different, as the Statute of the Court formed part of the Charter of the United Nations (Article 92).

38. Turning to the question of the place of the crime of genocide in article 24, which had been raised by the representatives of Denmark, Pakistan and the United States of America, he felt that as genocide was regarded as a crime under international law, it should be regarded as falling under paragraph (1) and not under paragraph (3).

39. Mr. de LACHARRIERE (France) submitted that the particular case of genocide should not raise any difficulties. If the Committee maintained the provisions of the Secretary-General's preliminary draft concerning the jurisdiction of the court, genocide would be covered by the expression "crimes under international law" which appeared in paragraph (1) of article 24. If, on the other hand, the Committee decided that the court's jurisdiction would be solely determined by conventions, the Convention on Genocide would be referred to ipso facto.

(1) Protocol of signature of the Statute of the Permanent Court of International Justice; Hudson, International Legislation, Vol. I, p. 528 and seq.

40. That Convention, in the draft which the Committee proposed to formulate, would occupy a prominent place as representing the international community's initial effort to define crimes under international law. However, since the jurisdiction of the future court should not be limited to genocide alone, it would be wrong to give that crime preferential treatment, as it were, by expressly mentioning it. The possibility of progressively extending the court's jurisdiction should remain intact, genocide despite its importance being only a particular case.

41. It would be premature for the time being to take a position on the texts of the articles. All that should be done at plenary meetings was to establish certain principles, which would then be elaborated by a sub-committee or the Rapporteur. The Committee seemed to be unanimously in favour of the principle that the jurisdiction of the Court should be determined on the basis of conventions. That, he submitted, was one of the principles which the proposed Sub-Committee should take as a guiding line.

42. Apart from that first directive, it would also be desirable to settle the question whether the conventions concerned would deal solely with major crimes under international law, or could be extended to minor offences such as counterfeiting, smuggling and slave trading. The Committee should take a decision on that point.

43. It would also be necessary to decide whether, the offence having been committed, the jurisdiction of the Court could be based on an arrangement provided for in a previous agreement between two States. He himself accepted the Danish representative's suggestions on that point,¹⁾ and would be inclined to give an affirmative reply.

44. Further, the Committee would have to consider whether a State could renounce its jurisdiction unilaterally. The question was whether a State could be permitted to withdraw jurisdiction from its own courts and bring a crime under international law before the court for trial and punishment.

1) Summary Record of the 3rd meeting, paragraph 55.

45. Those were the points which the Committee must settle before a sub-committee could start to draft the relevant articles.

46. Mr. KHOSROVANI (Iran) thought that the court's jurisdiction should be so determined as to enable it to try a wide range of crimes in respect of which jurisdiction was conferred upon it by international conventions. In general, he supported the Pakistani amendment, although he regarded it preferable to omit any reference to genocide in the convention establishing the court, the Convention on Genocide having been drafted and adopted to meet special circumstances. It had to be remembered that if that Convention had not provided for dual jurisdiction in article VI, it might well not have been ratified by so many governments. He considered it unlikely that all governments which accepted that article, would be prepared to renounce the jurisdiction of their national courts in favour of the international court. In his opinion, therefore, article 24 should be couched in broad terms.

47. The CHAIRMAN, summarizing the discussion, said that the problem now to be settled was whether specific crimes should be mentioned in article 24.

The meeting was suspended at 11.15 a.m. and was resumed at 11.30 a.m.

48. The CHAIRMAN proposed that a small drafting sub-committee be set up to deal with any drafting problems that might arise. The sub-committee would consist of the Rapporteur and himself ex officio, and the representative of France, the Netherlands and Israel, under the chairmanship of the Rapporteur.

49. Mr. PINEYRO CHAIN (Uruguay) said that the presence of the United States representative in the sub-committee would be most valuable.

50. Mr. AMADO (Brazil) agreed with the representative of Uruguay. Nor should the valuable participation of Mr. Maktos prevent the Chairman from staying on the sub-committee as well.

51. The CHAIRMAN said that it would be undesirable to have two representatives of the United States of America in the sub-committee. Moreover, he worked closely with Mr. Maktos, so it was really unnecessary.

52. Mr. AMADO (Brazil) thought that it would be premature to set up a real drafting committee. It was the practice in the United Nations to appoint a drafting committee when clear decisions on principle had been adopted in plenary meeting. Agreement on principles, however, had not yet been reached. If, on the other hand, the proposed sub-committee were instructed to submit a co-ordinated summary of the views of its own members, thus eliminating a number of difficulties, he would have no objection to it being appointed.

53. The CHAIRMAN said that the reason for his proposal was that the Committee would have to decide in principle on proposals made by the various representatives, such as that already made by the Pakistani representative. The drafting group would have the task of expressing all principles decided upon in language that the majority in the Committee agreed upon; in other words the drafting group would be solely a committee on style, and would in no way attempt to guide the deliberations or influence the decisions of the Committee.

54. Mr. AMADO (Brazil) did not think that the text of the Pakistani representative's amendment should be put to the vote before it had been thoroughly discussed. It contained an express reference to genocide, whereas neither the Secretary-General's preliminary draft nor the proposal of the United States representative contained any such reference. He himself considered that the crime in question was already covered by the words "crimes under international law".

He pointed out that the representative of Israel had strongly criticized the French delegation's proposal to give the court jurisdiction over minor offences under international law.

55. The CHAIRMAN said that there was still some misapprehension as to the purpose of his proposal to set up a drafting sub-committee to express in appropriate language the decisions reached by the Committee. If the Committee was unable to agree on anything, there would be nothing for the sub-committee to do.

The Chairman's proposal was unanimously adopted.

56. Mr. PINEYRO CHAIN (Uruguay) considered the existence of an international criminal law to be a fact beyond dispute. Crimes under that law should be punished by the international community, exercising its punitive powers. The legal principles followed by the Nürnberg Tribunal had been approved by the General Assembly, and had just been formulated by the International Law Commission in the draft Code of Offences against the Peace and Security of Mankind. The establishment of an international criminal court was therefore an inescapable and urgent necessity.

57. When classifying crimes under international law, one could include, in a first category, all those affecting the fundamental interests of international society as a legal entity, namely, crimes against peace, war crimes and crimes against humanity. In the second category could come the other offences described by previous speakers as minor offences under international law. Of the latter, some were localized, others were not. Primarily, they were violations of the rights of the States concerned, but they also had an international aspect which, in certain circumstances, might justify international punitive action. The chief task of the court should be the punishment of international crimes in the strict sense of the term, but its jurisdiction might, at the same time, extend, in a secondary way, to offences which, while not exactly international in character, did possess a certain international aspect.

58. The French representative had considered that the Committee, as a whole, had agreed to define the jurisdiction of the court as being the jurisdiction it derived from conventions concluded for that purpose. It would be a mistake for such a solution, which had been advocated by the United States and Pakistan representatives, to be accepted. In the case of offences which had an international aspect, there would be no objection to deciding that the jurisdiction of the court should be fixed by conventions, such jurisdiction only in cases where two or more States agreed to bring a matter before the court, and only in certain specified circumstances. In the case of crimes under international law in the strict sense of the term, however, there was not so much justification for defining the jurisdiction of the court in that manner. In the latter case, it should be expressly declared that the jurisdiction of the court over crimes

under international criminal law, such as crimes against peace, against the rules of war and against humanity, was based on the prior consent of States as signified in their acceptance of the statute of the court.

59. By determining the jurisdiction of the court in that way, the United Nations would avoid leaving the way open to the anarchy which would reign if States were left free to make their own choice among offences under international law. If, it were settled solely by conventions, persons committing acts regarded as crimes would be liable to punishment in the eyes of those States bound by a convention, but would be innocent in the eyes of the others. The jurisdiction of the court should therefore extend to all crimes under international law, since such crimes did injury to supra-national interests. It was impossible for the jurisdiction of the court to be carved up by the complicated interplay of numerous conventions, leaving each State free to delimit that jurisdiction as it deemed fit. In the case of crimes under international law, the jurisdiction of the court must be accepted en bloc.

60. The conventional element would be indirectly respected by the fact that the convention establishing the statute of the court would be open for acceptance by all States. To take account of political considerations, it should be noted that, while the court would be vested with competence as soon as the requisite number of acceptances were forthcoming, it did not follow that the court would automatically take action on the mere allegation that a crime under international law had been committed. In each particular case, it would be logical for the seizing of the court to be subject to a specific request from an organ of the United Nations, which might either be the General Assembly or the Security Council. In that manner, the court would exercise its punitive powers with the political support of the organ which had brought the matter before it.

61. Briefly, the jurisdiction of the court should cover two headings. The first would include all crimes under international law, without naming them specifically, the consent of States, in that case, being signified by their acceptance of the statute; the second would relate to other offences covered by special conventions.

Furthermore, the jurisdiction of the court would not come into play automatically. Its action should, in every case, arise from a decision of an organ of the international community. It would indeed be inadmissible for acts to be labelled as crimes under international law when, in the opinion of the majority of Members of the United Nations, they were not of that nature.

62. Mr. LIANG, Secretary to the Committee, in reply to a question put by Mr. MAKTOU (United States of America), said that if genocide were placed under paragraph (3) of article 24 it would give rise to the difficulties to which the Rapporteur had referred.⁽¹⁾ However, genocide should properly come under paragraph (1) of article 24, which dealt with crimes under international law. To include it in paragraph (3) would require amendment of the text.

63. Mr. MAKTOU (United States of America) agreed that genocide should be mentioned, if at all, in paragraph (1) of article 24.

64. Turning to the Pakistani amendment, he said that he had three modifications to propose to it. His first proposal was that the reference to genocide be deleted. If such a reference were included, the acceptability of the convention would be greatly diminished, because States which were unwilling to surrender jurisdiction in the matter of genocide would not be prepared to agree to a convention specifically bringing genocide within the competence of an international criminal court. The main purpose of the convention was to establish an international criminal court acceptable to a majority of States. Genocide, if it was desired to specify it as a crime over which the court would have jurisdiction, could be relegated to a protocol which could be signed by States desiring its inclusion. Moreover, there were technical difficulties in specifying genocide, such as that of demarcating domestic and international jurisdiction in the question, and of deciding who would surrender criminals guilty of genocide, who would punish them and in what way they should be punished. The Pakistani representative had argued that genocide should be specifically mentioned because it had been mentioned in

(1) Summary Record of the 3rd meeting, paragraph 55.

General Assembly resolution 489 (V) which laid down the Committee's terms of reference. That mention of genocide, however, had been made in the preamble to the resolution, and was not intended to limit in any way the operative part of the resolution, which constituted the true terms of reference of the Committee. Another argument against specific mention of genocide was that it was undesirable that the Committee should adopt half measures; it should either make the convention so broad in scope that it included everything, or it should specify each particular type of international crime. For those reasons, he thought that the specific reference to genocide should be deleted from the amendment.

65. The second modification he proposed to the Pakistani amendment was the insertion of some such words as "offences against the law of nations". The Pakistani amendment gave jurisdiction to the court only when such jurisdiction had been conferred upon it by conventions. As the Uruguayan representative had said, however, it should also have jurisdiction over crimes under international law which did not fall within the category of those defined as such by conventions. If, however, such agreements were relegated to a different chapter, as the Uruguayan representative had suggested, a further difficulty would arise, in that they could be defined to a certain extent, but if given separate mention the provision would be so indefinite as to be inconsistent with the requirements of an international convention. The French representative had spoken of minor international crimes, but such crimes did not require specific definition, since, as in the case of genocide, they could be dealt with by separate protocol. It had to be remembered that if States were unwilling to accord the dignity of the title of international crime to any minor crime such as those mentioned by the French representative, it was extremely unlikely that they would regard such a crime as an international crime or ratify any convention treating it as such. On the whole, therefore, it was desirable to mention offences against the law of nations in the Pakistani amendment, but it would be unnecessary to define them specifically or devote to them a separate section or chapter.

66. His third proposal was that the words "concluded in pursuance of recommendations of the General Assembly" should be added at the end of the Pakistani amendment.

Such an addition would also contribute to the general acceptance of the convention. If that addition, or some similar addition, were not adopted, it might be found, for example, that certain States agreed that some act, for instance, war propaganda, constituted an international crime, and entered into a convention to that effect. If those States were parties to the convention establishing an international criminal court, other States would also be compelled to accept war propaganda as an international crime, even though they were not even certain of the meaning to be attached to the term "war propaganda". Addition of the words he had suggested would mean that the United Nations as a whole would approve of the convention, so that no case of the type he had quoted could arise.

67. The three suggestions he had made provided three important limitations of unilateral surrender of jurisdiction. If they were accepted, jurisdiction would be surrendered by States to the court only by their own consent, only in respect of crimes against the law of nations, and only through conventions requiring recommendations by the General Assembly. In his view, a majority of countries would then be prepared to accept the convention.

68. Mr. KERNO (Assistant Secretary-General) suggested that there was no special reason why the words "offences against the law of nations" should be used rather than the words "crimes under international law". The latter expression was more precise, and had been used in drafts prepared by the International Law Commission and in the Convention on Genocide. He therefore asked if the United States representative was prepared to alter the second of his proposed amendments to "crimes under international law".

69. Mr. MAKROS (United States of America) said in reply that he had not intended to propose any specific wording for his modifications. The expression he had used was to be found in the Constitution of the United States of America, but he had no objection to the expression "crimes under international law", provided that there was no difference between the two expressions.

70. Mr. WANG (China) agreed with the United States representative as to the great importance of the jurisdiction of an international criminal court. In his own opinion, however, it was desirable to specify international crimes in the convention establishing the court, as reference to other conventions would in effect mean postponement of the question of the court's jurisdiction. To specify such crimes would raise difficulties for which he could not suggest a solution, but the attempt should be made.

71. He agreed with the United States representative that reference to genocide should be deleted from article 24. In any convention conferring jurisdiction on an international criminal court the general definitions would naturally include genocide, and specific mention of it in the text of the convention would give the impression that the court was intended for the sole purpose, or almost for the sole purpose, of trying the crime of genocide, and that the convention was a mere annex to the Convention on Genocide.

72. The CHAIRMAN, summarizing the discussion, said that three general questions had been raised: whether the jurisdiction of the international criminal court should cover specifically one or more kinds of crime; whether the court's jurisdiction should be determined ultimately by conventions to which the States concerned would accede; and whether the General Assembly's recommendations should be required for conventions by States.

73. Mr. de LACHARRIERE (France) was grateful to the representative of Pakistan who, by submitting his amendment, had made it possible for the Committee to penetrate more deeply into certain aspects of the court's jurisdiction. However, if the amendment were put to the vote, it would be difficult at that stage to come to any decision, since that would mean taking a stand, outright one way or the other on a whole series of interesting ideas, each of which was worthy of separate study.

74. Before enquiring into anything else, the Committee should draw up a list of the questions of principle connected with the determination of the Court's jurisdiction. Subsequently, members of the Committee might give their views on

each of those questions and their replies would be of guidance to the drafting committee in its task.

75. The questions to be settled were as follows. Should the jurisdiction of the court be left to be settled by conventions or should two sources of jurisdiction be recognized, the acceptance of the statute of the court itself, in the case of crimes under international law, and conventions, in the case of other offences? Should specific reference be made to genocide? In the event of the jurisdiction of the court being fixed entirely by conventions, should the latter deal only with major crimes? Should it be possible for the court to be seized of a matter by means of a special agreement subsequent to the criminal act and, if so, under what conditions? Should it be possible for the court to be seized of a case by the unilateral decision of a State in cases where no provision was made for the jurisdiction of the court over the crime in question in any convention binding that State, and, if so, under what conditions?

76. Following on the observations of the Uruguayan and United States representatives, a sixth question might be added to the list, namely, whether a recommendation of the General Assembly was necessary in order to determine beforehand whether the case in point was a crime under international law or not.

77. The CHAIRMAN thought that the questions outlined by the French representative might be regarded as a basis for discussion. It was for the Committee to decide how it would discuss each separate question.

78. Mr. MUNIR (Pakistan), referring to his amendment to article 24, said that if it were decided not to specify any offences in that article, and if the jurisdiction of the Court was made to depend on conventions by States, he would not insist on the reference to genocide being retained in his amendment.

79. Mr. ROBINSON (Israel) suggested a group of questions modifying to some extent those propounded by the French representative. Under the first question, which would relate to the kind of jurisdiction that the international criminal court should have, there would be two sub-headings: jurisdiction over

crimes under international law, and jurisdiction over other crimes. The second question would be on the method of conferring such jurisdiction, and would have the following sub-headings. Should such jurisdiction be conferred automatically by the convention setting up the court? Should it be conferred by a protocol to the convention setting up the court? Should it be conferred by particular multilateral or bilateral conventions? Should it be conferred by special agreement between two or more States? Should it be conferred by unilateral action, with or without certain guarantees?

80. The third question, in general terms, would be that of the role of the General Assembly in the matter of determining the jurisdiction of the court. The final question would be whether there was any need to include a specific reference to genocide in the convention.

81. Mr. SÖRENSEN (Denmark), speaking to the substance of the question of jurisdiction, said that the exchange of views had been extremely useful, but he was not certain that the ideas put forward could be as yet formulated in a text. If the jurisdiction of the court was to be based on conventions, it seemed to him difficult, if not impossible, to establish any clear-cut rules regarding jurisdiction without at the same time keeping in mind the question of who would be entitled to bring cases before the court. The Committee should therefore, while considering article 24, bear in mind also articles 25 and 26, which were intimately linked with it. If the Committee accepted that connexion, the problem then did not hinge on whether crimes were crimes in international law or only crimes of international concern affecting one or more States, but on the distinction between cases which a United Nations organ could bring before the court and cases which States could bring before the court.

82. If the provisions of paragraphs (a) and (b) of article 25 were adopted, the need for basing jurisdiction on a convention or conventions would not be so manifest. The stage had now been reached in international relations and in international law in which a two-thirds majority of the Members of the General Assembly could, and should, bring criminals before an international criminal court, irrespective of

whether the State of which the criminal was a national or on the territory of which the crime had been committed had accepted the jurisdiction of the court. In such cases there would be no need for conventions.

83. In the case, however, of a single State bringing a case before the court, a basis constituted by a convention or conventions was clearly necessary. He was not prepared to go so far as paragraph (a) of article 26, of which the exact scope was not quite clear to him. Nor did he agree with the United States representative that such conventions should have the approval of the General Assembly, or find the United States representative's example convincing⁽¹⁾, as none of the criminals in that example could have been brought before an international criminal court unless the State concerned had accepted the court's jurisdiction. It seemed to be a sufficient safeguard that the State harbouring the criminal should have accepted the jurisdiction of the court.

84. Summing up, he emphasized again that the question of jurisdiction could only be considered in the light of the method whereby cases of crimes under international law would be brought before the court.

85. Mr. MAKTOU (United States of America), referring to the question of the Committee's methods of procedure, said that he preferred the suggestions of the French representative to those of the Israeli representative, on the ground that some of the questions suggested by the latter were not procedural, but fundamental matters of policy. Moreover, if the Israeli representative's suggestions were followed, genocide, which he himself hoped to banish from the draft, would creep back again. The important question was whether the consent of States was required or not, and in that respect the French postulates were more suitable.

86. The CHAIRMAN suggested that the future procedure of the Committee should be to take the formal amendment of the Pakistani representative as the basis for its discussions, make any amendments to it that were considered desirable, discuss them and vote upon them. In that way the discussion would not be deflected.

It was so agreed.

The meeting rose at 1 p.m.

(1) See paragraph 66 above.