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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE NINTH MEETING

held at the Palais des Nations, Geneva,
on Monday, 13 August 1951, at 9 a.m.

CONTENTS:

Present:

Chairman: Mr. MORRIS

Members:

Australia	Mr. WYNES
China	Mr. WANG
Cuba	Mr. VALDES ROIG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. de LACHARRIERE
Iran	Mr. MOSSOVANI
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

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.3 and Corr.1)

1. The CHAIRMAN, requesting the Committee to continue its discussion on the jurisdiction of an international criminal court, said that, according to the programme of work decided on at the previous meeting, the Committee should first examine point 6 of the points of discussion proposed by the Drafting Sub-Committee (A/AC.48/L.3), and then begin examination of article 27 of annex II to the Secretary-General's memorandum (A/AC.48/1). Before the discussion began, however, he called upon the Rapporteur to review the work of the Drafting Sub-Committee, which had met since the last meeting of the Committee.

2. Mr. SORENSEN (Denmark), Rapporteur, said that the Drafting Sub-Committee had drafted articles covering the first five points of document A/AC.48/L.3. It proposed that there should be a second reading of the draft articles by the Sub-Committee before they were put before the Committee, both in order that the text should be fully satisfactory, and in order to incorporate any decision reached on point 6 at the present meeting; but the draft articles had been circulated unofficially to keep the Committee fully informed of the work of the Drafting Sub-Committee, and to give members an opportunity of proposing any drafting amendments they deemed desirable, for consideration at the second reading. Needless to say, members would not thereby be prevented from raising in the Committee points concerning the draft articles.

3. Certain clauses and, indeed, one complete article had been put in brackets. Some brackets contained clauses on which the Drafting Sub-Committee had been unable to reach a decision, others referred to problems that had been encountered in the work of drafting but had not been thoroughly discussed by the Committee as a whole. The Drafting Sub-Committee did not, however, intend that the questions within brackets should be discussed immediately in the Committee, for no doubt opportunity would arise later for discussing them; nor did it propose that the programme of work suggested at the last meeting of the Committee be altered in any way.

4. Mr. VALDES ROIG (Cuba) apologized for the absence of Mr. Del Valle, Minister Plenipotentiary, who was detained at Berne by his official duties. He hoped to be able to take part in the Committee's discussion later.

5. He (Mr. Valdes Roig) wished to define the position of the Cuban Government, which was in favour of the creation of an international criminal court.

6. The idea of creating such a body was not a new one. In the inspiring days of the League of Nations, following Mr. Briand's eloquent speeches denouncing war as an abominable crime, a declaration had been made outlawing war. That declaration had entailed the necessity of creating a body that would be able to give it effect, and to apply severe sanctions to perpetrators of the crime. Unfortunately the opportunity had not been seized at the right moment. The great war criminals of the First World War had been allowed to go almost unscathed.

7. The rosy hopes aroused by General Treaty for the Renunciation of War as an Instrument of National Policy of 1928, known as the Kellog-Briand Pact had not been realized, because confidence in the future and in the League of Nations had been such that no one at that time had envisaged the possibility of a repetition of the terrible events which, for four years, had rocked the world. Twenty years later a second world war, the most terrible of all time, had brought the civilized peoples to arms against the barbarism and savagery of man. At the present juncture the situation was no less grave, but there was no longer the old confidence. The future loomed dark. The peace of the world was in danger.

8. During the discussion several representatives had expressed doubts as to the possibility of creating an international criminal court. The Brazilian representative had said that he did not believe such a court would prove effective, thus suggesting that the scheme was more generous than sensible. The United Kingdom representative had painted such a pessimistic picture of the difficulties the court would have in functioning that one wondered whether, indeed positive results could really be attained.

9. There were, however, weighty reasons for persevering with the scheme. It was premature to prophesy the failure of a body not yet in existence. The members of the Committee mentioned had possibly not realized the service which the court might render to the cause of peace and to the development of international law. It should be regarded, not in isolation as a strictly penal body, but as one of the various means which the United Nations could employ for preserving peace and defending collective security. As the Uruguayan representative had remarked, there was an international law in existence which was not embodied in written codes: an organ was required to define and apply that law. Such an organ should have, but had not, been created by the League of Nations. It had already been tacitly approved by a number of States, and under the terms of reference given to the Committee by the General Assembly it was the function of the Committee to draw up a viable and durable statute for it.

10. Not only war itself must be outlawed, but want, concentration camps, the spirit of aggression, attacks on the freedom of opinion, deportation to places where death awaited dictators' victims, pernicious propaganda, and insidious campaigns of lies and calumny, which inevitably led to war.

11. Must there be a third world war before another tribunal was improvised like the Nuremberg Tribunal, the judgments of which had been just but which had been set up to meet particular circumstances? It would be ridiculous to subordinate the operation of justice to the triumph of arms and the reign of force.

12. For those reasons of principle, the Cuban delegation would vote for the creation of an international criminal court of a permanent character. That did not mean that his delegation was unaware of the immense difficulties which the court would encounter in exercising its functions. It was under no illusion as to the great difficulties of the Committee's task.

Point 6 (A/AC.48/L.3)

13. Mr. SORENSEN (Denmark), introducing point 6 of the points of discussion proposed by the Drafting Sub-Committee (A/AC.48/L.3), said that the question of the remedy to be given to States challenging the jurisdiction of an international criminal court had been raised in the Committee, and the Drafting Sub-Committee had considered it desirable to include it among the points for discussion. The Sub-Committee had not, however, entered into the substance of the question.

14. Mr. RÖLING (Netherlands) said that the Committee had approved the principle that the jurisdiction of an international criminal court in respect of the nationals of any State should be based on the consent of that State (point 2). By its approval of that principle, it had stressed the interest of the State in the trial of one of its nationals, not only from the standpoint of its possible anxiety to protect its nationals, but also from the standpoint that in the trial of its nationals its internal or foreign policy might be judged, implicitly or explicitly.

15. In addition to the situation envisaged in point 2, that other situation might well arise in which a State did not recognize the jurisdiction of the international criminal court, either because it disagreed with the interpretation placed upon the conventions conferring jurisdiction upon the court or for other reasons, and the question would then arise whether a State would be compelled to leave the question of jurisdiction to be taken up by the accused, or whether it should have the right itself to challenge the court's jurisdiction. In his view, the answer was that a State should have that right.

16. If it were agreed that a State should have the right to challenge the court's jurisdiction, the question would then arise what court should decide that preliminary issue. It seemed to him that as the international criminal court would try individuals, and as the International Court of Justice decided disputes between States, it should be the latter which should decide any

challenge by a State of the jurisdiction of the international criminal court; for the question was essentially one of the interpretation of treaties and conventions. His answer to point 6 would therefore be that a State challenging the jurisdiction of the international criminal court should be permitted to do so by bringing the question before the International Court of Justice.

17. In reply to a point raised by the CHAIRMAN, he said that he proposed that only States should have the right to challenge the court's jurisdiction before the International Court of Justice; the accused individuals could do so only before the international criminal court itself.

18. Mr. ROBINSON (Israel) thought that the question raised by the Netherlands representative was one of extreme complexity. There were serious difficulties in the way of giving States the right to contest the jurisdiction of the international criminal court before the International Court of Justice. The jurisdiction of the International Court of Justice, under its Statute, was derived from acceptance of the optional clause in Article 36 thereof, and from special agreement. A special agreement required the presence of two States, and therefore no single State could confer jurisdiction upon the Court in that way. The States which signed the optional clause admittedly permitted the Court to decide legal disputes concerning the interpretation of a treaty and the other matters mentioned in paragraph 2 of Article 36, but it could safely be said that the States which had signed the optional clause had never envisaged the International Court of Justice's deciding the question of the jurisdiction of another court which had not existed at the time when the optional clause had been drafted. He felt, therefore, that neither method of conferring jurisdiction upon the International Court of Justice was permissible.

19. How, then, could the International Court of Justice be granted jurisdiction, except by a clause in the convention establishing the international criminal court, to the effect that any challenge to the court's jurisdiction by a State a national of which was indicted before the court should be brought before the

International Court of Justice? If such a solution were adopted, however, that Court would be given a kind of jurisdiction that had not been envisaged when its statute had been framed and brought into force, and it might well be questioned whether such a clause would in fact in any way bind the International Court of Justice. It was possible that the Court might be prepared to accept such a clause, but on the other hand it might not. All those questions required a definite answer, and on the whole he thought it desirable that consideration of the Netherlands proposal should be deferred at least till the following meeting, in order to enable the members of the Committee to weigh its pros and cons.

20. Mr. KERNO (Assistant Secretary-General) shared the Israeli representative's doubts regarding the Netherlands proposal. It would seem that the words "in treaties and conventions in force" in paragraph 1 of Article 36 of the Statute of the International Court of Justice could not be regarded as affording a solution to the problem of how jurisdiction could be conferred on that Court, although it was true that under many conventions differences of opinion regarding interpretation and implementation of the provisions could be referred to the International Court of Justice on application by one contracting State alone. He agreed that the question was so complex that further consideration should be deferred to enable members to study it.

21. The CHAIRMAN proposed that, to simplify the Committee's discussions, the question of the particular body to which a State could apply for a decision on jurisdiction be deferred, and that the Committee should first decide whether a State should have the right to challenge the jurisdiction of the international criminal court when one of its nationals was being tried by it.

22. Mr. GORDON (United Kingdom) assumed that decision on the preliminary issue of jurisdiction would be given before any enquiry was made into facts. He agreed with the Chairman, therefore, that the question first to be decided was whether a State not party to a case before the international criminal court

should be permitted to challenge the jurisdiction of that court in respect of its nationals. The related question - to which body an appeal should be made - should be deferred until it had been decided whether there should be any appeal from the decisions of the international criminal court.

23. Mr. WYNES (Australia) drawing the attention of the Committee to article 44 of annex II to the Secretary-General's memorandum (A/AC.48/1), enquired whether it was contemplated, as seemed to be implied in that article, that individuals should have the right of appeal to the International Court of Justice.

24. Mr. KERNO (Assistant Secretary-General) said that the Secretary-General's views on the subject were outlined in chapter VI of the memorandum. There could be no appeal by individuals to the International Court of Justice.

25. The CHAIRMAN said that, as the Committee had decided that States could prohibit trial of their nationals by the international criminal court, it had clearly recognized their interests in cases affecting their nationals. It seemed obvious to him, therefore, that States should be permitted to challenge the jurisdiction of the court.

26. Mr. de LACHARRIERE (France) wished to know whether the remedy envisaged by the Netherlands representative was, in the true sense, an appeal to another body against a decision already taken by the court in the exercise of its own jurisdiction.

27. He would himself prefer - and his preference was apparently shared by the Netherlands representative - that the question of jurisdiction, when raised, should be regarded as an antecedent problem distinct from punishment, and accordingly referred to the International Court of Justice before the criminal court arrived at a decision. As a supreme tribunal, the criminal court would have to make judgments from which there was no appeal.

28. Mr. ROLING (Netherlands), explaining his view, said that if an individual was indicted before the court, his country would either be interested in the indictment or not. If it were interested, and, for one reason or another, wished to prevent the trial of that individual by the court, it should be given the right to challenge the jurisdiction of the court before the International Court of Justice. He did not think that the international criminal court should first decide the question of jurisdiction, leaving it to the State to appeal, if it so desired, from that decision to the International Court of Justice; for both courts would be tribunals of international importance, and it would be detrimental to their prestige if they gave conflicting decisions.

29. Mr. KERNO (Assistant Secretary-General) made a distinction between the rights of the individual brought for trial and the rights of the State of which he was a national. The accused would have a right to a fair trial, and thus also a right to claim before the international criminal court that it had no jurisdiction in the case in which he was being tried. There should be no right of appeal conferred upon such an individual against the court's decision on that point.

30. But the right of a State to challenge the jurisdiction of the court could be considered from the point of view of whether it should make such a challenge first before the court, with liberty to appeal to the International Court of Justice; or at once before the International Court of Justice. That problem involved the interpretation of international conventions, and the subject was of such complexity that, while it merited close consideration, he must again stress that it should not be settled at once without further study.

31. The CHAIRMAN thought that the Committee could, before dealing with the other issues that had been raised, decide whether States should have the right to challenge the jurisdiction of the international criminal court. He accordingly put that question to the vote.

The Committee approved of States being accorded the right to challenge the jurisdiction of the international criminal court, by 12 votes to none, with 2 abstentions.

32. Mr. PINEYRO CHAIN (Uruguay) said that his abstention was due to the attitude his delegation had adopted, that in no case should a State be able to question the competence of the court on grounds of the nationality of the offender or of the place where the crime was committed.

33. The CHAIRMAN said that the Committee's decision now raised the problem of what court should hear a State which challenged the jurisdiction of the international criminal court.

34. Mr. SORENSEN (Denmark) thought that a provision enabling a State to apply direct to the International Court of Justice in such circumstances might conflict with the decision that cases might be brought before the international criminal court by an organ of the United Nations. If a criminal were indicted before the international criminal court by such an organ, and the State of which he was a national challenged the court's jurisdiction, the dispute would be virtually one between that State and the United Nations. According to the Statute of the International Court of Justice, only States could be parties to a dispute; consequently, a dispute between a State and the United Nations could not go before the International Court of Justice.

35. Mr. KERNO (Assistant Secretary-General) confirmed the Danish representative's interpretation of the Statute of the International Court of Justice.

36. The United Nations could not be a party to a case of disputed jurisdiction, before the International Court of Justice. Therefore, the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, provided that in the event of a difference concerning the interpretation or application

of the Convention between the United Nations and a Member State an advisory opinion would be requested of the International Court of Justice which would be accepted as decisive (section 30), and the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947 provided that such disputes would be referred for final decision to an arbitral tribunal, although the Secretary-General or the United States Government could ask the General Assembly to request an advisory opinion of the International Court of Justice, and in its final decision the arbitral tribunal would have regard to the opinion of the Court (section 21).

37. Mr. SORENSEN (Denmark), pursuing his argument, said that if a State challenged the jurisdiction of the international criminal court in the circumstances he had described, the challenge could go before the International Court of Justice only if the Statute of that Court were amended, which did not seem feasible at the present time.

38. Another difficulty that might arise was that if an accused person and the State of which he was a national both challenged the jurisdiction of the international criminal court, there might be danger of conflict of opinion between the courts. In his view, therefore, States and individuals should both be allowed to raise questions of jurisdiction before the international criminal court itself. A procedural clause might perhaps be inserted in the statute to that effect, to enable a State to raise a question of jurisdiction before the court. Appeal from that decision to the International Court of Justice might be allowed, but only in such cases as came within the purview of the Statute of the International Court of Justice, that was, if there were a dispute between two States.

39. Mr. LIANG, Secretary to the Committee, pointed out that, as the International Court of Justice could take cognizance only of disputes brought by States, it could not consider a question of jurisdiction brought by one State, because there was no second State as party; the remaining States of the United Nations could obviously not all be cited. Even if other States were concerned

to some extent, the question of compulsory jurisdiction referred to in paragraph 2 of Article 36 of the Statute of the International Court of Justice had to be considered; compulsory jurisdiction had to be accepted by all States concerned as a formal act. Moreover, a clause in the Statute of the international criminal court to the effect that disputes concerning its jurisdiction would be decided by the International Court of Justice would not constitute acceptance of the latter's compulsory jurisdiction under Article 36, paragraph 2, of its Statute.

40. A State could not seek an advisory opinion from the International Court of Justice (Article 96 of the Charter). The General Assembly was required to authorize requests for advisory opinions, but could only do so after reviewing the facts of the case, which would amount to pre-judging the issue. In the circumstances, therefore, he felt that the International Court of Justice could not be made the receptacle of appeals regarding the jurisdiction of the international criminal court.

41. Mr. GORDON (United Kingdom) felt that it would lower the prestige of an international criminal court if, after an accused person had availed himself of all the pleas open to him, the State of which he was a national was entitled to approach another court with the claim that the international criminal court did not have jurisdiction. In most systems of law preliminary issues such as that of jurisdiction were dealt with before enquiry was made into the facts of the case. If the Netherlands proposal were accepted, there would seem to be nothing to prevent a State from raising such an issue even at the end of the case.

42. Mr. TARAZI (Syria) drew attention to the connexion between point 6 (A/AC.48/L.3) and article 44 of annex II in the Secretary-General's memorandum.

43. The Danish representative had shown that a conflict of jurisdiction might occur between the international criminal court and the International Court of Justice if the objection were raised both by a State and by the natural person

prosecuted. Though article 43 in annex II of the Secretary-General's memorandum laid down that "There shall be no appeal against the decisions of the court" it nevertheless (article 44) provided, exceptionally, for an appeal inter alia, in limine litis, when the jurisdiction of the court was disputed. That involved no conflict of jurisdiction, since it was for the International Court of Justice to settle the matter, even when the objection was raised by the accused.

44. If however an individual were to be permitted to appeal against the findings of the court to the International Court of Justice, it would be necessary to revise the Statute of the International Court of Justice, which had power to take cognizance of disputes between States alone, not between individuals.

45. How did the Secretariat reconcile the jurisdiction given to the International Court of Justice under article 44, sub-paragraph (a), in annex II of the Secretary-General's memorandum, with the Statute of the International Court of Justice? If it were possible to allow an appeal by an individual to the International Court of Justice it might, with yet more justice, be decided to permit appeal by the State of which the accused was a national.

46. Mr. ROLING (Netherlands) said that of the two questions before the Committee that of whether the question of jurisdiction could be brought before the International Court of Justice was a technical one. In his view, a solution was possible, even without amendment of the Statute, and one had indeed been envisaged in article 44 of annex II. It seemed to him possible that States should have the right to demand a decision from the Court, on the interpretation of the convention concerned, and that the international criminal court should be bound by that decision.

47. The second question was whether there was any danger involved in a State and an individual both raising the question of jurisdiction, one before the international criminal court and the other before the International Court of Justice. Individuals should clearly have such a right. The international criminal court would judge on the facts placed before it by the individual,

whereas the International Court of Justice dealt with the interests of States and the interpretation of treaties; it was undesirable, therefore, that the international criminal court should deal first with the question of jurisdiction, which involved both interpretation of treaties and international interests.

48. Mr. LIANG, Secretary to the Committee, dealing with article 44 of annex II, agreed that in many conventions, such as the Convention on Genocide, provision had been made for questions of interpretation, application of fulfilment of the convention to be submitted to the International Court of Justice. In those conventions the prime consideration was the interpretation of treaties, and it was assumed that there would be two or more States as parties in the dispute. In the case of the proposal before the Committee, however, only one party would be a State, the other, if it was possible to call it a party, being the international criminal court. There could admittedly be cases in which two States were in dispute as the result of a case before the international criminal court, as, for example, when one State cited a national of another before the court and the second State held that the court had no jurisdiction over him. In such a case, as had been suggested in the Secretary-General's memorandum, the International Court of Justice might settle the dispute, but clearly in that case both States must be parties to the optional clause in its Statute. According to that Statute, the question of jurisdiction could not be raised before the Court in any other circumstances.

49. The CHAIRMAN pointed out that if it were desired to confer jurisdiction on the International Court of Justice in respect of questions concerning the jurisdiction of the international criminal court, the States concerned would naturally have to comply with the requirements of the Statute of the former. As the Netherlands proposal was based on the assumption that that Statute could not be altered in existing circumstances, it seemed to him that jurisdiction could be conferred upon the Court only if the statute of the international criminal court made the necessary provision for so doing.

50. Mr. de LACHARRIERE (France) said that he had not entirely grasped the arguments advanced by the Secretary in support of his contention that there was no contradiction between the Secretariat's preliminary draft and the comments of various representatives. On the one hand, article 25 in annex II, provided that: "The United Nations shall be entitled to bring cases before the Court" and, on the other article 44 provided that: "... an appeal may be lodged with the International Court of Justice..."

51. The Netherlands representative had expressed the opinion that when a State challenged the court's jurisdiction over one of its nationals, that plea of non-competence should be the subject of a preliminary case, to be considered as a dispute between two States regarding the interpretation of a convention, and should therefore be heard by the International Court of Justice in first instance. To that, the Danish representative had objected that, if the accused person should himself challenge the criminal court's jurisdiction on the same grounds as were advanced by the State of which he was a national, there would be two objections entered, one of which would come before the international criminal court and the other before the Court of International Justice. Two judgments would then be given, and would not necessarily be identical.

52. Those difficulties, which were by no means imaginary, arose from the contention that the International Court of Justice could only take cognizance of disputes between States. But it did not follow that, because Article 35 of the Statute of the International Court of Justice laid down that: "The Court shall be open to states parties...", a dispute between States was essential. There would normally be such a dispute, but as regards the punishment of crime there were no parties as understood in civil contract law or under the law of treaties. Nothing in the Statute of the International Court of Justice would appear to require that cases brought before that Court should involve two States as parties to a dispute. If one State alone were to contest the jurisdiction of the criminal court with regard to the interpretation of a convention affecting one of its nationals, there would be no reason to deny it the right to approach the International Court of Justice in the matter, even though the case brought before the criminal court arose from a complaint by the United Nations.

53. If such a right were granted to States the decision of the International Court of Justice would be given at an early stage of proceedings before any decision by the criminal court. Similarly, if the accused himself were to contest the criminal court's jurisdiction, that court would suspend judgment and, thereafter, probably conform to the findings of the International Court of Justice. Although theoretically possible, a conflict between the two decisions would appear somewhat unlikely.

54. Should that course be adopted the following procedure would apply: a natural person (x) having been indicted before the criminal court, State X would enter a plea before the International Court of Justice that the criminal court had no jurisdiction, while the accused (x) would, on the same grounds, enter a plea of non-competence before the criminal court itself. So long as the International Court of Justice had not ruled on the question of jurisdiction the criminal court would defer its decision. Subsequently, it would give its decision regarding the question of jurisdiction raised by (x) which, more often than not, would be on the same lines as that of the International Court of Justice.

55. He would therefore support the Netherlands representative's proposal, provided it was understood that the International Court of Justice could take cognizance of pleas of non-competence entered by the State of which the accused was a national, even though the case before the international criminal court had originated in a complaint by the United Nations.

56. In view of the difficulty of formulating the various hypotheses, it would, however, be desirable to allow the members of the Committee time to reflect further on the problem as a whole.

57. Mr. ROBINSON (Israel) said that, whatever the Committee's decision regarding the International Court of Justice, it would in no way bind that Court. He felt, therefore, that the Committee should vote without delay on

whether a State challenging the jurisdiction of the international criminal court should bring such a challenge before the court itself, or before the International Court of Justice. The problems arising from the answer to that question could then be deferred until article 44 to annex II was examined.

58. The CHAIRMAN said that all the collateral issues that had been raised during the discussion would help to clarify the minds of members of the Committee in respect of the question before what tribunal a State challenging the jurisdiction of the international criminal court should seek a hearing. In deference to the opinions expressed in favour of deferring the question either for further study or till article 44 had been examined, he placed that issue before the Committee.

59. Mr. PINEYRO CHAIN (Uruguay) supported the French representative's suggestion, and proposed that the Committee resume its consideration of all cases of appeals in connexion with the study of article 44 of the preliminary draft.

60. Mr. SÖRENSEN (Denmark), while personally sharing the view of the Israeli representative that one question could be decided at once, was prepared to agree to a deferment, but asked for clarification on two points. One concerned the French representative's view that the Statute of the International Court of Justice did not rule out consideration by that Court of matters other than those in which two States were in dispute. The French representative appeared to base his view on Article 35 of the Statute of the International Court of Justice, whereas he himself thought that Article 34 excluded such a possibility. His first point was therefore whether there was any substance in the French representative's view.

61. His second point was whether it was possible according to the Statute of the Court or the Charter of the United Nations for a State to ask for an advisory opinion by the International Court of Justice. In his opinion, Article 96 of the Charter precluded that.

62. Mr. KERNO (Assistant Secretary-General) said that article 44 in annex II of the Secretary-General's memorandum should not be interpreted as recognizing the right of a private individual to approach the International Court of Justice.

63. In the matter of disputes, only States were entitled to appear before the Court. Advisory opinions could, however, under Article 96 of the Charter and Article 65 of the Statute of the International Court of Justice be requested by the Security Council, by the General Assembly, or by other organs of the United Nations or of the specialized agencies authorized by the General Assembly so to do.

64. The French representative had interpreted the Statute of the International Court of Justice as empowering a State to submit to that Court a question not in dispute with another State. He could not himself agree to such an interpretation as, in his opinion, only disputes in which at least two States were concerned could be brought before the International Court of Justice.

65. Mr. VALDES ROIG (Cuba) said that his delegation would favour deferring the study of the question of appeals. He agreed with the United Kingdom representative that it should be left to the criminal court itself to determine its jurisdiction with a view to establishing its own case-law.

The meeting was suspended at 10.55 a.m. and was resumed at 11.10 a.m.

66. Mr. SÖRENSEN (Denmark), proposed that consideration of the question of what remedy should be given to States challenging the jurisdiction of the court should be deferred until such time as a member of the Committee cared to bring it up again, it being understood that, if it were not raised within the next few days, the Drafting Sub-Committee could take it up and make proposals for the consideration of the Committee. In the latter event it would be an advantage if members would formulate specific proposals for the benefit of the Drafting Sub-Committee.

The Danish representative's proposal was adopted.

67. Replying to the CHAIRMAN, Mr. SÖRENSEN (Denmark) said he believed that the Committee should proceed with consideration of articles 27, 28, 29 and 30, in that order, Annex II of the Secretary-General's memorandum (A/AC.48/1).

68. The CHAIRMAN, in the absence of objection, ruled accordingly. Consideration would, of course, be given to any proposal for departure from that order of procedure.

Article 27 of annex II (A/AC.48/1)

69. Mr. MUNIR (Pakistan) proposed that article 27 should consist of one paragraph, combining the first alternative to paragraph 1 with paragraph 2, and reading: "The Court shall be competent to judge only individuals, whether officials or constitutionally responsible rulers accused of crimes coming under its jurisdiction". There was no difference in substance between that text and the original text of the two paragraphs he had mentioned. The idea behind his proposal was that the article should state exactly which individuals were responsible and what they were responsible for.

70. Mr. KERNO (Assistant Secretary-General) said that article 27 as drafted covered two problems. The first was whether only individuals or also legal entities and in that he would include States - should be judged by the court. That problem had already been dealt with at the Nuremberg Trial and by the International Law Commission in its draft Code of Offences against the Peace and Security of Mankind.[1/] The second was whether constitutionally responsible rulers and officials would be held criminally responsible. The latter category had been included in the International Law Commission's draft code, article 3 of which laid down that "The fact that a person acted as Head of State or as a responsible Government official does not relieve him from responsibility for committing any of the offences defined in this Code".[2/] It was for the Committee to decide whether that question should be dealt with both in the code and in the statute or only in the code.

71. Mr. MUNIR (Pakistan) explained that under the Pakistani legal system the categories of persons which a court had competence to try were defined, and that his intention was that the categories of individuals referred to in the first alternative of paragraph 1 of article 27 should also be defined.

1/ A/CN.4/48 paragraph 58
2/ Ibid, paragraph 59

72. He did not favour judgment of legal entities by the court. Admittedly, legal entities had been tried by the Nuremberg Tribunal, but that had not been because they had been punishable. He also considered that it might be advisable to include a specific provision with regard to Heads of States and responsible government officials similar to that in article 3 of the draft Code of offences elaborated by the International Law Commission.

73. Mr. WYNES (Australia) wondered whether it was wise to exclude the possibility of trial of legal entities. The question perhaps depended to some extent on the system of law to which one was accustomed. Nevertheless, it seemed that, if, as might well be, confiscation of property was one of the penalties prescribed in the statute, consideration might be given to the possibility of the imposition of such a penalty on a corporation, the head of which, acting on behalf of that corporation, had committed a crime; for if that person were a man of straw it could only be through application of the penalty to the corporation that the judgment imposing such a penalty could be enforced. The Secretariat in its comments[1/] had concentrated largely on the responsibility of States, but he was thinking more of private institutions. He would be glad to hear the views of other members on that point.

74. Mr. de LACHARRIER (France) thought that under the national law of the various countries, punishment of criminal acts committed by legal entities was not sufficiently crystallized to enable it to be incorporated easily in international criminal law. Moreover, it was difficult to separate the guilt of States from the guilt of their governments, or to impose penalties on States as such. Hence at the present stage in the evolution of law, it was preferable to keep to the question of criminal responsibility of individuals exclusively.

75. Nevertheless, a difficulty still remained in regard to actions for damages. In France, for example, in a court of law, repressive action involving a sentence would often be accompanied, before the same judges, by an action for damages brought by the partie civile and resulting in the award of compensation to the injured party.

1/ A/AC.48/1. Part II, chapter I, section I, II B.

There might be reason to think that, in the international sphere, the problem of damages would also arise. In the event of the injured parties being content to demand no more than moral or symbolical reparation, there would be no difficulty; but if financial compensation were demanded, more often than not the resources of the guilty party would be inadequate. A State which the agent had represented, and which had placed its trust in him, would have made itself liable not in a criminal, but in a civil way; and it would therefore be desirable to render a State responsible for making good any damage caused by the criminal conduct of its agents. It would be an anomaly to see a former minister; for example, condemned for a crime under international law without the injured parties receiving compensation.

76. Hence a system might perhaps be adopted under which the Court would judge only individuals, with the proviso that it could sentence States or other legal entities to the obligation to make good any damage caused by the criminal acts of persons representing them.

77. Mr. ROBINSON (Israel) believed that consideration should be given to the connexion between the question under review and the two categories of crimes over which it had been agreed that the court should have jurisdiction, namely, crimes under international law and other crimes of international concern.[1/] Where the latter category was concerned - and he believed that the Australian representative was thinking mainly of that category - there was a definite problem, since under certain national systems of law legal entities had no criminal responsibility, whereas under others they had. In the case of crimes under international law, it was obvious that, in addition to the responsibility of the individual, there was also the collective political responsibility of the State. It was difficult to imagine that in such cases the individual could commit a crime without the knowledge and the co-operation of the State. It was equally difficult to admit that such crimes committed by legal entities were not equally within the knowledge of the State, and even committed with its connivance. There thus arose the problem of dual responsibility, the criminal responsibility of the individual, and the political responsibility of the State. Crimes under international law were such

1/ Summary record of the 5th meeting (A/AC.48/SR.5), paragraphs 54 and 70.

important violations of the United Nations Charter that means of dealing with them would develop within the United Nations; Chapters VI and VII of the Charter dealt with such procedures. The Nuremberg and Tokio Tribunals had distinguished between the criminal responsibility of the individual and the political responsibility of the State, although not without a certain amount of difficulty. He believed that no one present would wish that a political body should be brought before the international criminal court for trial.

78. The question of partie civile raised by the French representative was a different problem and was more a matter of procedure than of principle. The point had been covered in the Secretary-General's memorandum and its conclusions.[1/] The Committee, however, was not necessarily bound by those conclusions. If it decided to introduce a provision covering the point under consideration, it would be necessary to provide not only for a criminal defendant but also for a civil defendant, which would be the State.

79. Thus the Committee was faced with three aspects of responsibility: political, criminal and civil. At that point, however, it was merely concerned with criminal responsibility, and not with political responsibility and should reserve the question of partie civile and civil responsibility for consideration when the matter of damages was dealt with.

80. The CHAIRMAN observed that the question of partie civile would come up for consideration when article 37 of annex II to the Secretary-General's memorandum was discussed.

81. Mr. MUNIR (Pakistan) said that he had excluded legal entities from his text[2/] on the ground that all criminal liability was personal. In cases of conspiracy, abettment and the like, a vicarious responsibility presented itself, and a man could be punished for what his associates had done, if there had been agreement on his part to the commission of the crime or evidence of intention to commit the crime. The idea of punishing legal entities was foreign to the law of many countries.

1/ A/AC.48/1. Part II, chapter V and annex II, article 37.
2/ See paragraph 69 above.

82. The question of damages was another matter, and was covered by the draft statute. Where it was a question of punishment by imprisonment and the like, however, he submitted that the first alternative to paragraph 1 of article 27 was preferable; that was to say, the court should judge only individuals accused of crimes coming under its jurisdiction, inclusive of those accused of crimes in cases of conspiracy and the like.

83. Mr. RÖLING (Netherlands) believed that as international law had not advanced sufficiently far to permit of the recognition of the criminality of a State, it was out of the question to lay down in the statute that the court should judge States. In his view, it would also be wrong to provide for judgment by the court of legal entities, in view of the fact that, while the criminality of legal entities was recognized in certain countries, in others it was not. He would, therefore, vote in favour of judgment by the international criminal court of individuals only.

84. Mr. GORDON (United Kingdom) observed that the whole matter hinged on the question of responsibility. Could an official of a corporation be held liable for acts of the corporation? The Nuremberg Tribunal established such a principle. Under the system of law in the United Kingdom corporations could be prosecuted for statutory offences and all the officials of a corporation would be held liable unless they had disassociated themselves from the particular action leading to the prosecution; alternatively the onus might be on the Crown to prove that the officials had committed certain acts. If the principle of vicarious responsibility was admitted, there seemed to be no need to go beyond the provision that the court should judge individuals, and the only penalty imposable on the corporation would be a monetary one. He also agreed that the court could not and should not judge States.

85. Mr. de LACHARRIERE (France) recalled that, in an earlier statement[1/] he had intimated that, up to a point, he was in favour of extending the competence of the court beyond the sphere of individuals to include the problem of civil damages. Certain members had then pointed out that article 37 of annex II, under which third parties could constitute themselves partie civile, covered that particular point.

1/ See paragraphs 74 and 75, above.

Actually, the question was different, namely, whether States or legal entities could be sentenced and required to make civil restitution for damage caused by the criminal behaviour of their representatives. By the terms of article 37, the entire civil responsibility for damage would be placed at the door of the individual, though his resources might be insufficient to make reparation in full.

86. Hence, he urged that the question of civil damages payable by States or legal entities should be left open.

87. Mr. TARAZI (Syria) said that the French representative was suggesting that the court should have two types of jurisdiction - a criminal jurisdiction and a civil jurisdiction. The court would in addition secondarily be competent to deal with the civil responsibility of a State whose national had been sentenced on criminal grounds. That would amount to the extension to international law of the principle of civil responsibility of third parties, recognized, in particular, in article 1384 of the Napoleonic Code.

88. That was undoubtedly a matter of substance, and not a mere procedural question. In municipal law, it came under the penal code and not under that of criminal investigation.

89. The CHAIRMAN gathered from the remarks of the French and Syrian representatives that they held the view that the vote should only cover the question of criminal responsibility.

90. Mr. VALDES ROIG (Cuba) asked the Assistant Secretary-General whether, in spite of the terms of article 27, paragraph 1, it would not be advisable to make provision for the case of a State applying to be tried by the court with the object of using a decision exonerating it from blame as a means of defence against charges made by the international community. That was admittedly an unusual hypothesis, though not an impossible one. If such a request were made, would the court have to declare that it had no jurisdiction?

91. Mr. KERNO (Assistant Secretary-General) said that the Secretariat had always considered the international criminal court as one which would punish international crimes; that was why it had not considered the point made by the Cuban representative as to whether the court might be used in order to clear the reputation of a State.

92. He observed that the amendment presented by the Pakistani representative in its present wording would exclude private individuals. As that was obviously not the intention, he suggested that it should be revised along the lines of article IV of the Convention on Genocide, which spoke of persons "whether they are constitutionally responsible rulers, public officials or private individuals".

93. The CHAIRMAN requested the Rapporteur of the Drafting Sub-Committee to bear the Assistant Secretary-General's comment in mind when drafting article 27.

94. Replying to the CHAIRMAN, Mr. WYNES (Australia) said that he would not press for further consideration of the point he had raised, being prepared to take it up again under article 37 of Annex II. He was, nevertheless, a little concerned by the fact that article 37 only made provision for persons entitled to claim damages, and not for persons liable to pay damages.

95. The CHAIRMAN said that, as it appeared to be generally agreed to leave the question of responsibility for damages until article 37 was discussed, he would put to the vote the question whether the court should judge individuals only, whether they were officials or constitutionally responsible rulers.

An affirmative answer to that question was approved by 11 votes to none with 3 abstentions.

Article 28 of annex II

96. Mr. MAKTOS (United States of America) hoped that the Committee would not vote in favour of article 28, and that it would leave its stipulations for inclusion in future conventions. If the Committee were to take up in detail the various obligations of States listed in that article, the debate might be prolonged interminably.

97. None the less, the provisions of article 28 appeared perfectly logical. The court could not function unless States did co-operate in the manner suggested therein, for there was no international police force and no international government. His own inclination at first had been to favour the inclusion of such a provision, but

he had come to think that, as in the case of the crimes over which the court should have jurisdiction, it would be inadvisable to burden the convention with such difficult, and possibly controversial issues, which might defeat the very purpose for which the Committee had been convened. He would agree that such provisions were a sine qua non if no other conventions were likely to be drawn up conferring jurisdiction on the court in respect of specific crimes. However, there was every likelihood that States would have an opportunity in future conventions of agreeing on the obligations they should undertake in respect of specific crimes. And in that connexion, he would stress that the obligations to be undertaken might vary according to the crime. His Government had found that in complicated matters such as questions of extradition and domestic jurisdiction, it was preferable that specific duties should attach to specific crimes.

98. Mr. GORDON (United Kingdom) agreed in principle with the United States representative. On the other hand, if the problem were deferred until other conventions had been concluded the Committee would merely be putting off the evil day; for his delegation believed that it was difficult, if not impossible, to give practical effect to the obligations laid down, for example, in sub-paragraph (a). There were such considerations as when an accused person should be handed over, whether he was entitled to bail, and so on, matters upon which the head of his delegation had touched in his opening statements.[1/]

99. Mr. ROBINSON (Israel) agreed with the United States representative, and in part with the United Kingdom representative. He accepted the reasoning of the former, whose position seemed to be strengthened by the arguments advanced by the latter. It was a problem that could be solved not in abstracto, but only in relation to particular crimes. He believed that the United Kingdom representative had objected to a theoretical approach to article 28.

100. From the point of view of legal method, it was questionable whether the matter of searching for, apprehending and handing over an accused person to the court was a matter of jurisdiction. In fact, he believed that article 28, which referred to the duties of States, would fall more properly under the chapter on procedure (Chapter III of annex II).

1/ Summary record of the 2nd meeting (A/AC.48/SR.2). paragraphs 8 and 9

101. Mr. de LACHARRIERE (France) did not agree with the views expressed by the previous speakers. Article 28 contained essential provisions which alone enabled the court to act. Without such means of action, the court would be completely ineffective.

102. Obviously, States would have to renounce part of their sovereignty; but was not that the way to make progress in the field of international law? Moreover, accession to the Charter of the United Nations in itself constituted an appreciable surrender of sovereignty. Those difficulties did not seem to him to be so very serious. The safeguards with which extradition was surrounded were due to the need to protect individuals from justice which was not impartial, which might be applied to them in another country. Since the court was free from suspicion of partiality the question of the right of asylum and the safeguards concerning extradition would not arise. It should also be remarked that the assistance to be given to the court by States under article 28 would only be furnished, when the jurisdiction of the court had been recognized. What would be the use of creating the court if States did not at the same time agree to assist it? If definition of that assistance were left to special conventions the entry into operation of the court would be postponed indefinitely; an abstract institution would be created without means of functioning.

103. In his view, article 28 of annex II must of necessity be included in the statute of the court.

104. Mr. LIANG, Secretary to the Committee, said that the Secretariat had not thought fit to make any recommendation as to whether the article in question should appear in the body of the statute or in a separate convention, since that was a matter of principle. On the other hand, he felt that it should appear under the chapter on the jurisdiction of the court, since it dealt with the methods by which the court would acquire jurisdiction. In that instance, it would be pertinent to think in terms of conventions on judicial assistance, for the Committee was concerned with jurisdiction ratione personae and with the need for enabling the court to acquire jurisdiction over an individual through the only machinery available, namely, that of the State.

105. Mr. SÖRENSEN (Denmark) felt that the question of the proper place for article 28 in the statute should not stand in the way of further discussion on the subject. He associated himself with the views expressed by the French representative. It would, indeed, be putting off the evil day if the Committee failed to face up to the issue before it. Moreover, by failing to do so and by omitting the article, the Committee would prevent the General Assembly from appreciating all the difficulties. He imagined that States reluctant to accept the obligations in question as part of the convention setting up the court would also, to some extent, hesitate to do so under a convention granting jurisdiction in respect of a particular crime or crimes. As it was essential for the proper functioning of the court that the accused should be surrendered to it, States parties to a convention on an international criminal court would have to accept those basic obligations; and, if they were not accepted under the statute, he believed it would be better to have no court at all and to leave States to set up ad hoc tribunals. He would, therefore, vote for the retention of article 28.

106. The Committee might, of course, have to face certain problems of lesser importance, such as that of the judicial guarantees an individual could claim. He agreed that an accused person should not be handed over by administrative act, but should be entitled to the various guarantees existing in different countries, some of which had been referred to. There was nothing, however, in article 28 which would violate the rights of individuals in that connexion. The further question as to who should take the individual into custody was a technical problem with which the Committee would have to deal at a later stage. So far as he was concerned, the general principle of the provisions in article 28 was acceptable and even necessary.

107. Mr. WANG (China) supported the Danish representative. It had been agreed that the jurisdiction of the court would be limited by specific conventions to certain crimes. He felt, therefore, that governments would enjoy all the protection they required, and that, consequently, it was not necessary to leave such provisions as were contained in article 28 to be prescribed in subsequent conventions. The duties laid down there were minimum obligations and, if the formulation of such duties were left to future and separate conventions, there would be a risk of lack of uniformity in the methods prescribed for assisting the court in the search for, apprehension and handing over of accused persons.

108. Mr. RÖLING (Netherlands) considered the issue to be one of policy. He gathered from the remarks of the United States representative that the United States Government would not be inclined to co-operate in the establishment of an international criminal court if obligations for States followed from its establishment. So far as he (Mr. Röling), could see, those obligations would be confined to the duties laid down in article 28. The Chinese representative thought that States would be sufficiently protected by the limitation of the jurisdiction of the court to particular crimes laid down in international conventions. That conclusion, however, was questionable, because it was possible that a State which was a party to the statute and which had not recognized the jurisdiction of the court under some later convention, would be bound to hand over an accused person who was not a national of that State, and who had not committed the crime within the territory of that State but who was, none the less, resident there. That was an obligation to which States might take objection.

109. The aim was to set up an international criminal court and, in order to do so as successfully as possible it would be wise not to burden States participating in a convention setting up the court, with such obligations. He, therefore, supported the United States representative.

110. Mr. MAKTOS (United States of America) explained that he had not wished to imply that his Government would not undertake obligations. The question was whether it wished to undertake obligations which were incompatible with domestic procedures. When a government raised serious objections to the acceptance of those duties, it did not do so because it objected to the obligations as such. Its main concern was that the court should be established under the best possible conditions.

111. Mr. PINEYRO CHAIN (Uruguay) considered the provisions of article 28 to be fundamental. An international court on which States failed to confer the political power essential to its functioning was unthinkable. The creation of the court would involve an inevitable surrender of sovereignty, but any development of international law entailed the sacrifice of some aspects of State sovereignty. A general provision reproducing the substance of the principles laid down in article 28 should be included both in the Statute itself and in later conventions conferring

jurisdiction on the court. It would prescribe the minimum obligations which States must take upon themselves in order to enable the court to try and convict. If the Committee left it to later conventions to provide the court with means of apprehending the accused and of seeing that its sentence was carried out, the solution of the problem would merely be postponed. The persons who framed the conventions would encounter the same difficulties. The statute of the court itself ought therefore to lay down the limitations to their sovereignty which the States were to accept.

112. The beginning of article 28 might perhaps be amended in the following manner to take into account certain comments which had been made:

> "The States parties to this Convention, which recognize the jurisdiction of the Court, undertake: ..."

113. Such a provision would on the one hand emphasize that acceptance of the rules of article 28 was subject to recognition of the jurisdiction of the court, and on the other ensure that conventions concluded later would be uniform on that point.

114. Mr. LIANG, Secretary to the Committee, referred to the apprehensions that had been expressed with regard to the manner in which the accused might be apprehended and handed over to the court and stated that, when drafting sub-paragraph (a) of article 28, the Secretariat had had in mind that the search for and the apprehension of accused persons should be carried out in accordance with the municipal law of the country concerned. That, incidentally, was the implication in treaties on judicial assistance.

115. The CHAIRMAN enquired whether the Committee wished to vote on the United States suggestion that article 28 should be deleted.

116. Mr. ROBINSON (Israel) proposed that the vote should be deferred until the following meeting, when he hoped to submit a text which might satisfy both those who favoured the retention of article 28 and those who sought its deletion.

117. The CHAIRMAN said that, if there was no objection the procedure proposed by the Israeli representative would be followed.

118. Mr. KHOSROVANI (Iran) felt it desirable that the United States representative should answer the objections raised by several speakers to his suggestion.

119. Mr. MAKTOS (United States of America) said that he agreed with the French representative that States should change their legislation if they agreed to undertake obligations requiring such modification. None the less, he felt that the obligations would be easier of acceptance under subsequent conventions. The point had also been made that a State objecting to such obligations under a convention on an international criminal court would also object to them in a subsequent convention. On that score, he would distinguish between the indefinite duties laid down in article 28 and the more specific obligations that would be included in a convention conferring jurisdiction on the court in respect of a specific crime. As to the Chinese representative's point that a State would be sufficiently protected if given the opportunity of adhering to a future convention which conferred jurisdiction on the court in respect of particular crimes, he submitted that many States would be reluctant to ratify the present and future conventions if they contained something which required clarification. As to lack of uniformity, procedures with regard to surrender of an accused already differ considerably from country to country. He hoped that the text which the Israeli representative was to propose would secure general acceptance.

120. At the request of Mr. SÖRENSEN (Denmark), Mr. ROBINSON (Israel) read out a text, suggested by his colleague, the Attorney-General of Israel, the substance of which was what he intended to propose, though the wording might not be perfect. It read:

> "The court shall have jurisdiction to issue warrants of arrest against persons accused before or convicted by the court. Such warrants shall be executed by States parties to a convention which confers upon the court any particular jurisdiction in such a manner as such convention may determine."

The meeting rose at 1 p.m.