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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE TENTH MEETING

held at the Palais des Nations, Geneva,
on Tuesday, 14 August 1951, at 9 a.m.

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

Present:

Chairman:

Mr. MORRIS

Members:

Australia

Mr. WYNES

China

Mr. WANG

Cuba

Mr. VALDES ROIG

Denmark

Mr. SORENSEN

Egypt

MOSTAFA Bey

France

Mr. PINTO

Iran

Mr. KHOSROVANI

Israel

Mr. ROBINSON

Mr. COHN

Netherlands

Mr. ROLING

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.6, A/AC.48/L.7)

Article 28 of annex II (continued) (A/AC.48/1)

1. The CHAIRMAN called upon the Israeli representative to introduce the compromise text to replace article 28, which his delegation had undertaken to submit, at the previous meeting.

2. Mr. COHN (Israel) moved the substitution for article 28 of the following text:

"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 manner as such convention may determine." (A/AC.48/L.6).

3. In the course of the earlier discussion on article 28 the question had been raised as to whether a warrant of arrest against an accused person should be issued by a judicial authority or by an administrative authority. The Secretariat's draft of article 28, as the Secretary had indicated, provided for apprehension of the accused under the municipal laws of each country. Thus, while that text provided a sufficient guarantee of the civil liberties of an accused person, in countries where arrest was effected by a judicial authority, he doubted whether the same would apply in countries where apprehension was undertaken by an administrative authority. It seemed to his delegation that the jurisdiction of an international criminal court should be so exercised as to secure to the private individual all those liberties which could be reasonably guaranteed in any criminal court. He therefore considered that no warrant of arrest should be issued except by the court itself. That was the main point before the Committee; all considerations concerning the execution of such warrants were matters of procedure which, as the United States representative had urged, would best be left for solution under subsequent conventions conferring jurisdiction on the court.

4. Mr. MAKTOŠ (United States of America) said that, while recognizing the value of the Israeli representative's suggestion, he would have to abstain from voting on his text for article 28 because the State Department considered that the statute should not contain any provision with regard to surrender of accused. At the same time, he wondered whether the Israeli representative could not agree to the substitution of the word "power" for the word "jurisdiction" in the first line of his proposal, and to the deletion of the words "or convicted by" in the second line. It was obvious that a person could not be convicted unless he had been brought before the court.

5. Mr. COHN (Israel) had no objection to the replacement of the word "jurisdiction" by the word "power". As to the suggestion that the words "or convicted by" should be deleted, he could agree that discussion of that point should be deferred until the Committee came to consider the question of how far the court would be empowered to judge a person in absentia. If the Committee finally decided that the court could so judge an accused person, he would urge the retention of the words "or convicted by" in the text of article 28, as it would enable the court to issue a warrant for that person's arrest after conviction and before sentence was pronounced.

6. Mr. SOREENSEN (Denmark) appreciated the effort made by the Israeli delegation, but thought that its amendment failed to solve the problem with which the Committee was faced. That amendment admittedly introduced an interesting new idea, which was acceptable to his delegation, namely, the obligation of States to surrender an accused person only after the issue of a warrant of arrest by the court. However, it nevertheless retained the limitation originally proposed by the United States representative, to which other members of the Committee had objected, that the obligation to hand over accused persons to the court should only be imposed upon States parties to conventions conferring jurisdiction on the court. The Israeli proposal therefore was not actually a compromise. He recognized however that it might not be possible to reconcile the two opposing views, and that the Committee would have to choose between the two.

7. It would be useful to examine the matter in the light of the limitations on the jurisdiction of the court to which the Committee had already agreed. If, for example, a State ratified the statute of the court containing article 28 as drafted by the Secretariat, it would not be obliged to hand over one of its nationals unless it had accepted the jurisdiction of the court in respect of the particular crime committed by that national. In such a case there was no difference between the two points of view. Whether laid down in the statute or in the convention, such an obligation would be binding only on a State that had accepted the jurisdiction of the court. In view of the Committee's decision on the principle of territoriality there was also no possibility of conflict in the case where an alien had committed a crime in the territory of a particular State: there again there would only be an obligation on the part of that State to hand over the accused if it had recognized the jurisdiction of the court.

8. Thus the only case in which the two points of view would be in conflict was when a foreigner committed a crime in the territory of a State other than the one in which he was found. If, for example, Denmark accepted article 28 as drafted by the Secretariat, and if there was an alien in Denmark who had committed in another country a crime over which the court had jurisdiction, Denmark would be obliged to hand him over for trial to the court, even if it was not itself a party to the convention recognizing the court's jurisdiction in respect of the crime. Were either the United States or the Israeli proposal to be accepted, however, Denmark would be under no such obligation. That, in his view, was the full extent of the problem, and he consequently believed it preferable to insert such an obligation in the statute itself. If that were not done, and if, in such a case as he had illustrated, a State was not obliged to assist the court, or the State making the accusation, in bringing the accused before the court for trial, he feared that the whole idea of an international criminal court would be seriously prejudiced. Moreover, he believed that many States would object to a statute which conferred privileges on States without at the same time imposing necessary duties upon them. The very raison d'être of an international criminal court was to give effect to international solidarity in combating crimes under international law and other crimes of international concern, and only if such solidarity were expressed by the minimum provision that a State should hand over

a person accused of committing a crime in another country would a convention setting up an international criminal court have any real meaning.

9. The United States representative had urged that the absence of any such obligations on States would be likely to improve the chances of wide ratification of the statute of the court. Personally, he would himself prefer to run the risk of seeing a number of States refuse to ratify the statute to the existence of an instrument that failed to impose essential duties on the parties thereto. As the Netherlands representative had rightly said, the question was one of policy; the Committee must, therefore, discuss it and take a position on it, particularly in view of its importance from the point of view of the functioning of the court.

10. Mr. GORDON (United Kingdom) welcomed the Israeli delegation's attempt to devise a satisfactory solution to the problem raised by article 28, but agreed with the United States representative's criticism of that solution. On first examining the Secretariat's draft of article 28, he had thought that the cart had been put before the horse, in that the question of search and apprehension had been given precedence over the question of the issue of a warrant of arrest. Nevertheless, he had wondered whether that was a fair criticism of the text. A perusal of the Israeli proposal had now led him to the conclusion that the provision was of a purely procedural nature. That being the case, he felt that it might be better to amend the original text of article 28 by adding a clause which would protect the rights of the individual in the event of any such proceedings being taken against him, by declaring that the safeguards afforded by his national law would remain applicable.

11. Mr. PINTO (France) fully supported the views expressed by the Danish representative for the reasons given by him; at the same time, he was prepared to accept the Israeli proposal, not perhaps in its existing form, but with additions taking into account Mr. Sorensen's comments. The Israeli proposal failed to provide for the case of States which were parties to the convention by which the court was set up, but which were not directly concerned in the case it was to hear, first, because the accused was not one of their nationals and the alleged crime had not been committed on their territory, and, second, because, in the particular case in

question they had not signed the convention conferring jurisdiction on the court. Would such States be able to paralyse international justice? He did not think they would.

12. The exception could be provided for by adding the following words at the end of the Israeli proposal:

"and by the States Parties to the statute of the court when the persons accused before it are not nationals of those States or the alleged crimes have not been committed in their territory."

13. Mr. WYNES (Australia) wondered whether it would not meet both the Danish and the French point of view and, at the same time, simplify the text if the Israeli proposal were amended to read:

"The court shall have power to issue warrants of arrest against persons accused before, or convicted by, the court, of crimes jurisdiction in respect of which has been conferred in pursuance of article ... [article stipulating the manner in which States may confer jurisdiction on the court/ hereof. Such warrants shall be executed by States parties hereto."

It seemed to him that such a solution would be acceptable to the protagonists of either policy, because the action of the court would be limited by the article stipulating how States could confer jurisdiction on the court; again, any State ratifying the statute of the court would undertake to execute a warrant of arrest whether the accused was its national or an alien, and irrespective of where the crime had been committed. The only State that would have the obligation to surrender an accused person would be the State in which that person happened to be at the relevant time. It seemed to him that in any event any international criminal court that was set up would have to be clothed with certain powers, and to that extent he agreed with the Danish representative.

14. Mr. WANG (China) observed that there was general agreement that jurisdiction in respect of particular crimes should be conferred on the court by means of subsequent international conventions, and that the controversial issue was clearly whether a provision relating to the duty of the State to apprehend an

accused person should be included in the statute, or whether that should be done in later conventions. It was clear from sub-paragraph (a) of article 28, and there he agreed with the Danish representative, that where the jurisdiction of the court was limited by conventions conferring jurisdiction on the court, the obligation to apprehend a criminal would not become operative if the jurisdiction of the court had not been accepted in respect of the crime which that person had committed. In his view, therefore, a provision relating to the apprehension of the accused should appear in the statute. If such a provision were left for inclusion in subsequent conventions, the statute would look somewhat empty, particularly as the question of the crimes over which the court would have jurisdiction would also only be specified in later instruments.

15. When, at the previous meeting,¹⁾ he had urged the need for uniformity he had in mind uniformity of treaty provisions with regard to obligations; and that would be better achieved by a general blanket clause in the statute than by the inclusion of such provisions in separate conventions conferring jurisdiction on the court.

16. He also felt that if the court were accepted at all, and if there was the reservation that it would have no jurisdiction over particular crimes unless such jurisdiction were accepted, States would have adequate guarantees. He could appreciate that the United States representative might be confronted with constitutional difficulties, but he wondered whether it would not be possible to convince the State Department of the need for the acceptance of such a general provision. After all, article 28 would not apply until such time as a State had accepted the jurisdiction of the court.

17. Mr. TARAZI (Syria) said that he hoped he might put forward a proposal which would reconcile the different points of view. The Committee had before it the United States proposal (A/AC.48/L.7) for the establishment of a board of enquiry. One of the functions of that board, or of examining magistrates in continental legal systems, would be to issue warrants for arrest or committal.

1) Summary Record of 9th meeting (A/AC.48/SR.9), paragraph 107.

Article 11 of the United States proposal dealt with the decisions of the board of enquiry. It might be possible to insert similar provisions in that article as those inserted in article 28 of annex II of the Secretary-General's memorandum.

18. He did not know what the views of the United States representative were concerning the powers of the board but he personally believed that they should include the power to issue warrants. He hoped, therefore, that the United States representative would agree to such a provision being included in article 11 of his text. If the Secretary-General sent notices of the decisions of the board, each Member State of the United Nations or any State which had accepted jurisdiction of the court would thereby be bound to carry out the decision such as, for example, the arrest of a governor of a province who had committed a crime under international law coming within the jurisdiction of the court.

19. He suggested, in order to avoid repetitive discussion, that further consideration of the problem be deferred until the Committee took up the United States proposal since article 28 in annex II and article 11 of that proposal were inter-related.

20. The CHAIRMAN ruled that the question of the board of inquiry could be dealt with in conjunction with article 28 in annex II of the Secretary-General's text.

21. Mr. SØRENSEN (Denmark) said that he had no strong feelings in the matter. His understanding of the United States proposal (A/AC.48/L.7) was that the board would not be a judicial, but an administrative organ. It would be noted that many organs of the United Nations were endeavouring to establish the principle that no one should be deprived of his liberty except by a judicial organ. Consequently, he preferred that the issue of a warrant of arrest should be left to a judicial and not to an administrative body.

22. Replying to the CHAIRMAN, he indicated his preference for continuing the discussion of article 28 and the relative amendments thereto.

23. Mr. WYNES (Australia) considered that the proposal to set up a board of inquiry was a procedural matter which might best be taken up under chapter III. He, too, would prefer that the discussion on article 28 should be continued.

24. Mr. KERNO (Assistant Secretary-General) said that the Committee seemed to be approaching a solution of the important question of the issue of warrants of arrest and of the still more important question of the execution of those warrants by States. All present appeared to agree that the issue of warrants of arrest would be necessary, and that the obligation to execute them should be imposed upon States parties to conventions conferring jurisdiction upon the court.

25. The point at issue was whether that obligation should be prescribed in the statute or in subsequent conventions, or in both. In his view, that should be done in the statute. It was a fundamental undertaking, and had obviously to be very carefully considered by States, but so many guarantees for States in connexion with the jurisdiction of the court had already been adopted that the inclusion in the statute of that obligation should prove no hardship. Uniformity would be among the particular advantages of that method.

26. The CHAIRMAN said that most members of the Committee seemed in favour of settling the question and not in favour of leaving it to future conventions. If there were no objections, therefore, he would put to the vote: first, the question whether the matter should be dealt with in the statute of the court; secondly, whether it should be left to subsequent conventions. If the majority favoured the first course he would rule that the discussion should continue, whereas if the second course were favoured, the question could be left over for the time being.

27. Mr. PINEYRO CHAIN (Uruguay) said the question was whether that particular point should be dealt with under article 28 in the chapter dealing with the jurisdiction of the court, or whether discussion of it should be deferred till the Committee came to consider the United States proposal for the establishment of a board of inquiry. The board of inquiry would be a body whose function it would be to approve or reject requests for action by the court. At the present stage, the Committee was considering another matter, namely, the procedural action which would have to be taken to enable the court to examine a case and, in addition, the duties to be undertaken by the States in order that such action were carried out in a regular manner. He felt, therefore, that the proper place for the text in question was the chapter dealing with jurisdiction.

28. He proposed that discussion of the problem should be divided into the following three parts, to be voted upon separately: (i) the court to have jurisdiction to issue warrants against persons accused before the court, or convicted by it; (ii) States Parties to the convention setting up the court which accepted the jurisdiction of the court by a special convention to execute those warrants in such manner as the special convention might determine; (iii) the States Parties to the first convention which did not accept that particular jurisdiction should also execute the warrants of the court when they could not challenge the jurisdiction of the court on grounds provided by the statute.

29. There could be no difficulty about point (i). If the court could not secure the surrender of the accused, it would be necessary to consider the question of judgments in absentia. As to point (ii), he felt that States Parties must undertake to hand over the accused, or the repressive function of the court could not be exercised.

30. On point (iii) he would abstain. He did not think it right that States should be allowed the power to deny the court's jurisdiction on account of the accused's nationality or the territory in which the crime had been committed.

31. The CHAIRMAN felt that the Israeli representative should develop his case in the light of the discussion that had followed the introduction of his proposal.

32. Mr. COHN (Israel) shared the doubts of those who had said that the issue of a warrant of arrest by the court or a board of inquiry was not a question of jurisdiction but one of procedure. The real issue before the Committee, however, was the question of what obligations should be undertaken by States with regard to the surrender of accused persons to the international criminal court. He had until that morning, been under the impression that the Committee was unanimously agreed that the statute establishing the court should do no more than establish that court, that it should not impose specific obligations on States parties thereto, and that the imposition of such obligations should be left to subsequent conventions to the extent that States might agree upon them and be prepared to undertake them. So long as a State had not expressed its willingness to undertake

an obligation, it could not be bound against its will to perform the duties entailed. He could not accept the Danish and French representatives' view that the absence of such obligations from the statute would constitute a serious omission. The object of the statute was to establish the court, not to impose obligations on States. Once the court had been established, States would have to come together to see what they were prepared to undertake in the way of obligations. It was not only a question of surrender of the individual accused, but also a question of jurisdiction, for the conferring of which the court would have to rely on subsequent conventions; and what applied to the jurisdiction of the court must apply a fortiori to the less important questions of surrender and execution of sentence.

33. From the point of view of policy he also saw a grave objection to the amendment proposed by the French representative. If a State which was party to the convention establishing the court, but not party to a subsequent convention conferring jurisdiction on it granted asylum to an alien who had committed a crime outside its territory, that State, if the French amendment were accepted, would be obliged to surrender that person. Thus the decision with regard to surrender of the accused would be vested in a State and not in the court, and the State of which that foreigner was a national and which had conferred jurisdiction upon the court might be willing to contest that jurisdiction, but be precluded from so doing because the State of asylum had already surrendered the accused. The United Kingdom representative had expressed grave misgivings lest the statute prejudice the right of asylum which fugitive criminals might enjoy. If the obligation to surrender were imposed in the statute, it might be necessary for extradition treaties and municipal laws relating to extradition to be consequentially amended.

34. The CHAIRMAN said that the Committee had before it article 28 of annex II in the Secretary-General's memorandum, an Israeli amendment thereto (A/AC.48/L.6), and a French amendment to the Israeli amendment. The normal procedure would be to deal first with the French amendment to the Israeli amendment.

35. Mr. PINTO (France) said that his amendment consisted of an addition to the Israeli representative's text which he wholeheartedly supported. He would, however, be prepared to accept the United States representative's suggestion to substitute the word "power" for the word "jurisdiction" in the English text of the proposal, and to delete the words "or convicted by".

36. He found the Australian representative's text well-conceived and entirely satisfactory.

37. Replying to the Chairman, Mr. WYNES (Australia) confirmed that he wished the words "or convicted by" to be retained, and that his proposed amendment which had been made as a drafting suggestion would not include the second sentence of the Israeli amendment. He would abstain from voting on the substantive aspect of the question.

38. Mr. SORENSEN (Denmark) recalled the Uruguayan representative's proposal that the vote should be taken by division on three separate issues. Consequently, as the Australian amendment which had been accepted by the representative of France would be voted on first, he suggested that, in order to meet the wishes of the Uruguayan representative, the first vote should be on the words "of crimes, jurisdiction in respect of which has been conferred in pursuance of article ... hereof", and the second on the clause "Such warrants shall be executed by States parties hereto".

39. Replying to Mr. WANG (China), the CHAIRMAN stated that contrary to the Israeli representative's impression, the Committee had not yet decided as a matter of principle that the statute should merely establish the court and leave the imposition of obligations on states to subsequent conventions. That question was considered in connexion with every problem discussed and would probably have to be left open until almost the very end of the Committee's work.

40. He then asked the Uruguayan representative how he would like the Australian amendment to the Israeli amendment to be voted upon, in view of his request that the vote be taken in parts.

41. Mr. PINEXRO CHAIN (Uruguay) proposed the division of the question into three parts. The first point, as to whether the court could issue warrants of arrest, could be voted upon without discussion, which would start with the second point, namely: the position of States in regard to such warrants. The States in question were those which were parties to the convention setting up the court, and which had also recognized the jurisdiction of the court in a special convention. Finally, there was the third point which related to the French and Australian suggestion concerning States parties to the convention setting up the Court but not to the special convention. He was in favour of the Israeli proposal, as amended by the French and Australian representatives.

42. In his opinion, the only point on which it would be necessary to take a separate vote was the French proposal, as formulated by the Australian representative.

43. The CHAIRMAN said that, subject to any objections, he would rule the Uruguayan proposal out of order.

It was so agreed.

44. Mr. MAKOTOS (United States of America) enquired whether the Australian amendment would exclude the right of States to insert provisions relating to surrender of accused persons in conventions conferring jurisdiction on the court.

45. Mr. WYNES (Australia) confirmed that his amendment would deprive States of such a right. As the second sentence of his amendment was controversial, it would perhaps be best to vote separately on each sentence.

46. Mr. MAKOTOS (United States of America) observed that so far there had been no discussion on the substance of the Australian amendment. In the light of what its author had just said, the text was even more objectionable, in his opinion, than the Secretariat's original draft of article 28, since it deprived States of the right to include provisions with regard to the surrender of an accused person in subsequent conventions.

47. He could agree with the Chinese representative that the acceptance of a general obligation to surrender the accused would only be binding on a State that had accepted the jurisdiction of the court by subsequent convention, and that having ratified such a convention, that State would be obliged to fulfil such an obligation. His main objection was that if there were specific provisions on the surrender of accused persons in the statute, States might not accept any subsequent convention because of the general obligation under the statute.

48. Assuming that the Australian amendment were embodied in the statute, and that a new convention conferring jurisdiction on the court in respect of the crime of genocide were under consideration, it would not be possible, because of the general obligation relating to surrender under the statute, to tell the authorities of a State which would have to approve the convention before ratification, that rules relating to surrender could be prescribed in that convention on genocide. In such circumstances, some governments would object to ratifying both the statute and any such new convention on genocide. Was that position preferable to accepting the creation of a court on the understanding that the surrender of either a national or an alien would be prescribed in a particular convention?

49. Moreover, he was afraid that it would be almost impossible for the Committee, in the time at its disposal, to discuss numerous important problems, such as extradition, which would have to be faced if the obligation to surrender an accused were included in the statute. It was easy to take the view that the statute should contain such a provision, but the important thing was that the convention establishing an international criminal court should be ratified by States. As he had already said, his first reaction had been that such a provision should appear in the statute, but consideration of the matter in collaboration with officials of the State Department had induced him to take the opposite view in the very interests of the establishment of the court. In view of his Government's attitude, he would have to abstain from voting on the Australian amendment. In his view, the Israeli draft of article 28 was satisfactory.

50. The CHAIRMAN saw no objection to taking a vote on the Australian amendment by division.

51. Mr. PINTO (France) said that he had accepted the Australian representative's wording, because he had been under the impression that it meant exactly the same thing as his own proposal. It appeared however from the Australian representative's explanations that the amendment implied a negative reply to the United States representative's question, and did not therefore have the same meaning as the French proposal. He would therefore prefer that the Committee take a decision on the latter.

The meeting was suspended at 11.0 a.m. and was resumed at 11.15 a.m.

52. Mr. SORENSEN (Denmark), Rapporteur, said that, in conjunction with the Australian and French representatives, he had prepared during the interval a text on which all three had agreed. It was proposed to add at the end of the first sentence of the Israeli amendment (A/AC.48/L.6) the following words: ", of crimes jurisdiction in respect of which has been conferred in pursuance of article ----- hereof". In that same sentence the word "jurisdiction" would be replaced by the word "power", and the words "or convicted by" would be placed in brackets. At the end of the second sentence the following words would be added: ", and by other States parties to the present convention".

53. Mr. MAKTOU (United States of America) asked whether the text as amended would prevent States from laying down in future conventions conditions governing the surrender of criminals by them to the court.

54. Mr. WYNES (Australia) was reluctant to answer that question, as it seemed to him to be to some extent irrelevant to the amendment he had suggested, which as he had pointed out was a mere question of drafting.

55. Mr. COHN (Israel) thought that the addition proposed to the second sentence of his delegation's text implied that warrants of arrest could be executed by States regardless of what might be provided for in future conventions. If that was indeed the meaning, the answer to the United States representative's question was in the affirmative.

56. Mr. SORENSEN (Denmark) pointed out that the question was one of substance and that conventions between States could not impose obligations or confer rights on States not parties to such conventions. The practical question had arisen how warrants issued by the court would be executed, and it seemed to him that the court could lay down conditions of execution that would be guided by the special conventions entered into by States.

57. Mr. COHN (Israel) reverting to the question raised by the United States representative, said that the problem was whether the statute establishing the court should impose on the signatory States the obligation to surrender criminals, or whether that obligation could be left to subsequent conventions. In his view, the amendment to his delegation's text in no way clarified the problem, but, on the contrary, made it more confused. He suggested therefore that the Committee should first decide the question in principle, and leave it to the Drafting Sub-Committee to frame the article in appropriate language.

58. Mr. SORENSEN (Denmark) considered it would be easier to vote on the amended text, on the understanding that the Drafting Sub-Committee would examine the text, if approved, and embody in it such verbal improvements as seemed desirable.

59. Mr. ROLING (Netherlands) thought that the addition to the first sentence of the Israeli text was superfluous, since the power to issue warrants would be one of the necessary consequences of conferring jurisdiction upon an international criminal court in respect of particular crimes.

60. Mr. MAKTOU (United States of America) said that it would be unwise to vote on a text, the meaning of which was by no means clear. He had no objection to voting on the principle, provided it was clearly understood that the right of States to specify conditions governing the execution of warrants in their territories would be maintained in future conventions.

61. Mr. SORENSEN (Denmark) said that the amended text did not exclude States from specifying conditions under which warrants could be issued by the

court. States, on the other hand, would not be able to deprive the court of power to issue warrants; they would only be able in future conventions to prescribe the conditions governing the execution of warrants in their territories.

62. The CHAIRMAN put to the vote the first sentence as amended of the Israeli amendment (A/AC.48/L.6), to article 28 of annex II of the Secretary-General's memorandum.

63. The Committee approved the first sentence of the Israeli amendment, as amended, by 9 votes to 3, with 2 abstentions.

64. Mr. KHOSROVANI (Iran) supported by Mr. COHN (Israel), proposed that the amended text of the second sentence of the Israeli amendment be voted on in two parts: first, the proposed addition of the words: "and by other States parties to the present convention"; second, the remainder of the sentence as originally framed by the Israeli delegation.

It was so agreed.

65. Mr. MAKTOU (United States of America) thought that if the additional clause meant that a State signing the statute of the international criminal court, but not other conventions conferring jurisdiction on it, would be under the obligation to execute the warrants of the court, such a provision would be going to extremes, and would militate against the establishment of a court. He therefore hoped that the proposed addition would be withdrawn.

66. Mr. SORENSEN (Denmark) confirmed the United States representative's interpretation of the additional clause. As the issue had already been discussed at length, the time had come, in his view, to vote upon it. It had to be borne in mind, however, that States executing the warrants, although not parties to conventions conferring any particular jurisdiction upon the court, would yet have the right to challenge the court's jurisdiction, and the obligation would arise only in cases over which the court had jurisdiction.

67. Mr. WYNES (Australia) agreed, and said that the additional clause had been suggested originally by him solely to improve the wording of the Israeli

proposal and to reconcile different views expressed by members of the Committee. Although he had suggested it, he proposed to abstain from voting upon it.

68. Mr. PINTO (France) pointed out that approval by an organ of the United Nations of the conventions under which the court would be given jurisdiction gave States an additional guarantee.

69. In reply to a question by Mr. WANG (China), Mr. SORESENSEN (Denmark) made it clear that if the additional clause to the second sentence of the Israeli amendment was adopted by the Committee, it would mean that all States parties to the convention establishing the international criminal court would have to execute warrants, even though they were not parties to conventions conferring jurisdiction upon the court in respect of particular crimes.

70. The CHAIRMAN put to the vote the proposed addition of the words "and by other States parties to the present convention" to the second sentence of the Israeli amendment (A/C.48/L.6).

The proposal was rejected by 6 votes to 5, with 3 abstentions.

71. Referring to doubts expressed by the Chinese representative regarding the wording of the second sentence of the Israeli amendment to article 28, Mr. COHN (Israel) said that the Drafting Sub-Committee would examine the text and improve it, if necessary.

72. The CHAIRMAN put to the vote the second sentence of the Israeli amendment.

The Committee approved the second sentence of the Israeli amendment, by 5 votes to 3, with 5 abstentions.

73. The CHAIRMAN put to the vote the Israeli amendment (A/C.48/L.6) as amended.

The amendment as a whole was rejected by 6 votes to 5, with 3 abstentions.

74. The CHAIRMAN presumed that the Committee would revert to the examination of article 28 in annex II to the Secretary-General's memorandum.

75. Mr. TARAZI (Syria) observed that the Committee had come back to the proposal he had put forward,¹⁾ but which had not been taken up, to combine article 28 with the text proposed by the United States delegation. More than two hours of discussion had yielded no conclusion. He formally proposed that the discussion of article 28 be combined with that of the United States text (A/AC.48/L.7).

76. In reply to his previous statement, the Danish representative had maintained that under the terms of the United States proposal, the proposed board of inquiry would have administrative and not judicial functions. But the United States proposal provided that the board was to be attached to the court - a judicial organ; it would in fact be a chamber of the court. There could not be, beside the court, an organ carrying out administrative functions. Article 2 of the United States text gave the board of inquiry the right to hear charges in closed session. If it approved a charge, it could take a decision which would be notified, in accordance with article 11.

77. In all democratic countries, the constitution provided safeguards for the liberty of the subject, and no-one could be arrested without a judicial warrant. Provisions for the application of that principle were to be found in the code of criminal examination (code d'instruction criminelle) or the codes of criminal procedures. In the case in question the second category of provisions applied. If the Committee did not wish to discuss article 28 at the same time as the United States proposal, it could, at least, give the court the right to issue warrants.

78. Mr. SORENSEN (Denmark) was reluctant to accept the Syrian representative's proposal, for reasons he had outlined earlier. The United States proposal regarding a board of inquiry would not offer the judicial guarantees that in his view were necessary where any deprivation of the individual's liberty was concerned. The hearings of the board would be in closed session, whereas it was

1) See paragraph 17 above.

a fundamental principle of criminal law that charges should be heard in public. No provision was made in the proposal for the individual charged to be present at the hearing. In the absence of those and other judicial guarantees, he opposed the discussion of warrants of arrest in connexion with the United States proposal.

79. In his view, however, the problem created by the rejection by the Committee of the Israeli amendment and the amendments to it, to article 28, could be solved if it were decided to submit alternative texts to the General Assembly. The terms of reference of the Committee did not preclude such a possibility.

80. The CHAIRMAN thought that the Committee would have to decide whether it favoured the inclusion in the statute of the principles discussed during the meeting and incorporated in the Israeli proposal, or their exclusion therefrom. In the first eventuality, the Drafting Sub-Committee could be asked to prepare a text embodying those principles.

81. Mr. KERNO (Assistant Secretary-General) thought that the rejection of the Israeli text for article 28 clearly illustrated the danger that sometimes arose from voting on a specific text rather than on a general principle. Clearly, the Committee did not intend that the international criminal court should not have power to issue warrants, nor States to execute them. The majority seemed to be in favour of the first sentence of the Israeli proposal, and the real question was whether the provision regarding the execution of warrants should be included in the convention establishing the court, or in a subsequent convention or conventions.

82. Mr. GORDON (United Kingdom) thought it inconceivable that the statute establishing the court should omit all reference to the issue of warrants of arrest or to the execution of such warrants. Clearly, therefore, some fresh article replacing the article rejected by the Committee would have to be inserted.

83. Mr. MAKTOU (United States of America) and Mr. RÖLING (Netherlands) proposed that the Committee vote on the general question whether warrants should be executed by States parties to a convention conferring upon the court particular jurisdiction, in such manner as such convention might determine.

84. Mr. PINTO (France) asked for elucidation. It seemed to him that the Committee had for the first time voted on an article, whereas up to the present it had only taken decisions on general principles. He was under the impression that the Committee had adopted the first sentence of the Israeli amendment amended by the Rapporteur to read: "The court shall have power to issue warrants of arrest against persons accused before, or convicted by the court, of crimes, jurisdiction in respect of which has been conferred in pursuance of article hereof." He wished to know if that provision was to be considered as accepted by the Committee.

85. The CHAIRMAN, in reply, said that, according to the rules of procedure, as the whole article had been rejected, its constituent parts had also been rejected.

86. In accordance with a suggestion made by Mr. KERNO (Assistant Secretary-General), he put to the vote the proposal that there be inserted in the statute establishing the international court a provision to the effect that the conditions governing the execution of warrants issued by the court would be dealt with in subsequent conventions.

The Committee approved the proposal by 9 votes to 4, with one abstention.

87. Mr. PINEYRO CHLIN (Uruguay) explained that he had voted for the proposal by mistake; he had intended to vote against it.

88. Mr. WYNES (Australia) suggested that the Committee's report should indicate the divergence of views among members on that subject.

It was so agreed.

Article 29 of annex II (A/AC.48/1)

89. Mr. MAKTOU (United States of America) said that the question of the penalties to be imposed by the court was extremely important and of great complexity. It would be insufficient merely to say that the court should pass sentence, and he felt that future conventions should lay down the penalties which

the court should impose. He therefore proposed the addition to article 29 of the following sentence:

"The court shall have the right to impose on a defendant, upon conviction, such penalty as the court may determine, in conformity with the provisions of the conventions conferring on the court jurisdiction regarding offences".

90. Mr. GORDON (United Kingdom) considered that the Committee should first deal with questions relating to trial, before dealing with sentences and penalties.

91. Mr. ROBINSON (Israel) agreed with the United Kingdom representative. He did not think, however, that it was for the Committee to deal with the question of the proper place for such a provision at that stage; it should confine itself to examination of the substance of the provision.

92. He supported the United States amendment, except for the clause reading: "in conformity with the provisions of the conventions conferring on the court jurisdiction regarding offences". Existing conventions dealing with crimes under international law specifically refrained from mentioning penalties; for example, the Convention on Genocide, which, in article VI, created a kind of division of labour between international and national legislations, or the four Geneva Conventions of August 12, 1949. Of the twenty-eight States which had signed the Convention on Genocide, only two had enacted laws regarding penalties for offences against that Convention. Consequently, if a case of genocide came before the international criminal court, that court, if the United States amendment were adopted, would consult the Convention on Genocide for a suitable penalty; the Convention would in turn refer it to national legislation, which as yet had not enacted any laws regarding penalties; and so a vicious circle would be set up. A possible way out would be to leave decisions regarding penalties to the court, in which case no scale of penalties need be elaborated. Such a solution was in accordance with modern developments in national criminal law, which tended towards the vesting of greater authority in the courts in respect of penalties, and even towards the vesting of authority in the executive

organs carrying out such penalties. In his view the last clause of the United States amendment would make the whole amendment inoperative, and he therefore proposed its deletion.

93. Mr. WYNES (Australia) asked whether the United States representative would, for the sake of completeness, agree to the addition of the words "including the confiscation of property" after the words "such penalty".

94. Mr. MAKTOG (United States of America) had no objection to the addition suggested by the Australian representative. In his own opinion, however, it was desirable that the wording should be broad enough to include all kinds of penalties; whenever any specific penalty was included, there was a tendency to assume that other penalties had been excluded.

95. With regard to the Israeli representative's objection to the last clause of his amendment, his (Mr. MaktoG) intention was that the penalty should be specified, not in conventions declaring a specific crime to be a crime under international law, but in conventions conferring jurisdiction on the court in respect of any such crime. There was obviously nothing to prevent States from entering into a convention in respect of crimes under international law, such as genocide, which would specify, inter alia, penalties for the commission of those crimes. In his view, it was better that penalties should be specified. To grant undefined powers to the international criminal court would almost certainly be to provoke opposition.

96. The CHAIRMAN thought that the Committee had reached the stage where it could vote on the question whether penalties could be left undefined by convention and imposed at the discretion of the court. If an affirmative decision were taken on that point, the Committee would be ready to vote on article 29 of annex II; if a negative decision was reached, the Committee could then decide whether penalties should be specified in the convention establishing the court or in subsequent conventions,

97. Mr. TARAZI (Syria) believed that the matter was dealt with in article 29 which laid down that: "The court shall decide whether the accused are guilty or

not guilty and shall pass sentence." On the other hand article 30 covered the United States proposal and met the comments to which the latter had given rise. The court would apply international criminal law as derived from international conventions, international custom, the general principles of law, and judicial decisions. Exceptionally, under the provisions of paragraph 2, the court would apply the national criminal law of a given State. Thus article 30 would serve as a penal code for the court. Paragraph 2 of the same article provided that "Exceptionally the court shall apply the national criminal law of a given State". Hence the article provided for two specific cases.

98. He wondered whether in discussing article 29 it would not be advisable merely to lay down the principle of the imposition of penalties, with the proviso that when article 30 came up for discussion, the United States proposal should be re-examined, or any other proposal considered.

99. Mr. ROBINSON (Israel) pointed out that the proposed addition to article 29 contained provisions of substantive law which referred back to other sources of substantive law. If a State signed a convention conferring jurisdiction on the court it could insert in that convention whatever conditions it regarded as necessary in respect of penalties. It was doubtful, therefore, whether there was any need for the article, and he suggested that the preliminary question to be answered by the Committee was whether it should discuss the substance of article 29. Only if it were to decide in the affirmative, was there any need to consider the United States proposal.

100. Mr. TARAZI (Syria) said he would like to ask the United States representative what would become of article 30 if his proposal were adopted.

101. Mr. MAKTOOS (United States of America) assured the Syrian representative that no decision that might be reached on his amendment would in any way prejudice the discussion of article 30.

102. With regard to the Israeli representative's view, he felt that if penalties were unspecified, judges of the court would be compelled to refer to text books and to the decisions of the Nuremberg Tribunal. International

criminal law was in its infancy, and far from clearly defined; it was desirable that every effort should be made to make it as specific as possible.

103. Mr. ROLING (Netherlands), while agreeing that hitherto penalties for international crimes had not been specified and the courts had decided what penalties should be imposed, was prepared to support the United States proposal on the ground that States would be more ready to accept an international criminal court if they could impose limitations upon the penalties it could inflict. He felt that it would improve the proposed amendment if the words "taking account of" were substituted for the words "in conformity with"; thus the court could determine the penalties, according to existing international law, but only subject to special conventions entered into by States.

104. Mr. MAKTOŠ (United States of America) had no objection to the Netherlands representative's suggestion, provided it meant that the court could not impose penalties greater than those laid down in such conventions.

105. In accordance with a suggestion made by the CHAIRMAN, he agreed to the substitution of the words "subject to" for the words "in conformity with" in his proposal.

106. Mr. PINEXRO CHAIN (Uruguay) thought that the provision in question should come within the chapter on jurisdiction, since its object was to stipulate that the court would be competent to pass sentence. The reference to the declaration of guilt should be deleted.

107. For the definition of crimes and the fixing of penalties, international criminal law was available. Problems of jurisdiction, which would arise prior to decision, would be settled by convention, so that the court would only be able to try cases in respect of which the parties had conferred jurisdiction on it, and would be able to fix penalties within the framework of the special convention. On that principle, if conventions could determine the court's jurisdiction, they should likewise make certain provisions concerning penalties. The system by which the court was to have competence in fixing penalties had one drawback, namely, that countries where certain types of penalty did not exist would

hesitate to accept the convention. He was thinking particularly of the death penalty, which might be replaced by penal servitude for life. In Uruguay, capital punishment had been abolished, and under the Constitution it could not be applied in any circumstances. It was a matter of legal tradition based on a well-established state of affairs and on the national conscience. He did not know whether Uruguay could accede to a convention which empowered the court to impose capital punishment.

108. He was in favour of the solution suggested by the Netherlands representative, and accepted by the United States representative, namely, that the court should have authority to fix penalties, subject to limitations to be settled by convention, so as to enable each country to specify whatever limitations were imposed on it by its own national law. He would support therefore the amended proposal.

109. The CHAIRMAN put to the vote the United States proposal, as amended.

The proposal, as amended, was adopted by 13 votes to none, with 1 abstention.

The meeting rose at 1.10 p.m.