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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD THE EIGHTH MEETING

held at the Palais des Nations, Geneva,
on Friday, 10 August 1951, at 9 a.m.

CONTENTS:

Present:

Chairman: Mr. MORRIS

Members:

Australia	Mr. WYNES
Brazil	Mr. AMADO
Cuba	Mr. VALDES ROIG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. de LACHARRIÈRE
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

1. JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT:

Chapter II of annex II to the Secretary-General's memorandum (continued) (A/AC.48/1, A/AC.48/L.1, A/AC.48/L.2, A/AC.48/L.3 and Corr. 1, A/AC.48/L.3/Add.1, A/AC.48/L.3/Add.2, A/AC.48/L.4)

New point B (3) (A/AC.48/L.3/Add.2)

1. The CHAIRMAN recalled that the Committee had requested the Drafting Sub-Committee to review the wording of point B(3) (A/AC.48/L.3/Add.1), and called upon the Rapporteur to inform the Committee of the Sub-Committee's conclusions.

2. Mr. SÖRENSEN (Denmark), Rapporteur, said that members of the Committee had been anxious to ensure that in the event of jurisdiction being conferred on the court in respect of new categories of crimes either by particular convention or by special agreement or by unilateral renunciation,[1] the Court should not be obliged to try persons accused of such crimes thus more or less arbitrarily added to those over which it had jurisdiction. Some members had felt that the limitation implicit in point B(3) (A/AC.48/L.3/Add.1) would be inadequate, whereas others had taken the opposite view. The Drafting Sub-Committee had concluded that the misgivings of those who thought that the safeguard implicit in point B(3) would be insufficient might be allayed by the adoption of the limitation formulated in the question set out in document A/AC.48/L.3/Add.2. The members of the Sub-Committee had not been unanimous as to whether the new question should be substituted for point B(3); some had felt that an affirmative answer to the new question would make further consideration of point B(3) unnecessary, others had thought differently. The Drafting Sub-Committee had therefore decided to propose that the new question should be answered before point B(3) was taken up again. An affirmative answer to the new question would facilitate the consideration of other outstanding points raised in documents A/AC.48/L.3 and A/AC.48/L.3/Add.2, and he therefore hoped that an affirmative answer would be given to it.

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1) Points 3(c) to 3(e) (A/AC.48/L.3)

3. MOSTAFA Bey (Egypt) asked for details concerning the procedure followed by the United Nations in approving conventions concluded outside the Organization by States, and especially by States not members of the United Nations. When conventions were concluded by Member or non-member States, by what method were they sanctioned by the United Nations? He did not himself think that it was customary to submit such conventions for approval by the United Nations.

4. Mr. SÖRENSEN (Denmark), Rapporteur, believed that the Egyptian representative's concern might be allayed by formulating the question as follows: "Should the conferring of jurisdiction on the court be subject to the approval of an organ of the United Nations?" Under international law States could not be prevented from entering into agreements; on the other hand, it would be possible when setting up the international criminal court to give an organ of the United Nations control over the cases to be brought before that court.

5. Mr. KERNO (Assistant Secretary-General), confirming the Rapporteur's remarks, observed that the court would be a creation of the United Nations, or, at least, brought about by States under the auspices of the United Nations. In those circumstances it was quite legitimate to make the applicability of a convention such as that contemplated in point B (3) dependent on approval by the United Nations.

6. Point 3 (c) (A/AC.48/L.3) envisaged particular conventions which would probably be negotiated, like the Convention on Genocide, under the auspices of United Nations. Texts approved by the General Assembly would be opened for signature by a number of States, and provision could be made in such instruments, as had been done in the Convention on Genocide, for non-member States to become parties. In such a case consent would, in fact, have been given in advance.

7. In the case of special agreements or unilateral renunciations, the approval of the United Nations would have to be given differently. States taking such action would have to submit their decisions to an organ of the United Nations. Such a procedure would be in no way exceptional.

8. Mr. RÖLING (Netherlands) was, in principle, in favour of some control being exercised over the cases that could be brought before the court. It might, however, be found, when the Committee came to consider the question of how cases could be brought before the court, that control could be effected in some other manner. He would therefore vote for an affirmative answer to the new question submitted by the Drafting Sub-Committee, on the understanding that the position thus taken could be modified if it were subsequently found more suitable to impose the limitation in another context.

9. The CHAIRMAN considered the reservation of the Netherlands representative to be logical, and agreed that it was not necessary at that stage to distinguish between the jurisdiction of the court and the way in which cases would be brought before it.

10. Mr. de LAGHARIÈRE (France) noted that, according to the general wish of members of the Committee, the right of States to confer jurisdiction on the court by particular conventions, by special agreements or by unilateral renunciation, should be accompanied by guarantees and limitations.

11. He would reply to the question submitted to the Committee in the affirmative, although not very enthusiastically. It was useless to multiply guarantees; in exceptional cases there would be no objection to substituting the jurisdiction of the court for that of national tribunals. In the majority of such cases, such a substitution would mean progress. He could, however, envisage cases where one or more States might be inclined to entrust to the court matters outside its province. It was those instances of an exceptional nature which alone justified the approval referred to in the question under discussion.

12. It might also be thought that the procedure of approval by an organ of the United Nations would be somewhat cumbrous and slow in the case of special agreements or renunciations. One of the virtues of penal justice should be its rapidity of repressive action, although in international criminal matters the preliminary investigation was bound to be slowed down by the necessity for carrying out enquiries of every kind. It was recognized that the value as a

social lesson of a belated judgment and of punishment inflicted after a long interval was greatly impaired. In order to eliminate all unnecessary delay, a statement in the following terms should be added:

> "Approval by the United Nations shall not be required for special agreements and unilateral renunciations when they relate to crimes defined in conventions which have already been approved by the United Nations".

13. The CHAIRMAN thought that, from the point of view of speeding up the Committee's work, the French proposal should be considered as a matter of detail, after the acceptance of the broad principle. In fact, approval of the broad principle would subsequently give rise to many questions as to how control should be exercised. It might be exercised by the General Assembly, by the court itself, or by the International Court of Justice.

14. Mr. KERNO (Assistant Secretary-General) expressed a similar view. The Committee had still a long way to go, and it would be advisable, if at all possible, to complete consideration of all the points in documents A/AC.48/L.3, A/AC.48/L.3/Add.1 and A/AC.48/L.3/Add.2 at the present meeting. Once the broad principle had been approved, detailed questions such as that just raised by the French representative might be left to the Drafting Sub-Committee.

15. Mr. LIANG, Secretary to the Committee, felt some concern that conferring of jurisdiction by convention and the conferring of jurisdiction by special agreement or unilateral renunciation, were mentioned together in the new point B (3). The discussion on point B (3) at the seventh meeting had been somewhat lengthy, mainly because a sufficiently clear distinction had not been made between conferring jurisdiction on the court and the establishment of categories of crimes. In the new context, of course, the conferring of jurisdiction could not possibly mean the definition of crimes.

16. There was, however, a more important point. Was it the intention that one of those three modes of conferring jurisdiction had to be approved by an organ of United Nations in every case? Such a requirement would be understandable

in the case of conventions, but in the case of special agreement or unilateral renunciation ex post facto he could not see how an organ of United Nations could have competence in the matter, since there was no provision of any kind in the Charter conferring such competence on any existing organ of the United Nations. In his view, therefore, a clear distinction should be made between conventions on the one hand and special agreements or unilateral renunciation on the other.

17. The CHAIRMAN observed that the Committee's aim was to ensure that, wherever States endeavoured to confer jurisdiction on the Court by convention, special agreement or unilateral renunciation, such jurisdiction should be subject to the approval of an organ of the United Nations, and not that such approval should extend to the terms of a "compromis".

18. Mr. LIANG, Secretary to the Committee, said that none the less, no existing organ of the United Nations was empowered to give such approval.

19. Mr. KERNO (Assistant Secretary-General) took the contrary view. There had been cases where an organ of the United Nations had assumed competence in somewhat similar circumstances. For instance, it had been agreed that the Security Council could appoint the Governor of the Free City of Trieste.(1) Again, the peace treaties with Bulgaria, Finland, Hungary, Italy and Romania made provision for the appointment of a third member of certain commissions by the Secretary-General, even although the latter had no such powers under the Charter,(2) and the Secretary-General had been prepared to make such an appointment. It therefore seemed to him that if an international criminal court were created under the auspices of the United Nations it would be possible for certain organs of the United Nations to undertake the task of approving conventions and the like conferring jurisdiction upon the Court, even in the absence of specific provision therefor in the Charter.

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(1) Treaty of Peace with Italy. Annex VI, article 11.

(2) Treaty of Peace with Bulgaria, article 36; with Finland, article 35; with Hungary, article 40; with Italy, article 83 and with Romania, article 38.

20. Mr. LIANG, Secretary to the Committee, agreed that there had been cases where organs of the United Nations had assumed competence not provided for in the Charter. Approval of the conferment of jurisdiction upon the Court, however, would be a judicial function, and he therefore adhered to the view he had expressed.

21. Mr. HYNES (Australia) said that as he had similar misgivings as the Secretary, he would have to abstain from taking a stand on the point at issue. Moreover, would not an affirmative answer to the new question exclude the possibility, mentioned by the Chairman, of the matter being left to the decision of the court itself?

22. The CHAIRMAN believed that the court would be an organ of the United Nations, so that the answer to the Australian representative's question would be in the negative.

23. Mr. PINEYRO CHAIN (Uruguay) considered that conventions, special agreements and unilateral renunciations should, as a general rule, be subject to approval by the United Nations. Exceptions such as those mentioned by the French representative might, however, be permitted. In the case of conventions, action by a United Nations organ would be in the nature of prior approval, whereas in the case of special agreements and unilateral renunciations such approval would be in the nature of sanction a posteriori.

24. The effects of approval would be both legal and political; it would include recognition of the jurisdiction of the court and authorization to refer a case to the court. There was no justification for such approval except in respect of crimes of international concern. That should be remembered when the Committee came to examine the second category of crime.

25. Mr. TARAZI (Syria) agreed, in principle, with the views expressed by the Secretary, and considered that to subject the consent by States to approval by the United Nations would be contrary to the principle of Article 2, paragraph 7, of the Charter, according to which nothing contained in the Charter authorized the

United Nations to intervene in matters which were essentially within the domestic jurisdiction of any State or required the Members to submit such matters to settlement under the Charter.

26. The examples given by the Assistant Secretary-General of jurisdiction being conferred on organs of the United Nations in specific cases, were not conclusive. Under the treaties of peace signed with Hungary and Bulgaria, the Secretary-General enjoyed the right to appoint the third member of certain commissions by the express consent of the Parties to those treaties. The right of the Security Council to nominate the Governor of Trieste also derived from a provision of the Treaty of Peace with Italy.

27. To limit the action of States would be to limit their sovereignty in advance. Since States resorting to conventions, special agreements or unilateral renunciations might not be members of the United Nations, such a limitation would be in the nature of a stipulation binding third parties.

28. He accordingly favoured a negative reply to the question in new point B (3).

29. Mr. WYNES (Australia) wondered whether decision on the principle would not be made easier if the question were amended to read:

"Should the categories of crimes, jurisdiction over which may be conferred on the Court, be subject to the approval of an organ of the United Nations?"

30. Mr. MARTOS (United States of America) preferred the original version. It was a question of recognizing certain instruments rather than particular crimes.

31. The CHAIRMAN put the new point B (3) (A/AC.48/L.3/Add.2) to the vote.

An affirmative answer to the question was approved by 7 votes to 1 with 4 abstentions.

Former point B (3) (A/AC.48/SR.3/Add.1) (resumed from the previous meeting)

32. The CHAIRMAN requested the Committee to resume consideration of former point B (3) (A/AC.48/L.3/Add.1) which would now become point B (4).

33. Mr. SÖRENSEN (Denmark) believed that the decision just taken by the Committee established the safeguard which was the underlying purpose of the question contained in former point B (3), and that there was therefore no need to vote on the latter.

34. Mr. ROBINSON (Israel) moved that a vote be taken on former point B (3) since some members of the Committee had misgivings about the connexion between the court, and the United Nations, and wished to have additional guarantees, in case the proposed control by the United Nations would ultimately not be established.

35. Mr. RÖLING (Netherlands) believed that if there was to be a vote, the course taken by the discussion at the previous meeting should be remembered. The Drafting Sub-Committee had fully discussed the question, and had agreed on its meaning. The position was that once a statute for the court existed, it would be necessary to have further conventions conferring jurisdiction on the court, and the implication in former point B (3) was that no jurisdiction could be conferred by special agreement or after unilateral renunciation in respect of crimes over which jurisdiction had not already been conferred upon by the court by a particular convention. Thus, if no such conventions were concluded, there could be no possibility of referring cases to the court. It had been considered that that position was illogical, and that another type of control should therefore be found. Now that the Drafting Sub-Committee's proposed alternative procedure had been approved, the principle underlying former point B (3) had been accepted, and there appeared no need to consider the matter further.

36. Mr. MATOS (United States of America) recalled that the United States delegation had urged that the crimes should be specified in conventions, so that States would have an opportunity of expressing their will and approval. It had been considered that the approval of an organ of the United Nations was also necessary as an additional safeguard. However, in his opinion, it remained necessary that special agreements or unilateral renunciation should be limited to those crimes over which jurisdiction had already been conferred on

the court by particular conventions. Otherwise States might, for ex post facto cases, confer on the court jurisdiction over crimes selected from all over the world. He therefore did not think that a vote should be taken on former point B (3).

37. Mr. PINEYRO CHAIN (Uruguay) interpreted the question under discussion as placing special agreements or unilateral renunciations on a lower level than conventions, and as proposing their dependence on the prior existence of a convention conferring jurisdiction on the court in respect of the categories of crimes to which such agreements or unilateral renunciations referred.

38. He considered such a system indefensible.

39. The CHAIRMAN put to the vote the question whether a vote should be taken on former point B (3) (A/AC.48/L.3/Add.1).

The Committee decided by 5 votes to 2 with 4 abstentions that a vote should be taken on former point B (3).

40. Mr. de LECHARRIÈRE (France) pointed out that, in addition to the limitation constituted by approval by a United Nations organ, which the Committee had just adopted, it was also proposed to stipulate that the procedure for conferring jurisdiction on the court a posteriori, namely, by special agreements or unilateral renunciations, should come within the scope of the jurisdiction already conferred on the court by particular conventions.

41. He was opposed to that further limitation, and favoured a negative reply to point B (3). An affirmative decision would be undesirable. In the experimental period through which the court would pass in its early stages, States must be free to test the court. That was particularly true in the case of crimes under international law. States which would hesitate to confer general jurisdiction on the court in respect of, for example, the crime of genocide, might none the less desire to bring cases of genocide before it. They would thus be able to anticipate the development of international law by convention.

42. The CHAIRMAN put former point B (3) (A/AC.48/L.3/Add.1) to the vote.

A negative answer to that question was approved by 5 votes to 2 with 5 abstentions.

Proposed point 3(f) (A/AC.48/L.4)

43. The CHAIRMAN requested the Committee to turn to the Australian proposal (A/AC.48/L.4) which suggested the addition of a new paragraph under point 3 of document A/AC.48/L.3, reading "(f). by declaration similar to that provided for by Article 36 of the Statute of the International Court of Justice".

44. Mr. KERNO (Assistant Secretary-General) wondered whether the Australian suggestion could appropriately be included under point 3. He personally felt that its proper place would be in the final clauses of a convention conferring jurisdiction on the court, since it specified a method whereby a State could become party to such convention. By a declaration of that sort a State would indicate its acceptance of the jurisdiction of the court in respect of all, or some of, the crimes, and possibly subject to other limitations as to time etc.

45. Mr. WYNES (Australia) said that he had something different in mind. Under point 3 (A/AC.48/L.3) an attempt was made to express the views of the Committee as to how States should accept the jurisdiction of the court in respect of certain crimes. His idea had been that the filing of a declaration with the court or with some other appropriate body should be considered as a possible method of indicating acceptance of the jurisdiction of the court in respect of a specific crime or crimes.

46. Mr. ROBINSON (Israel) hesitated to accept the Australian representative's proposal for the expression of consent to the jurisdiction of the court by declaration similar to that provided for by Article 36 of the Statute of the International Court of Justice was ante factum in nature, and would have covered

both the competence of the court and the definition of categories of crimes. It would be noted that acceptance of the competence of the International Court of Justice could be expressed by conventions, by compromis or by optional clauses equivalent to ante factum acceptance of its jurisdiction. By virtue of those optional clauses, a State could accept the jurisdiction of that Court with certain reservations, and, as a consequence, unilateral acceptance of that jurisdiction meant limitation of it.

47. In the case of an international criminal court, however, the position would be just the reverse, as unilateral acceptance of the court's jurisdiction could only imply the extension of its jurisdiction. He would therefore oppose the Australian proposal.

48. Mr. MUNIR (Pakistan) asked whether the Australian representative regarded his proposed method of conferring jurisdiction on the court as also being subject to the approval of an organ of the United Nations.

49. Mr. WYNES (Australia) said that his proposal had been submitted on that understanding.

50. Mr. RÖLING (Netherlands) thought that the Australian representative might be satisfied if the Drafting Sub-Committee, when formulating in articles the principles that had been adopted, took into account the provisions of the Statute of the International Court of Justice, and particularly to the point made by him. It was in reality a matter of technique rather than one of principle.

51. Mr. WYNES (Australia) confirmed that his main object was to make sure that the Drafting Sub-Committee should not overlook that method of conferring jurisdiction on the Court.

52. Mr. MAKTOS (United States of America) said that, if the Australian proposal implied more than mere acceptance of the provisions of a convention conferring jurisdiction on the court, he would not be in favour of it.

53. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) shared the misgivings of the Israeli representative. However, no objection could be taken to the Australian proposal if it were merely a statement of another possible mode of accession to a convention.

54. Mr. SÖRENSEN (Denmark) thought that, if such a declaration were only a method of opening up a convention to States, the Committee need not consider the question at that stage; but if it implied more than what was intended under point 3(c), he agreed with the Israeli representative.

55. The CHAIRMAN proposed, and Mr. WYNES (Australia) agreed, that, in the light of the discussion, no vote should be taken on the Australian proposal, and that it should be left over for further consideration when the Committee took up the relevant clauses of the draft statute.

Point C (A/AC.48/L.3/Add.1)

56. The CHAIRMAN invited the Committee to consider point C (A/AC.48/L.3/Add.1), namely the question of the instruments in which the approved limitations should be laid down.

57. Mr. SÖRENSEN (Denmark), Rapporteur, explained that the Drafting Sub-Committee had not fully discussed the implications of the three possibilities listed under point C. From the Committee's discussions it seemed clear that the approved limitations should be expressed in the statute of the court, or, in other words, that an affirmative answer should be given to point C (a). On the assumption that conventions conferring jurisdiction on the court would be subordinate to the general provisions of the statute of the court, he thought that it would be unnecessary to lay down those limitations in such conventions. Again, while it was possible for limitations to be specified in resolutions of a

United Nations body, such a procedure appeared superfluous if the limitations were to be included in the convention establishing the court. He would therefore move that the answer to point C (a) should be in the affirmative, and the answers to points C (b) and C (c) in the negative.

58. The CHAIRMAN put point C (a) to the vote.

An affirmative answer to point C (a) was unanimously approved.

59. The CHAIRMAN construed the affirmative vote on C (a) to mean that there was no need to consider further the two other possibilities under points C (b) and (c) which would, however, undoubtedly come up for consideration when the Committee came to deal with its main task of implementing the decision on point C (a).

60. Mr. ROBINSON (Israel) was uncertain whether a vote should not be taken on the two other possibilities, particularly on point C (b). The test of the statute would lie in its application, and particularly in conventions conferring jurisdiction upon the court. It would be important to envisage all the possible limitations on conferment of jurisdiction, in the instrument which the Committee was drafting. It might well be that a new convention defining new crimes would require limitations which had not occurred to the Committee, and there appeared no reason why States concluding a future convention should be deprived of the right of introducing necessary limitations that had not been specifically mentioned in the statute of the court. If he did not insist on a vote being taken on point C (b), it would be on the understanding that in drafting the convention due consideration would be given to the possibility of additional limitations being imposed by subsequent conventions.

61. Mr. SÖRENSEN (Denmark) observed that the emphasis should be on the word "those" in the introductory phrase to point C; in other words, the limitations that were to be laid down were those that had been approved. That, however, would not preclude further limitations being imposed in subsequent instruments.

The Committee agreed not to vote on points C (b) and (c) on the understanding put forward by the Israeli representative.

Point 4 (A/AC.48/L.3)

62. The CHAIRMAN requested the Committee to take up point 4 (A/AC.48/L.3).

63. Mr. SÖRENSEN (Denmark), Rapporteur, said that point 4 raised the question of whether or not specific crimes should be mentioned in the clauses defining the jurisdiction of the court. The question had been introduced as a result of the Pakistani representative's proposal (A/AC.48/L.1) that the statute should contain a clause conferring jurisdiction on the court in respect of the crime of genocide. In his (Mr. Sörensen's) view, it would be preferable to have a separate convention.

64. Mr. MUNIR (Pakistan) said that he had already given his reasons for proposing the inclusion of a clause specifying the crime of genocide. The Committee had been set up because the question of genocide had been referred to the International Law Commission, and the terms of reference of that Commission were that it should study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.

65. Mr. SÖRENSEN (Denmark) said that the jurisdiction of the court would be defined by the clauses specifying the methods of expressing consent to its jurisdiction. Consequently, the Committee should consider the possibility of drafting a convention to confer jurisdiction on the court in respect of genocide.

66. Mr. RÖLING (Netherlands) and Mr. MAKTOS (United States of America) opposed specific reference in the statute of the court to the crime of genocide.

67. Subsequent to a discussion as to whether the word "clause" in point 4 referred to a clause of the statute of the court or to clauses of conventions conferring jurisdiction upon it, Mr. PINEYRO CHAIN (Uruguay) observed that the problem could be approached in various ways. In considering whether certain

specific crimes should be mentioned, a distinction had to be drawn between two categories of clauses; those defining the crimes of which the court could take cognizance (the statutory clauses proper); and those laying down the procedure for conferring jurisdiction on the court, which might be termed the conventional clauses.

68. According to the Pakistani representative, the specific crime of genocide should be mentioned in the statutory clauses as a special case under point 1 (a) (A/AC.48/L.3); whereas, according to the Danish representative, it should be mentioned in the conventional clauses contemplated in point 3 (c).

69. A possible third solution would be to append to the draft statute of the court, as an annex a convention giving the court jurisdiction in respect of genocide under specific conditions.

70. He noted that Professor Pella recommended in article 27 of the preliminary draft statute contained in his memorandum (A/AC.48/3), a special method of bringing a matter before the court which would make it easier to bring genocide within its jurisdiction.

71. In the event of genocide being mentioned in the clauses relating to the crimes of which the court could take cognizance, the generic term "crimes under international law", could be replaced by a formula giving a list of crimes amongst which genocide would be included.

72. In his view, two solutions were possible: either the retention of the existing generic term , without mentioning any specific crime, or an enumeration of all the crimes under international law in more detail naturally including genocide.

The meeting was suspended at 11 a.m. and was resumed at 11.15 a.m.

73. Mr. RÖLING (Netherlands) suggested that point 4 would be clearer if it read: "Should there be mention of specific crimes in the provisions of the statute dealing with the jurisdiction of the international criminal court?" He would give a negative answer to that question.

74. Mr. ROBINSON (Israel) thought that the Netherlands representative's variant was an improvement. He was prepared to vote against mention of specific crimes in the provisions of the statute dealing with the jurisdiction of the international criminal court, but only on certain conditions. Genocide could not be ignored, for it was the only international crime that had been specifically defined in a Convention drafted by the United Nations, and, moreover, that Convention had been ratified by twenty-eight States. Specific mention had also been made of genocide in the terms of reference both of the International Law Commission and of General Assembly resolution 489(V) establishing the Committee. He proposed, therefore, that the Committee adopt the following draft resolution to accompany a negative answer to point 4:

"The Committee on International Criminal Jurisdiction,

Considering that genocide - a crime under international law - has been exactly defined in the Convention on Genocide,

Considering that this Convention was ratified by twenty-eight States,

Considering that special mention of the crime of genocide was made in the terms of reference of the International Law Commission in resolution 260 B III, and of this Committee in resolution 489 (V),

Recommends the General Assembly along with the adoption of the convention establishing the court to draw up a protocol conferring jurisdiction on this court in respect of genocide."

75. In reply to a question by the CHAIRMAN, Mr. ROBINSON (Israel) agreed that the draft resolution should be discussed later.

76. Mr. MAKTOS (United States of America) asked whether the Netherlands representative would be prepared to replace the words "dealing with the jurisdiction of the international criminal court" by the words "establishing the international criminal court".

77. Mr. RÖLING (Netherlands) agreed with the United States representative that the point at issue was whether specific crimes should or should not be mentioned in the statute establishing the court. As the Committee had been

discussing the jurisdiction of the court, however, he had used wording similar to that of point 4.

78. The CHAIRMAN put to the vote the Netherlands amendment to the wording of point 4.

The Netherlands amendment was approved by 7 votes to none with 5 abstentions.

79. The CHAIRMAN, replying to a point raised by Mr. AYNES (Australia) said that point 4, as amended, referred to other crimes as well as genocide.

80. He then put to the vote point 4, as amended.

The Committee opposed mention of specific crimes in the provisions of the statute dealing with the jurisdiction of an international criminal court, by 4 votes to none, with 8 abstentions.

81. Mr. ROBINSON (Israel), explaining his abstention, said that he could vote against such mention only if the draft resolution he had submitted were adopted by the Committee.

Point 5 (A/AC.48/L.3)

82. Mr. SÖRENSEN (Denmark) submitted that the discussion would be clearer if point 5 were considered under two separate headings namely, in respect of crimes under international law and in respect of other crimes of international concern. In respect of crimes under international law, he proposed that the international criminal court be seizable by an organ of the United Nations and also by States, but not by any other international organ.

83. The CHAIRMAN, replying to a point raised by Mr. AYNES (Australia), said that the question in point 5 (a) was to be interpreted in the sense that in principle the court might be seized by one organ, or by more than one organ, of the United Nations, not in the sense that any organ whatsoever of the United Nations might be given such power.

84. Mr. RÖLING (Netherlands) thought that the issues raised in point 5 were extremely important, and should not be voted upon without prior discussion. The Committee would probably agree without much difficulty that a United Nations organ could seize the court, but he could not support the Danish representative in the view that the court should not be seized by other international organs; since it would be conducive to the establishment of an international criminal jurisdiction on a wide scale if other organs, such as the Council of Europe, were also permitted to seize the court, subject to being given the power to do so by a United Nations organ. He therefore believed that the answer to point 5 (b) should also be in the affirmative.

85. Mr. PINEYRO CHAIN (Uruguay) endorsed the remarks of the Netherlands representative. The organ of the United Nations would bring the matter before the court motu proprio. Other international organs and States would be able to submit specific cases to the United Nations organ, which would then bring them before the court. Question 5 should be amended accordingly.

86. The CHAIRMAN, speaking as United States representative, said that his country held the view that the court should only be seizable through the intermediary of the United Nations.

87. Speaking as Chairman, he made it clear that in using the expression "an organ of the United Nations" the Committee would at a later stage decide which organ.

88. Mr. SORENSEN (Denmark) asked for clarification of the views of the Netherlands and Uruguayan representatives. So far as he could see, the Netherlands representative favoured the view that other international organs should be entitled to seize the court by reason of a general authorization to do so for an unspecified length of time, in the same manner as certain bodies had been authorized to seek advisory opinions from the International Court of Justice. The Uruguayan representative, however, appeared to hold that other international organs should be able to seize the court only by first requesting the United Nations for permission to do so.

89. Mr. RÖLING (Netherlands) said that the Danish representative had interpreted him correctly. He opposed the Uruguayan representative's view, on the ground that if a State or an international organ in each given case had first to approach a United Nations organ, such as the General Assembly, it might as well place its case on the agenda of the General Assembly and the General Assembly could then, suo motu, seize the court, if it thought it desirable. There would be then no need for any mention of either State or international organ which he would deplore.

90. The CHAIRMAN put point 5 (a) to the vote.

The Committee approved of the international criminal court being seized by an organ of the United Nations by 8 votes to none, with 4 abstentions.

Point 5 (b) (A/AC.48/L.3)

91. Mr. RÖLING (Netherlands) said the conditions he had in mind under which other international organs could seize the international criminal court were similar to those laid down in Article 96 paragraph 2 of the Charter of the United Nations, which dealt with the authorization of "other" organs of the United Nations and of specialized agencies to request advisory opinions from the International Court of Justice.

92. On the suggestion of the CHAIRMAN, he agreed that what he had in mind would be suitably expressed by the formula: "(b) by any other international organ, under conditions prescribed by the United Nations." Such conditions would be general, not prescribed for a particular case.

93. Mr. TARAZI (Syria) thought that the analogy drawn by the Netherlands representative with Article 96 of the Charter was somewhat remote. That Article provided that other international organs, by authorization of the General Assembly, could request advisory opinions of the Court. In the present case, the question concerned would be that of repressive judgments. That must be clearly brought out, so as to ensure that a member voted in the full knowledge of the point at issue, unless it were the Committee's intention that international organs should be empowered to request advisory opinions of the Court.

94. Mr. SÖRENSEN (Denmark) observed that the Committee could usefully borrow the wording of Article 96 of the Charter. If the Netherlands representative's suggestion were accepted, and the Committee agreed that the court should be seized by other international organs under certain conditions, it would be essential that conditions similar to those laid down in Article 96 be imposed, for otherwise any international organ fulfilling general conditions prescribed by the United Nations might be able to seize the court, whereas it might well be felt desirable to limit that right to specific organs.

95. The CHAIRMAN again emphasized that the limitations and conditions would be dealt with when the Committee came to draft the statute. The question before the Committee was solely one of principle.

96. Mr. ROBINSON (Israel) drew attention to another difficulty. There were different kinds of international organs, and the kind the Committee presumably had in mind was inter-governmental organizations. He felt that it was undesirable that any kind of international organization should be permitted to seize the court; point 5 (b) should therefore be limited to inter-governmental organizations, while the clause of Article 96, paragraph 2 of the Charter could be used to provide an additional limitation.

97. Mr. RÖLING (Netherlands) supported the Israeli representative's suggestion, and proposed that the words "by any other inter-governmental organization which may at any time be so authorized by the United Nations" be substituted for point 5 (b).

98. Mr. MAKTOS (United States of America) said he would abstain from voting on point 5 (b) on the ground that there should be authorization by the United Nations in every case. An inter-governmental organization was, ipso facto, an organization of States, and any State might be permitted to seize the court, always provided it did so through the United Nations.

99. Mr. VALDES ROIG (Cuba) suggested that point 5 (b) be replaced by the following compromise formula:

"(b) International organs other than organs of the United Nations may bring a matter before the court. In that case, the court shall not acknowledge jurisdiction without the authorization of the United Nations."

100. The CHAIRMAN saw little difference between the amendment suggested by the Cuban representative and that of the Netherlands representative.

101. He put to the vote the Netherlands amendment, namely that the words "by any other inter-governmental organization which may at any time be so authorized by the United Nations" be substituted for point 5 (b).

The Committee approved of the international criminal court being seized by any other inter-governmental organization which might at any time be so authorized by the United Nations by 3 votes to 2, with 7 abstentions.

Point 5 (c) (A/AC.48/L.3)

102. Mr. de LACHARRIERE (France) said he had abstained from voting on the first two points in order the better to emphasize that he was in favour of permitting the international criminal court being seized by States. If single States had the right to bring a matter before the court, then, a fortiori, a number of States acting in concert and as an international organ could do the same.

103. If the particular case to be brought before the court was a crime of international concern, (point 1 (b)), it was difficult to believe that the United Nations would show any great interest in a matter affecting two or three States only. There was no occasion in such an eventuality, to involve the entire General Assembly. For that category of crimes, it would not therefore be convenient for a matter to be brought before the court by an organ of the United Nations. The Committee should not lose sight of the fact that it had already restricted the right of States to confer jurisdiction upon the court by requiring that conventions, special agreements or unilateral renunciations must first have

received the approval of the United Nations. Should it, then, in addition, prevent States carrying out the simple operation of bringing matters before the court directly?

104. It could easily be shown that seizing of the court by States direct would have one advantage. Under national law, the decision to bring a matter before a court was taken by the office of the Public Prosecutor, an institution for which there was no counterpart in international law. If, to remedy that deficiency, recourse was had to an organ of the United Nations, the question would have to be considered of establishing an authority to set the machinery of justice in motion, as suggested by Professor Pella.(1) If that device was not adopted, the task would have to be performed by a political organ of the United Nations, and before the legal trial by the court there would be an initial political suit before the United Nations. The machinery of justice would thus become embroiled with politics, whereas it was the desire of States to establish a serene justice, free from opportunist and political influences.

105. The possibility should also be borne in mind of States having recourse to the United Nations merely to make a political demonstration for propaganda purposes. The temptation to do so would be so strong that there was reason to fear that no state would always be able to resist it. By making it compulsory for the referral of a case to the court to be preceded by long discussions in the United Nations, the Committee would be facilitating such manoeuvres. On the other hand, where the court was seized by States directly, any eventual political demonstration would have fewer repercussions and be less general and serious in character. Even in cases of misuse of the right to bring a matter before the court, the political effects would be less harmful.

106. The French delegation attached great importance to point 5 (c), to which it would reply in the affirmative. It considered that the fullest facility should be given to all States to bring matters before the Court. The procedural act of seizing the court would, in itself, have but slight repercussions. It was the judgment of the court which would carry weight and receive publicity.

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(1) A/AC.48/3, paragraph 32

107. The CHAIRMAN, speaking as United States representative, said that in the criminal jurisdiction of every State restrictions were imposed on the bringing of charges against other persons. The preliminary screening process depended on the particular legal system involved; in most countries there was a permanent public prosecutor, a qualified person who had discretion to decide whether the evidence was such as to warrant bringing a charge before the court concerned. A similar function was performed in the United States system of law by the grand jury. Elsewhere, similar methods existed, but the principle everywhere was that no charge could be preferred unless the evidence was sufficient.

108. Clearly, it would be impossible, in view of the universal agreement upon the need for a preliminary screening process, to permit States freely to accuse a State or its nationals of crimes and thereby to bring such State or such individuals as the accused before an international criminal court. He agreed with the French representative that, if such accusations were discussed by the General Assembly and a majority favoured trial of the accused by the court, the discussion and decision of the General Assembly would be equivalent to prejudging the case, on the basis not of criminal law, but of political considerations. However, to permit a State to bring a case directly before the court without any previous screening would be to incur dangers as obvious as those that would arise if the accusation were made and discussed in the General Assembly.

109. While access to the court should be reasonably free, provision should clearly be made for a process of screening the evidence before the court took cognizance of the case. One possible method would be to appoint a permanent prosecuting officer or attorney to act under the auspices of the court, but the danger in such an arrangement would be that a prosecuting officer might seek to place cases before the court, even when evidence was insufficient, merely in order to further his own ambitions or interests. In his view, and in his country's view, there should therefore be yet another restraint placed upon the indiscriminate bringing of cases before the court. His delegation would in due course submit a proposal that a commission of enquiry be set up by vote of the General Assembly or of the States ratifying the statute establishing the international court. That

commission would give an initial hearing to all charges made, and would decide whether those charges, and the evidence advanced in support of them, provided adequate grounds for bringing a case before the court.

110. His Government's intention of proposing the establishment of a court of enquiry, was proof of its approval of the principle contained in point 5 (a) that the international criminal court should be seized by an organ of the United Nations. If it were decided also that States should be permitted to seize the court, his country would also approve that decision, provided that collateral conditions were attached as to the manner whereby States would be empowered to do so. In other words, the view of his Government was that a State could not seize the court direct without the preliminary screening process.

111. Mr. ROBINSON (Israel) said that the word "States" in point 5 (c), if left unqualified, would be extremely ambiguous, and might be interpreted as all States, as States parties to the convention establishing the court, or as States Members of the United Nations. He felt that the Committee should define precisely which States should be permitted to seize the court.

112. Mr. SÖRENSEN (Denmark) suggested that if the question were decided in principle whether States could seize the court, the Drafting Sub-Committee could outline the different possible limitations on the categories of States permitted to do so. He himself thought that only States parties to the convention establishing the court should have the right to seize it.

113. The CHAIRMAN said that the whole discussion of the jurisdiction of the court had been based on the assumption that the right of States to seize the court would be subject to restrictions to be specified, including restrictions on the kinds of States, that was, States parties or not parties to the convention establishing the court, States Members or non-members of the United Nations.

114. Mr. ROBINSON (Israel) said that the question of which States should be allowed to seize the court was one of substance that should be decided by the

Committee; the Drafting Sub-Committee should only provide an appropriate text embodying the decisions reached by the Committee itself. He therefore proposed that point 5 (c) should be amended to read: "by States parties to the convention establishing the court?"

115. Mr. MAKTOS (United States of America) felt that the Israeli amendment did not entirely exhaust the possible limitations that might be placed on States seizing the court. He therefore preferred the existing wording, on the understanding that the question of restricting the categories of States would be decided later.

116. Mr. ROBINSON (Israel) could not agree to vote on point 5 (c) as it stood, because it was too vague in meaning and in phraseology. He therefore maintained his proposal.

117. Replying to a point raised by Mr. MUNIR (Pakistan), he explained that the words "parties to the convention establishing the court" would include States acceding to the convention after the court had been established.

118. Mr. PINEYRO CHAIN (Uruguay) said that the point was a fundamental one and that the observations of the representatives of France and the United States of America were of great importance. In the manner of seizing the court, a distinction must be made between the two categories of crimes (points 1 (a) and 1 (b)). The French representative had shown that in the case of the second category (crimes of international concern), it was desirable for States to be left free to approach the court direct. The Committee should, however, reserve that suggestion for later examination, since it had been agreed to devote a separate study to the second category of crimes.

119. In the case of the other category, crimes under international law, it seemed to be essential that some collective body should play an intermediary role. That collective body could either be an organ of the United Nations on which special powers had been conferred, or a new body, like that advocated by the United States delegation, whose task it would be to conduct a judicial enquiry

into all cases which it was desired to bring before the court. It would be impossible, in the case of crimes under international law, to allow States to approach the court direct. The door must be kept firmly closed on political propaganda, individual initiative must be debarred from setting the machinery of the criminal court in motion, and the accused parties must be protected from the harm which abuse of the right to bring cases before the court might cause them.

120. Unless point 5 (c) was re-drafted, he would reply to it in the negative.

121. Mr. de LACHARRIERE (France) said he was in entire agreement with the remarks of the Chairman in his capacity as United States representative. Provision must be made, in the organization of the court, for machinery to screen the cases submitted to it. He himself, in his previous statement, had more or less implied that an organ of the court should be entrusted with the task of assessing the merits of complaints. In his opinion, there was no difference in view between the United States delegation, the Uruguayan delegation, and his own.

122. He agreed that complaints by States should be examined by an organ whose task it would be to conduct the preliminary enquiries. The court should be envisaged, as a whole, as a body with the twofold task of conducting judicial enquiries, and sitting in judgment - an organ empowered to receive the complaints of States.

123. The point under consideration would accordingly require re-drafting.

124. Mr. ROBINSON (Israel) shared the views of those members who favoured the institution of a means by which charges brought before the court would be screened, but emphasized that the point he had raised in his previous interventions was of a different nature, and must therefore be decided separately.

125. Mr. AMADO (Brazil) drew the attention of the Committee to articles 26 and 27 of the preliminary draft statute (A/AC.48/3) prepared by Professor Pella and especially to the comments on article 27, which read:

"This is the only instance of the direct reference of cases to the court by a State. This provision was necessary to meet the requirements of article VI of the Convention on Genocide. From the preparatory work to the Convention on Genocide it would appear that cases cannot be referred to the court by States unless the State concerned has previously arrested the accused."

126. Mr. MAKTOS (United States of America) proposed that the Israeli amendment be voted on in two parts: the first consisting of the words "by States"; the second of the words "parties to the convention establishing the court".

127. Mr. de LACHARRIERE (France) remarked that once the idea was accepted of establishing an organ to screen the complaints lodged, it was possible to frame point 5 (c) in a different form. He proposed the following wording: "(c) following upon the lodging of complaints by States?".

128. Mr. PINEYRO CHAIN (Uruguay) thought it would be advisable to specify that States would be entitled to lodge complaints but that the court would not be bound to judge such complaints.

129. It seemed to him essential that, quite apart from the State concerned, there should be an organ to determine whether or not the act in respect of which the complaint was lodged was a crime, and to strengthen the authority of the court by giving its political sanction to the trial of the case. The screening machinery should be not only legal, but also political. He would be able to vote for the wording proposed by the representative of France only if a further phrase such as: "subject to conditions to be laid down later" were added.

130. The CHAIRMAN called for a vote on point 5 (c), as amended by the French representative.

The Committee approved of the international criminal court being seized as a consequence of complaints lodged by States by 7 votes to 2, with 3 abstentions.

131. Mr. ROBINSON (Israel) pointed out that his proposed amendment, limiting the right to States parties to the convention establishing the court, still stood.

132. The CHAIRMAN put to the vote the Israeli amendment to point 5 (c).

The Israeli amendment was approved unanimously.

2. FUTURE PROGRAMME OF WORK

133. Mr. RÖLING (Netherlands) suggested that the Drafting Sub-Committee meet and prepare questions concerning such topics as the establishment and nature of the court, for discussion by the Committee before it started work on the draft.

134. Mr. MAKTOS (United States of America) proposed that the Committee take up article 1 of annex II to the Secretary-General's memorandum (A/AC.48/1), and deal with general questions as they arose during discussion of the articles.

135. The CHAIRMAN, after reviewing the decisions reached by the Committee regarding its programme of work, supported the United States representative's view that after discussion of point 6 in document A/AC.48/L.3 the Committee should start work upon article 1 of annex II.

136. Mr. RÖLING (Netherlands) said that during the week the Committee had clarified the issue of the jurisdiction of an international criminal court. There were three preliminary drafts of the statute of that court in the Secretary-General's memorandum, and it seemed necessary at that juncture to decide whether the court should be permanent or ad hoc, established by convention or by resolution of the General Assembly. When those decisions had been taken the relevant annex could be examined and the Drafting Sub-Committee could formulate the general questions arising.

137. Mr. SÖRENSEN (Denmark) said that the Committee's discussions had so far covered articles 24, 25 and 26 of annex II, and the Drafting Sub-Committee was now in a position to prepare texts based on the answers given by the Committee to the general questions raised in those articles. There were, however, other questions relating to jurisdiction which had not been decided by the

Committee, and in his view those questions should first be settled before the Committee took up other subjects. It was unnecessary for the Drafting Sub-Committee to formulate general questions, when they could equally well, if not better, be discussed on the basis of a concrete text. He therefore proposed that the Committee, after consideration of point 6, examine article 27 et seq of chapter II in annex II, then return to chapter I. The Drafting Sub-Committee could begin to draft texts on the basis of the Committee's decisions.

138. Mr. RÖLING (Netherlands) withdrew his suggestion in the light of the Danish representative's remarks.

The Danish representative's proposal was unanimously approved.

139. Mr. MAKTOS (United States of America) pointed out that his amendment (A/AC.48/L.2) and that of the Pakistani representative (A/AC.48/L.1), to article 24 had not been withdrawn, and were therefore still before the Committee. He asked for a ruling on whether he could be permitted to alter his amendment in the light of the Committee's discussions.

140. Mr. SÖRENSEN (Denmark) suggested that all the amendments and proposals should be considered by the Drafting Sub-Committee.

It was so agreed.

The meeting rose at 1.25 p.m.