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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE ELEVENTH MEETING

held at the Palais des Nations, Geneva,
on Wednesday, 15 August 1951, at 9 a.m.

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Present:

Chairman: Mr. MORRIS

Members:

Australia	Mr. WYNES
Brazil	Mr. AMADO
China	Mr. WANG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. de LACHARRIÈRE
Iran	Mr. KHOSROVANI
Israel	Mr. ROBINSON
	Mr. COHN
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. Liang

Secretary to the Committee

1. JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT:

Chapter II of annex II to the Secretary-General's memorandum (continued)
(A/AC.48/1, A/AC.48/L.7)

Article 30 of annex II (A/AC.48/1)

1. The CHAIRMAN, requesting the Committee to continue its discussion on the jurisdiction of an international criminal court, asked the Rapporteur to introduce article 30 of annex II to the Secretary-General's memorandum (A/AC.48/1).

2. Mr. SÖRENSEN (Denmark), Rapporteur, said that article 30 dealt with the law to be applied by the court. The alternative versions in annex II were explained in chapter IV of the memorandum. Three different possibilities had been envisaged: one of wording similar to that of Article 38 of the Statute of the International Court of Justice; one of a brief enumeration of the sources of international criminal law; and, lastly one of a mere brief statement that the court would apply international criminal law, with no enumeration of sources. All the three texts contained identical second paragraphs providing that the court would apply the national criminal law of a given State in certain circumstances. He submitted that, as it was based on the assumption that the court would have jurisdiction over the crimes under common law referred to in paragraphs (2) and (3) of article 24, that second paragraph was no longer appropriate, as the Committee had decided not to incorporate those paragraphs in the statute.

3. Mr. LIANG, Secretary to the Committee, pointed out that the Committee had nevertheless decided that the court would have jurisdiction over crimes of international concern, and that the national law of States implicated would therefore be applicable.

4. Mr. SÖRENSEN (Denmark), Rapporteur, maintained that the wording of paragraph 2 of article 30 would have to be amended in view of the Committee's decision. The problem of the circumstances in which the court would be able to apply national law still remained, and a fresh formulation was required.

5. It might be argued with regard to paragraph 1 of article 30 that a decision had already been taken by the Committee in respect of the international law to be applied by the court. Of the draft articles prepared by the Drafting Sub-Committee, which he had circulated unofficially and had referred to at the ninth meeting of the Committee¹⁾, one, article E provided that jurisdiction might be conferred upon the court with respect only to such crimes as might be defined in conventions or special agreements between States parties to the statute. That draft article had not yet been discussed by the Committee, but if it were adopted it would not, however, prejudice discussion of article 30. Even if a convention conferring jurisdiction on the court in respect of a given crime were adopted, such a convention would not necessarily exhaust the problems of international criminal law with which the court would be faced. Thus, for example, if such a convention granted jurisdiction over war crimes and defined them as violations of the laws and customs of war, that definition would not be exhaustive, for it would lead to an inquiry into customary law and other sources of international law, and the court would have to go to such sources for the information it required.

6. It had been decided that the court would try crimes of international concern. Such crimes could be brought before it by virtue of a general convention, special agreement or unilateral renunciation of jurisdiction. In such trials the court would apply national law, the question being what national law it would apply. It seemed to him that the court should decide which national law to apply in each specific case, and that the statute establishing the court could not go into details on the subject.

7. He held, therefore, that it was unnecessary to say that the court would apply national law, as it followed logically that it would do so from the decision of the Committee that it should try crimes of international concern.

8. With regard to crimes under international law, the general experience gained from the working of the International Court of Justice and its predecessor had taught that the enumeration of sources had no effect on the law to be applied.

1) Summary Record of the 9th meeting (A/AC.48/SR.9) paragraphs 2 and 3.

The International Court of Justice had not limited itself to the sources cited in Article 38 of its Statute, but had even applied its own decisions as rules of international law and not as a subsidiary means of determining rules of law. An enumeration therefore was unnecessary. A brief formulation was all that was required, and no recital of the sources of the law applicable was needed, as such law would be implicit in the jurisdiction conferred upon the court. He proposed therefore that no article on the lines of article 30 be inserted in the statute. If complete omission was unacceptable to the Committee, a short article at most might be adopted to the effect that the court should apply international criminal law, such as was proposed in the third alternative text for article 30.

9. Mr. LIANG, Secretary to the Committee, said that although the Committee had greatly modified article 24 of annex II the problem raised by that article remained, and the Committee should therefore define what it meant by crimes of international concern. Clearly, if two States agreed either by special agreement or by unilateral renunciation of jurisdiction to vest jurisdiction in the court in respect of any such crime, for example, counterfeiting, or traffic in obscene publications, the question of applying national law arose. If provisions covering such a contingency did not appear in the statute, it would not be clear what law should be applied by the court.

10. With regard to crimes under international law there could be no doubt that international law would be applicable. Even if the Convention on Genocide (article V) still relied on national legislation, that would no longer be so when jurisdiction in respect of genocide was conferred on the international court.

11. The Danish representative's view that there was no need to enumerate the sources of international criminal law was controversial. He (the Secretary) recalled that Mr. Sørensen and Mr. Lauterpacht had written on the development of international law by the application of article 38 of the Statutes of the Permanent Court of

International Justice, and the International Court of Justice.¹⁾ Mr. M.O. Hudson had also described how the Permanent Court of International Justice had been scrupulous in the application of international law on the basis of article 38 of its Statute.²⁾ In his own view, the International Court of Justice had been equally scrupulous in applying the provisions of Article 38 of its Statute. However, even if it had not, that was no convincing reason why a provision like that of Article 38 should be omitted from the statute of the international criminal court.

12. Mr. de LACHARRIÈRE (France) entirely agreed with the Rapporteur, but not quite so wholeheartedly with the Secretary. The question of the sources of the law to be applied had already been implicitly settled by provisions of principle concerning the jurisdiction of the court which had already been adopted by the Committee and according to which the court would try two kinds of crimes, crimes under international law and other crimes of international concern, and might be assigned its jurisdiction by conventions, special agreements or unilateral renunciations.

13. Those provisions could be repeated in article 30 but no particular practical purpose would appear to be served by enumerating the various sources of law, on which, moreover, the Committee would only be able to reach agreement after long discussion. If the Committee attempted to arrange the sources of law in hierarchical order, it would lose a great deal of time. That order would not be so important for the court, which would establish its jurisprudence itself, as for

(1) Max SÖRENSEN: "Les Sources du Droit international; étude sur la jurisprudence de la Court permanente de justice internationale", Copenhagen 1946.

H. LAUTERPACHT: "The Development of International Law by the Permanent Court of International Justice", Institut Universitaire des Hautes Etudes Internationales, Genève, No. 11, 1934.

(2) M.O. HUDSON: "The Permanent Court of International Justice, 1920 - 1942", New York, 1943.

the International Court of Justice, nor would it present the same difficulties, since international criminal law was of recent origin and embodied in cut and dried conventions.

14. In order to avoid leaving any apparent gap in the convention, however, the Committee might adopt a short formula, such as the following:

"The court shall apply international criminal law. Should occasion arise it shall apply the national criminal law of a particular State when the convention, special agreement or unilateral renunciation assigning jurisdiction to it makes reference to that national law."

15. That formula was simply the outcome of the Committee's previous decisions.

16. Mr. ROBINSON (Israel) said that three separate problems called for a decision. The first was whether there should be an article stating the law to be applied by the court; if that were answered in the affirmative, the question then arose how such an article should be framed: lastly, there was the question whether there should be a reference to national law. He did not agree that no article at all was needed. Even if draft article E, to which the Rapporteur had referred, were adopted, the question of the law to be applied by the court would not be solved: for that draft article merely covered provisions of particular conventions, whereas the law to be applied by the court would be international criminal law as a whole. In other words, conventions could only supply answers in a piecemeal way to the questions of international criminal law involved in the trial of a case.

17. How then could the question of the law to be applied be settled? Any omission of an article directing the judges to apply international criminal law would leave them without guidance. The provisions of Article 38 of the Statute of the International Court of Justice might not now be important to that Court, but they certainly had been to the Permanent Court of International Justice at its inception. Clearly, therefore, such an article was required in a statute establishing a new kind of court.

18. Granted, then, that a provision was necessary, he submitted that it should be brief. The French proposal was excellent, but he felt that it should be wider in scope, and he therefore proposed that article 30 be amended to read:

"In the absence of any subsequent conventional provisions to the contrary the court shall apply international law;"

He had contemplated including an additional phrase reading "and in particular international criminal law", but he was uncertain whether such an addition was necessary, and he would not therefore press it. The proposed wording, he submitted, would solve the problem of what national law should be applied by the court, for it enabled countries to provide specifically, in conventions, for the national law to be applied; it also laid down as a guiding principle for the court that it should apply international law. Possibly, if some fifty years later a revision of the statute were undertaken, such an article would be considered superfluous, but it would be useful at the present juncture.

19. Mr. WYNES (Australia) agreed that some provisions regarding the law to be applied should be inserted in the statute. The court would be new of its kind, and its establishment would break fresh ground; it would therefore be unwise at the outset to omit an article on the law the court should apply, although it might not be necessary after the court had been established for some time. He therefore supported the French amendment to article 30, but proposed that there be added to it the words "as derived from", followed by a recital of sub-paragraphs (a) to (d) of the first alternative text for that article in annex II of the Secretary-General's memorandum. To those four sub-paragraphs he would also add a fresh sub-paragraph (e) reading: "decisions of the International Court of Justice", although they might already be included implicitly in the wording of sub-paragraph (d).

20. Mr. RÖLING (Netherlands) felt that if an article were inserted in the statute regarding the law to be applied by the court it should serve a specific purpose. That the court should apply international law was obvious. The French and Israeli representatives had specified circumstances in which an international criminal court would apply national law, but other circumstances could be conceived of in which national law would be applied although not referred to in specific conventions. Thus, the Tokyo Tribunal had been faced with the problem of the duties of a subordinate given orders by a superior officer, and had been compelled to examine the provisions of Japanese law in order to decide how binding such orders were. International criminal law, indeed, constantly referred back to national law, and it might be said that it consisted in general of principles already elaborated in national law. He had for a time considered that a provision should be inserted that the court apply international criminal law unless national law were pertinent to the case, but it seemed to him superfluous to make such a provision, as the court

would obviously act accordingly. He therefore agreed with the Danish representative that article 30 should be omitted.

21. Mr. MAKTOS (United States of America) said that national law would have to be applied by the court in respect both of crimes under international law and of crimes of international concern. The court would be compelled, for example, before deciding whether a criminal was a national of a State, to examine the law of that State regarding nationality. The International Court of Justice had frequently applied national law, although there was no mention of it in its Statute. He therefore agreed with the Danish and Netherlands representatives that article 30 should be suppressed.

22. Mr. PINEYRO CHAIN (Uruguay) agreed with the French representative that article 30 should be worded in very general terms. In the case of crimes of international concern the court would apply international law, or in certain circumstances national law.

23. However, the observations by the representative of Israel had brought out a factor which it would be advisable to take into consideration, namely, that as the jurisdiction of the court would necessarily be based on a convention, the court should apply international law in the absence of special provisions in that convention.

24. He would suggest that the first sentence of the article be drafted to read:
"The court shall apply international criminal law, and within the limits of its competence, public international law."

25. For the rest of the text, he was in favour of the wording proposed by the French representative.

26. Mr. GORDON (United Kingdom) said that the problem of the law to be applied by the court had already been touched upon by Sir Frank Soskice, and he would not elaborate on the views already expressed by him. He doubted whether a wide formulation would provide a sufficient basis for an international criminal court, and he could not vote for any of the texts suggested.

27. The CHAIRMAN put to the vote the Danish representative's proposal that article 30 be omitted from the statute.

The proposal was rejected by 8 votes to 4.

28. Mr. ROBINSON (Israel) said that there was a large measure of agreement between his suggested amendment to article 30 and those of the French, Uruguayan and Australian representatives. He proposed, therefore, that the Drafting Sub-Committee or some other group draw up a text embodying the suggestions of all four delegations.

29. Mr. LIANG, Secretary to the Committee, drew the attention of the Committee to the Secretary-General's proposal on page 64 of his memorandum (A/AC.48/1), which could be of assistance in drafting an amendment to article 30.

30. The CHAIRMAN proposed that the French, Israeli, Australian and Uruguayan representatives meet during the recess and prepare a commonly acceptable text.¹⁾

It was so agreed.

2. FUTURE PROGRAMME OF WORK

31. The CHAIRMAN reminded the Committee that the Drafting Sub-Committee had met the previous day to decide on the programme of work of the Committee after the discussion on jurisdiction had been completed. He asked the Rapporteur to outline the decisions of the Drafting Sub-Committee.

32. Mr. SÖRENSEN (Denmark), Rapporteur, said that the Drafting Sub-Committee had decided to recommend that the Committee should take up the following problems in turn:

the procedure of an international criminal court, including the question of rules regarding indictment, accusation, procedural safeguards of the accused, judgment, appeal and execution; among those questions would be included the United States proposal for a board of inquiry (A/AC.48/L.7);

the general question of whether the court should be permanent or not; the question of how the court should be established; and, lastly questions relating to the organization of the court, including the qualifications of the judges, the composition of the court and the methods of election of judges, their rights and duties, the registry and so on.

33. The Drafting Sub-Committee had recommended no rigid time-table, but had pointed out that a week would probably be required for consideration by the Committee of

(1) See paragraphs 98 et seq below.

the draft texts submitted by the Drafting Sub-Committee and the draft report of the Committee to the General Assembly.

34. Mr. de LACHARRIERE said that two meetings a day would be necessary and formally proposed that the Committee alter its hours of work, and meet every day, except Saturdays, from 10 a.m. to 1 p.m. and from 3 p.m. to 5 p.m.

The French representative's proposal was adopted by 9 votes to none, with 1 abstention.

35. The CHAIRMAN suggested that the programme of work recommended by the Drafting Sub-Committee be followed.

It was so agreed.

PROCEDURE OF AN INTERNATIONAL CRIMINAL COURT:

Chapter III of annex II to the Secretary-General's memorandum (A/AC.48/1, A/AC.48/L.7, A/AC.48/L.8)

36. The CHAIRMAN, speaking as United States representative, introduced his delegation's proposal (A/AC.48/L.7) that a board of inquiry be established. He had already referred to the necessity of establishing such a board of inquiry at a previous meeting.¹⁾ The international criminal court should be a judicial tribunal, and every effort should be made to ensure that men appointed to it were judges, not politicians. The moment a charge was brought against any person or any State, that person or State would immediately become the focus of international political emotions and intrigues, and, as he had said, it was essential that a group of persons acting in a judicial manner should have the opportunity of deciding quietly whether the evidence brought by the accuser was sufficient to establish a prima facie case against the accused. There were many possible

(1) Summary record of the 8th meeting (A/AC.48/SR.8), paragraphs 107 to 110.

methods of achieving that, and the one proposed by his country was based on its own experience.

37. Mr. MAKTOS (United States of America) emphasized that his delegation was not wedded to the precise wording of or the precise procedure outlined in its proposal, but only to the central idea that there should be a board of inquiry to consider the preliminary evidence. As the proposal was lengthy and detailed, he proposed that it be considered article by article.

It was so agreed.

38. Mr. GORDON (United Kingdom) said that the purpose of the United States proposal seemed to be to set up a committing board. He could not, however, follow how a prima facie case would be established. Would a State bring the evidence before the board, or would a prosecutor do so? Would the evidence be oral or on affidavit? Would the uncorroborated evidence of one witness be sufficient to establish a case? Would notice be given to the accused?

39. Mr. MAKTOS (United States of America) explained that his delegation would later propose that a prosecutor should bring the preliminary evidence before the board of inquiry. Under article 9 of the proposal, the board would have authority to prescribe rules for the conduct of its business, and it would no doubt establish rules regarding admissible evidence. There should also, however, be a provision in the statute of the international criminal court that the court should itself prepare rules of evidence and publish them in advance, so that none of the confusion that had arisen in the Nuremberg Tribunal could result. Finally, the question whether the evidence of one witness would be sufficient to establish a prima facie case would depend on the weight given by the board to such evidence. It had not been contemplated that notice should be given to the accused of a charge brought against him. If it were regarded as necessary to service such notice, article 11 of the United States proposal could be altered accordingly.

Article 1 (A/AC.48/L.7)

40. Mr. LIANG, Secretary to the Committee, doubted whether the words "within the framework of the United Nations" was used with precision in connexion with the establishment of a board of inquiry. Unless an international criminal court were established by a resolution of the General Assembly, or by such resolution in combination with a convention, the court would not be an organ of the United Nations. A subsidiary organ of the United Nations must ipso facto be subsidiary to a principal organ. As a board of inquiry would fulfil a function similar to that of a grand jury, he was not certain whether the United States desired the board of inquiry to form part of the international criminal court, or to be separate. If it were decided that the board should be separate, the phrase he had referred to would require amendment.

41. The CHAIRMAN thought that the question of how the board would be established could be dealt with after it had been decided what its functions and other attributes would be.

42. Mr. MAKTOU (United States of America) said that the words to which the Secretary of the Committee had objected were to be found in another convention concluded at a United Nations conference, namely the Convention on the Declaration of Death of Missing Persons, which provided for an International Bureau for Declarations of Death "within the framework of the United Nations".¹⁾ With such a precedent, there could be nothing against those words.

43. His Government proposed that the board of inquiry should be separate from the international criminal court, for the court would be entrusted with the trial of accused persons or States, not with accusations in themselves.

44. Mr. TARAZI (Syria) recalled that General Assembly resolution 489 (V) expressly instructed the Committee to prepare "one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court" and pointed out that the terms of reference would be more faithfully observed if in article 1 of the United States proposal the words "within the framework of the United Nations" were replaced by "attached to the international criminal court".

(1) Article 8 of the Convention opened for accession by the Final Act of the Conference, signed at Lake Success, New York, on 6 April 1950.

45. Moreover, article 9 of the United States proposal, giving the board authority to prescribe the rules necessary to conduct its business, appeared to authorize it to settle certain substantive questions. In his opinion, questions such as respect for the personal freedom of accused persons, the manner in which the trial was conducted, whether there should or should not be a counsel for the defence, should be stipulated beforehand in the statute of the court itself.

46. Mr. MAKTOU (United States of America) thought the Drafting Subcommittee could discuss the question whether the board of inquiry should form part of the court or not, although in his view it should be separate. The judges of the court could frame the rules of evidence; in article 9 his Government had intended that the board should merely frame the rules of procedure governing the conduct of its own business.

Article 2

47. Mr. MAKTOU (United States of America) said that it had been suggested that the board of inquiry should not function in close session.¹⁾ His country believed that a person should not be tried twice for the same offence. If the sessions of the board of inquiry were open, there would be a manifest danger that the board would become virtually a preliminary court of trial, and thereby lose its function of merely sifting the evidence. What his country had in mind was a procedure somewhat similar to that of the Grand Jury, in which the accused was not called, and when an indictment was drawn up only if a prima facie case was established.

48. Mr. WYNES (Australia) suggested that in the first sentence of article 2, the word "approve" which had a distinctly political flavour, be replaced by a more neutral word. He proposed also that the words "establish the commission of the offence charged" be replaced by the words "establish a prima facie case".

1) Summary Record of the 10th meeting (A/AC.48/SR.10), paragraph 78.

49. Article 9 seemed to give excessively wide authority to the board to determine who might be present at its sessions. The Committee might desire to make a provision to protect the accused from being required to appear before the board and reply to questions, unless he specifically wished to do so.

50. Mr. MANTOS (United States of America) had no objection to the Australian amendments. With regard to the provision suggested by the Australian representative for inclusion in article 9, he emphasized that it was not intended that the accused should appear before the board of inquiry.

51. Mr. GORDON (United Kingdom) said that he envisaged the international criminal court as consisting of a panel of judges. He wondered whether it was not possible for a small number of those judges to decide whether there was a prima facie case against an accused person. Those judges would not subsequently act as the trial judges.

52. The CHAIRMAN said that the possibility of judges of the court acting as committing magistrates had been recognized in various countries, whereas in others it had been felt that ordinary lay persons, with their own rough ideas of justice, were sufficiently qualified to decide whether there was a case calling for committal. Either solution could be used for the board of inquiry without detriment to the central concept.

53. Replying to Mr. MUNIR (Pakistan), who asked whether the word "uncontradicted" meant that the accused could produce his own evidence, he said that the word "uncontradicted" merely meant that as the accused person would not be present, he would not therefore be able to bring any evidence to contradict that produced by the person making the charge. He was prepared, however, to accept any improvement in the wording.

54. Mr. MUNIR (Pakistan) suggested that the word "uncontradicted" should either be deleted, or replaced by more appropriate words.

55. Mr. RÖLING (Netherlands) said that the Grand Jury and similar institutions were intended to protect individuals from unfounded accusations. Presumably the board of inquiry was also intended to do so, but he found it

difficult to imagine a State bringing an accusation without being able to produce enough evidence to establish even a prima facie case. If the purpose of the board was to protect the court from having to try frivolous cases, however, many of the objections raised would be irrelevant. It seemed to him that there was much to be said for the view that the primary function of the board should be to protect the court.

56. Mr. MANTOS (United States of America) agreed that the court should be protected from unnecessary and perhaps tendentious complaints. In his view, however, the procedure protecting the individual would also protect the court, and no contradiction was implied in the double function.

57. Mr. PINERO CHAIN (Uruguay) accepted, as a whole, the draft articles submitted by the United States delegation.

58. As he was not familiar with the functions of the Grand Jury in the United States, he asked for information as to the scope of the board's decisions. It was his understanding that it was a question of a pre-judicial procedure for the formulation of the charge. The board's decisions would not be binding on the court. If that interpretation were correct, he would subscribe to all the general provisions contained in the United States proposal.

The meeting was suspended at 11 a.m. and was resumed at 11.30 a.m.

59. Mr. MANTOS (United States of America) referred to the point made by the Uruguayan representative to the effect that the board might find that there was prima facie evidence that the accused person was guilty, and submitted that, as the United Kingdom representative had previously indicated, the effect of such a decision would merely be an order to the prosecutor to proceed with the case.

Article 3

60. Mr. MANTOS (United States of America) submitted that it would be for the Committee to decide the strength of the board. An odd number of members would be preferable, say seven or nine, in order to avoid the possibility of a

tied vote. He believed that the Danish representative had a suggestion to make with regard to the qualifications that should be required of members of the board.

61. Mr. SÖRENSEN (Denmark) said that, as the sifting process envisaged should be non-political, he had thought that the non-political character of the board would be preserved if its members were elected on the basis of their judicial experience. The task of the board would be to examine evidence, and that appeared to warrant the conclusion that judicial experience on the part of its members was a necessity. The practice of leaving such a sifting process to laymen, as adopted in some countries, seemed hardly appropriate in the international field.

62. Mr. COHN (Israel) pointed out that there was no reference in article 3 to the qualifications of the members of the board. They might thus be qualified persons or unqualified persons, judges or politicians.

63. Mr. MAKTOU (United States of America) agreed that failure to mention the qualifications of the members of the board was a gap in the proposal. The Committee might decide what qualifications were necessary.

64. He supported the view expressed by the Danish representative and believed that the necessary amendment to article 3 might well be left to the Drafting Sub-Committee.

65. Mr. de LACHARRIERE (France) said that before determining the strength of the board, the Committee should decide on its general character. The Board might provisionally be called a "screening body". He himself was entirely in favour of the ideas on which the United States proposal was based. It seemed, however, to contemplate the establishment of an organ within the framework of the United Nations, but distinct from the court. It should be remembered that all Member States of the United Nations would not necessarily be parties to the convention establishing the court. The international community thereby constituted for that specific purpose would not therefore be identical with the community of the United Nations. Again, article 3 of the proposal provided for the election

of the organ's members by the General Assembly. As any election by the General Assembly necessarily had a political character, the proposed organ would be a political body, even though its members were selected from duly qualified legal experts. It would therefore appear that the proposal would have the effect of setting up machinery, distinct from the court, and of a political nature.

66. To meet the desired end, which was to preclude actions solely inspired by motives of political propaganda, it might be preferable to consider the establishment of a small collegiate body attached to the court. Its members would be debarred from participating in the actual trial, but should be members of the court. They would form an organ within which the preliminary examination of cases could be carried out without any political interference. The members of the court were the persons best qualified to reject frivolous charges.

67. The parallel which had been drawn with the Grand Jury was hardly accurate. The members of the jury were chosen haphazardly from among the general inhabitants of a given area regardless of their political opinions. If the members of the proposed body were nominated by the General Assembly on the contrary, the presumption was that they would have definite political leanings.

68. The CHAIRMAN said that the Danish and French representatives appeared to stress that the members of the board should be persons with judicial qualifications, so that the risk of political pressure being brought to bear on the functioning of the board would be reduced to a minimum.

69. Mr. COHN (Israel) had understood the French representative to suggest that not only should the members of the board have certain judicial qualifications, but also that the board should not be set up under the United Nations or divorced from the court itself. He supported that view, and found article 3 of the United States proposal to be unacceptable, since it delegated the establishment of the board and the election of its members to the General Assembly and would therefore have the effect of setting up a body entirely separate from the court.

70. His delegation had circulated for the consideration of the Committee certain proposals, consisting of five articles, that bore on the question of a procurator general and also of a court of inquiry (A/AC.48/L.8). His delegation proposed

that such a court of inquiry should consist of one or more judges of the international criminal court, at the discretion of the president of the latter. He personally believed that one judge would be sufficient, although those who were used to the Grand Jury, consisting of a fairly large number of persons, might not share that view.

71. In articles 3, 4 and 5 his delegation had proposed a procedure which was radically different from that suggested by the United States delegation. In his opinion, no accused person could be protected by a court of enquiry from mischievous accusations - and it was with the protection of the interests of the accused that the Committee was concerned - unless that person was put in a position to hear the evidence brought against him, to cross-examine witnesses and to adduce evidence of his own. It was his understanding that in the United States an accused was not given such an opportunity. In the United Kingdom and in his own country as well as in several others, it was a fundamental rule that such a person should be afforded such facilities. He preferred the second system, and felt that it should be adopted in the field which the Committee was considering, if an accused was to have really adequate protection. The accused would thus have had an opportunity of defending himself even before an order of committal was granted.

72. His delegation also felt that the prosecutor should be entirely independent of any State and the United Nations, but responsible to the court, and, moreover, that the investigations carried out by the prosecutor would constitute the first sifting, preliminary to any screening by the court of inquiry.

73. In his view, too, no judge having been a member of a court of inquiry should sit on the bench of the trial court. In normal cases a membership of three should be sufficient for the latter, and there need be no more than one judge on the bench of the court of inquiry. In exceptionally serious and complex cases the president of the international criminal court might be empowered to increase those numbers to five and three respectively.

74. The CHAIRMAN observing that the Israeli representative had introduced a new element into the discussion, said that the United States proposal did not preclude the introduction of a prosecutor either before or after the sifting process to be carried out by the board of enquiry.

75. Did the Committee wish to consider whether the board should be a part of the court, or whether it should be composed of judges elected by an independent body such as the United Nations and not be responsible to the court?

76. Mr. RÖLING (Netherlands) considered that the answer to the Chairman's question would depend on the answer to be given to the question he (Mr. Röling) had previously raised, namely, whether the primary purpose of the board was to protect the interests of the individual or to protect the interests of the court. The Committee as a whole had not pronounced on that point. It should be borne in mind that the court would be dealing with crimes under international law, and that while crimes against humanity perpetrated by an individual might be dealt with by States, such crimes committed by government officials would come under the jurisdiction of the international criminal court. In such cases the United Nations would initiate the prosecution, and so far as he could see there would be no need for the protection of the individual, for the reason that there would not be any lack of valid evidence.

77. It would be noted that in the Tokyo trial it had taken the Tribunal two years to deal with all the evidence and to screen hundreds of documents before reaching a decision. Consequently, it was difficult to see how in similar cases heard before a board of enquiry the latter would function in the interests of the accused. He therefore considered that the Committee should express an opinion as to whether the primary purpose of the board was to protect the individual or to protect the court.

78. The CHAIRMAN put the question to the Committee.

Six members of the Committee considered that the primary purpose of the board would be to protect the person charged.

Two members of the Committee considered that the primary purpose of the board would be to protect the court.

79. The CHAIRMAN said that, as a working basis for discussion, the primary object of the board of enquiry would be regarded as the protection of the accused individual. The Committee could now return to the question of the composition of the board, concerning which two opposite views had been expressed; the first, that the board should be part of the court and composed of persons associated with the court and having judicial qualifications; the second, that it should be an independent agency, composed of persons having judicial qualifications, and that it should stand on its own responsibility and be set up by an agency other than the court.

80. Mr. MANTOS (United States of America) said that the implication of the French representative's remarks concerning the election of the members of the board by the General Assembly was that any body appointed by the General Assembly would be a political body, and that therefore the General Assembly should not be relied upon so far as such election was concerned. He personally had no strong feelings in the matter, but he did not believe that the election of the members of the board by the General Assembly would automatically turn it into a political body. After all, the General Assembly would elect the members of the court, and it was to be hoped that the court would not become a political forum; a fortiori the election of the members of the board by the General Assembly should not be considered in any different light. It would, moreover, be noted that prior to the vote on the candidates to be elected, the General Assembly would have before it full biographical data, on the basis of which, he believed, the Members of the United Nations would not fail to proceed to fair election.

81. As to the suggestion that the board should be part of the court, some considered that the prosecuting authority should have no association whatsoever with the trial judges. While it would be a reflection on the integrity of judges to instruct them, in the same way as juries were instructed, not to discuss a case outside the court, it would be unwise, having regard to the absence of such instructions and to human limitations, to permit such close association between a board of enquiry judges and trial judges.

82. He also thought that the problem of who should be the prosecutor, and what the nature of his functions, should not be dealt with in the statute and that the committing authority should not appoint the prosecutor.

83. Mr. WANG (China) enquired whether the Secretariat, in preparing its memorandum, had at any time considered the idea of a screening process.

84. Mr. WANG, Secretary to the Committee, said that the Secretariat's memorandum provided a procedure which was considered adequate for normal cases. It had not taken account of the preferment of accusations based on malicious motives, or of possible abuses in the use of an international criminal court. As such abuses were possible, the United States proposal for a board of inquiry served a useful purpose.

85. Replying to Mr. WANG (China), the CHAIRMAN said that the Committee as a whole had not expressed an opinion as to the desirability of establishing a screening organ. The Committee was proceeding on the basis of an explanation of the provisions of the United States proposal, entailing a general discussion on each article in it. If the Chinese representative so wished, he would put to the vote the question whether or not the Committee considered that screening machinery was necessary and desirable.

86. Mr. WANG (China) believed that it would be preferable to allow the United States representative to complete his explanation of his delegation's proposal. He had only raised the question in view of the vote that had been taken concerning the primary purpose of the board.

87. Mr. de LACHARRIÈRE (France) felt that there was room for an intermediate solution between the two extremes - that of attaching the screening organ to the United Nations, and more specifically to the General Assembly, and that of placing it under the authority of the court, of which it would form an integral part.

88. The United States representative had correctly brought out the dangers of partiality to which the court's findings would be exposed were the members of the board of inquiry to form part of the same body as the court judges. There might be reason to fear, in fact, that the preliminary examination would prejudice the final judgment. However, it was not to be implied from that pertinent observation that the proposed board must necessarily be based on a

different system and be set up by the General Assembly. Selection by a majority of the Member States of the United Nations would introduce a political element that would be suspect in the eyes of the minority.

89. Between those two extremes, the provisions of the convention establishing the statute of the court might provide for the creation of two completely different organs: a screening board and the court proper, but with a stipulation that the procedure for nominating the members of either body should be identical. In that way, a court would be established to pass judgment side by side with the establishment of a board responsible for preventing improper cases from coming before it. That more coherent system would be generally based on the community of States party to the convention establishing the court.

90. Any attempt to make the screening organ also responsible for conducting inquiries would unnecessarily complicate its task. Inquiry proper was a protracted task, which included the study of evidence, the hearing of witnesses and the appointment of rogatory commissions. It would be advisable to concentrate those operations, which had nothing in common with screening, in the hands of a single magistrate. So far as the machinery for inquiry proper was concerned, the proposals of the representative of Israel might be adopted; while the political screening should be entrusted to a small group of persons whose status - on an equal footing with that of the court judges - would be defined in the convention itself.

91. Mr. SØRENSEN (Denmark) believed with the French representative that a solution could be found somewhere between the two extreme positions. The idea that a trial court should appoint in each case a limited number of judges to act on a board of inquiry was fraught with difficulties. Members of the international criminal court would presumably be elected on the basis of geographical distribution, but, if say, three of its judges were elected by the court to sit on a board of inquiry for a particular case, those three members of the board would not represent the same geographical distribution of the court. Moreover, those three judges would not be able to sit on the bench for the trial itself, which would again upset the geographical distribution. That was a point that could not be ignored.

92. The French representative had stressed the question of relations with the United Nations and the strong desire on the part of some members of the Committee that the complexion of the board should be as non-political as possible. On the other hand, the United States representative had contended that the non-political character of the board might be assured by the stipulation regarding judicial qualifications. It was well-known that such a position already obtained in certain organs of the United Nations as, for instance, the International Court of Justice.

93. The French representative's solution, in his view, came quite close to the United States proposal; that was to say, that there should be two distinct organs, that the board should not be set up by the court, but that both organs should be elected by identical procedures. He wondered what the reaction of the Committee would be to the following intermediate solution: that provision should be made for two distinct organs, and that the organ of inquiry should be elected by the court itself for a certain period of time and not for the purpose of investigating a particular case. The idea would be that if the court were established for a period of nine years its first duty would be to appoint an organ of, say, three or five or seven members to act as a board of inquiry for the same period as that during which the members of the court itself held office. Such a procedure would eliminate political considerations and obviate the difficulty arising out of the appointment to the board of the court's own judges.

94. Mr. MAKTOU (United States of America) said that he would have no objection to the election of the members of the board by the international criminal court instead of by the General Assembly, if the Committee preferred that course.

95. With regard to the French representative's remarks, he would point out that the latter had not answered his contention that the election of the members of the board by the General Assembly would not necessarily prevent the board from being independent. In his opinion, the fact of giving the court power to appoint the members of the board might leave the impression in the mind of an accused that the proceedings were not entirely free from bias.

96. The Secretary had stated that the Secretariat had omitted from its draft provisions relating to a sifting process because it had not taken account of accusations based on malicious motives. That seemed to imply that the Secretary believed that the United States proposal had been put forward to deal with such accusations. But that was not the case, and the sifting process suggested by his delegation was primarily intended to cover normal cases.

97. Mr. GORDON (United Kingdom), addressing himself to the Danish representative's remarks, found it difficult to see how the consideration of geographical distribution would not apply in the case of the election of members of the board as it applied in the case of the election of the members of the court. He also wondered whether there had not been an undue tendency in the discussion to under-rate the integrity of judges. He was sure that on the national plane there was no danger in allowing, say, a judge of first instance to discuss a case with an appeal judge.

4. JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT:
Chapter II of annex II to the Secretary-General's memorandum (resumed)¹⁾
Article 30 of annex II (A/AC.48/1)

98. The CHAIRMAN proposed that the Committee should take up the text proposed by the special sub-committee set up to draft a new text for article 30 of the draft statute which had now been distributed.

It was so agreed.

99. The CHAIRMAN called upon the French representative to introduce the Sub-Committee's proposed wording, which read:

"The Court shall apply international penal law, and insofar as it is necessary for the fulfilment of its functions, general public international law.

With regard to crimes of international concern the court shall apply the national penal law of a given State when the convention, special agreement or unilateral renunciation which granted it jurisdiction explicitly refer to said penal law."

1) See paragraph 30 above.

100. Mr. de LACHARRIERE (France) said that the first question the special sub-committee had discussed was whether reference should be made in the article to general public international law, and if so, how that reference should be included. It had agreed that the court's primary task would be to apply international penal law, but that it would also have to apply general public international law, as in the case of the Nuremberg and Tokyo Tribunals. To avoid any ambiguity, the sub-committee had deemed it advisable, in the first sentence of its draft, to include the specific words "insofar as it is necessary for the fulfilment of its functions".

101. After examination, the sub-committee had decided against the possibility of including in subsequent particular conventions a specific reference to the law to be applied by the court in order to avoid having international criminal law as a whole brought into question by conventions.

102. The sub-committee had also considered whether the various sources of law should be listed. It had decided against such an enumeration, which it had thought would be less useful in the case of the international criminal court than in that of the International Court of Justice.

103. Finally, the sub-committee had decided that - in the case of crimes of international concern only, to the exclusion of crimes under international law - the court would apply the national penal law when the convention, special agreement or unilateral renunciation which gave it jurisdiction explicitly referred to such national penal law.

104. In reply to a question by Mr. WANG (China), he explained that the text drawn up by the sub-committee closely resembled that in the third alternative to article 30 in annex II of the Secretary-General's memorandum, but included a few additional clarifications.

105. The reason why the sub-committee had thought it better not to list the sources of law was that it was anxious to avoid controversy, which might possibly be protracted, in the hope of securing results that might not be very necessary. International criminal law was a comparatively recent and lucid subject. General public international law, which the court could apply to the extent required for

the exercise of its functions, included the principles set forth in the Statute of the International Court of Justice (Article 38), and those derived from the established practice of that Court.

106. In short it would be very difficult, and not particularly helpful, to list the sources of law.

107. Mr. WANG (China) said that by merely stating that the court should apply general public international law, the problem of sources was not solved.

108. Replying to the CHAIRMAN, he confirmed that he was not ready to propose an amendment to meet that difficulty.

109. Mr. RÖLLING (Netherlands) said he would vote against the text proposed by the sub-committee. The provision that the court should apply general public international law in so far as it was necessary for the fulfilment of its functions implied that but for such a provision the court would apply such law unnecessarily. He further objected to the restriction of the application of national law to other crimes of international concern. It would be recalled that in the Tokyo trial, which had dealt with international crimes, that was, crimes under international law, very frequent use had been made of national Japanese law, in particular on the question of orders issued by superiors. In his view the court would be faced, in respect of such crimes, with the necessity of having to find solutions under national law. The text proposed by the sub-committee, which limited the application of national law to crimes of international concern, precluded the court from doing that.

110. Replying to the CHAIRMAN, he confirmed that at first he had urged that there should be no provision in the statute as to the law that the court should apply. If later he had confirmed his acceptance of a provision to the effect that it should apply international law if national law was not applicable in a specific case, he had none the less still maintained that any provision on the subject was superfluous. At the moment he had no precise amendment to propose to the sub-committee's draft.

111. Mr. SÖRENSEN (Denmark) said that he would abstain from voting on the sub-committee's draft for somewhat similar reasons to those adduced by the Netherlands representative. He might, however, be permitted to mention two drafting points. It had been agreed that the Court should have jurisdiction over crimes under international law and other crimes of international concern. That being the case, the second paragraph might well be revised to open with the words: "With regard to crimes of international concern other than crimes under international law the court"; alternatively, a specific reference might be made to the paragraph in the article defining such crimes. The Drafting Sub-Committee might also consider whether the English words "explicitly refer" were an absolute equivalent of the French "font renvoi".

The meeting rose at 1.10 p.m.