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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE THIRTEENTH MEETING

held at the Palais des Nations, Geneva,
on Thursday, 16 August 1951, at 3 p.m.

CONTENTS:

Present:

Chairman:	Mr. MORRIS
Members:	
Australia	Mr. WYNES
China	Mr. WANG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. de LACHARRIERE
Iran	Mr. KHOSROVANI
Israel	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

PROCEDURE OF AN INTERNATIONAL CRIMINAL COURT:

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

Board of inquiry (continued) (A/AC.48/L.7, A/AC.48/L.8)

1. The CHAIRMAN invited the Committee to consider the proposal regarding an investigating authority which had been submitted by the Israeli delegation at the previous meeting,[1] and reading as follows:

> "The court shall appoint an investigating authority. No indictment shall be filed with the court, unless the investigating authority has certified that there is sufficient prima facie evidence to support the charges contained in the indictment".

2. Mr. COHN (Israel) said that, if he had correctly interpreted the attitude of the United States representative, the latter did not wish to insist upon the proposed board of inquiry being appointed by the General Assembly. The primary object of his proposal (A/AC.48/L.7) appeared to be to ensure that such a board was set up, the manner of its appointment being of secondary concern.

3. There were other members of the Committee, however, who considered the question of who should be responsible for the election of the board of inquiry to be one of fundamental importance. According to the Israeli proposal, the court itself should appoint the investigating authority. Although he personally would prefer the investigation to be carried out by one or more of the judges of the court, he would be content with a stipulation that the members of the board be elected by the court.

4. His use of the words "investigating authority" instead of "board of inquiry" was deliberate, since the latter term seemed necessarily to imply that there should be more than one member. He considered that, in most cases, one person would be quite sufficient to conduct the preliminary inquiry, and in coming to that conclusion he had been greatly influenced by the remarks of the Netherlands representative on the excessive amount of time lost at Tokyo in collecting

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1) Summary Record of the 12th meeting (A/AC.48/SR.12), paragraph 81.

evidence for the trial. It was essential that the preliminary investigation procedure should be as short and simple as possible, an object which could best be achieved by appointing one person only to act as investigating authority.

5. Although in his proposal he had intentionally refrained from any reference to procedure, he was prepared to insert a clause to the effect that the procedure of the investigating authority, with the exception of one important item, should be fixed either by the court or by the authority itself. The exception was the question of the presence of the accused, a matter which, he understood, came next on the Rapporteur's list of points for discussion.

6. The CHAIRMAN said that the term "investigating authority" had at first led him to believe that the Israeli proposal related to the idea of a prosecuting authority. To avoid any confusion between the proposed authority and the latter body, which would be responsible for collecting evidence, it might be preferable for the former to be designated "trial commission".

7. Mr. COHN (Israel) confirmed that his idea was that the investigating authority and the prosecuting authority should be two quite distinct bodies. The investigating authority would have nothing whatever to do with the process of prosecution as such. However, he was somewhat hesitant about adopting the Chairman's suggestion that the investigating authority be called the "trial commission", in view of the close association of the word "trial" with later stages in the procedure.

8. The CHAIRMAN said that in those circumstances he would suggest the title "trial certifying commission".

9. Mr. de LACHARRIÈRE (France) said that several other questions arose in addition to the question of principle raised by the Chairman. In the first place the Israeli representative's proposal failed to state whether the investigating authority was to be appointed once and for all for a certain period of time, or whether it was to be an ad hoc body appointed separately for each case submitted to the court. Secondly, the Israeli proposal did not state whether the functions of the investigating authority would be only to certify that there was sufficient

prima facie evidence to support the charge, or whether it would have an additional function of preliminary investigation. Lastly, would the member or members of the investigating authority appointed by the court be judges of the court, or persons who were not members of the court, or both?

10. Mr. COHN (Israel) thought that it would not be desirable for the Committee to come to any definite decision at that stage on the question of whether the investigating authority should be an ad hoc or a standing body. The court might be in existence for some time before any case was brought before it. When a case arose, it could set up an investigating authority, either of an ad hoc or of a permanent nature, as it thought fit. He would prefer to leave the question open.

11. On the question whether the authority should concern itself with "instruction" in the French sense of that term, his reply must be that it emphatically should not. The collection of evidence and the preparation of the trial were police functions to be performed by the national agencies concerned.

12. With regard to the third question as to the composition of the investigating authority, he considered that the court should be left free to select them from among its own judges or to appoint outside persons, as it deemed fit.

13. Mr. MAKTOS (United States of America) observed that, while his delegation would not insist on the board of inquiry being appointed by the General Assembly, it was by no means anxious to abandon the idea. If, as had been decided, the board was to be of a quasi-judicial or judicial character, it should be on much the same lines as the court, and should be elected either by the General Assembly or by exactly the same procedure as that adopted for the election of the judges of the court. It should not be subordinate to the court.

14. The Committee should resist the tendency to assume that the General Assembly would not itself be impartial enough to elect an impartial body. It should be remembered that it also participated in the elections of the members of the International Court of Justice. He wanted the board to have close links with the United Nations.

15. According to the United States' proposal, the board of inquiry should be of a more or less permanent nature, so that its members could gain experience and ensure continuity in its work. It was also desirable to decide at that stage the number of persons who were to sit on the board of inquiry. One, he considered, would not be enough. Five or seven members would not be too many.

16. He was not in favour of the Israeli representative's proposal to leave certain matters open. In his view they should be put to the vote.

17. Replying to the CHAIRMAN, he added that he wished to propose that the members of the board of inquiry be elected by the same procedure as that adopted for electing the judges of the court.

18. Mr. SÖRENSEN (Denmark) regretted that the turn taken by the debate seemed to rule out the possibility of compromise. Since it had been settled that the function of the board of inquiry has to be non-political, he could not see why the exact composition of the board and the mode of election of its members should be regarded as matters of primary importance.

19. The latest Israeli proposal contained some useful points which might be incorporated in the United States proposal, and there were other points in it which might well stand by themselves. Nevertheless in an endeavour to reach a compromise on the question, he would suggest the addition to the first sentence of the Israeli proposal, immediately after the words "investigating authority" of the following text: "composed of three persons, not members of the court, to hold office for the same period as the members of the court". He had tentatively proposed that they should be three in number.

20. In view of the fact that certain members of the Committee seemed to feel that definite solutions should be found to the questions raised by the French representative, he wondered whether the Israeli representative regarded it as absolutely essential for those matters to be left in suspense.

21. Mr. MAKTOS (United States of America) said that, while admiring the Rapporteur's efforts to reach a compromise, he felt that the latter was in fact not in favour of the United States proposal. He requested that a vote be taken on

his own proposal that the members of the board of inquiry be elected by the same procedure as the judges of the court.

22. Mr. de LACHARRIÈRE (France) was in favour of both proposals. That of the United States delegation, moreover, conformed fairly closely to his own views. If the members of the investigating authority were appointed in the same manner as the judges of the court, their ability and integrity would be fully guaranteed. However, if the investigating authority only had a few members, would it not be difficult to respect the principle of geographical distribution and of representation of the different legal systems?

23. Mr. MAKTOS (United States of America) agreed that if the board of enquiry had only three members, the issue raised by the French representative would have to be faced. He, himself, however, was in favour of five or seven members, and if the principle of equitable geographical distribution and adequate representation of legal systems could not be satisfied by such a composition, it certainly could not be satisfied by having only one member. In his opinion the judicial qualifications of members of the board were more important than the geographical distribution of seats.

24. The CHAIRMAN put to the vote the question whether the members of the board of enquiry (or investigating authority) should be elected by the same procedure as that adopted for the election of the judges of the court.

The Committee gave an affirmative reply to that question by 7 votes to 1 with 5 abstentions.

25. The CHAIRMAN pointed out that the first sentence of the Israeli proposal had accordingly been replaced by the United States proposal, and invited the Committee to vote on the second sentence:

> "No indictment shall be filed with the court unless the investigating authority has certified that there is sufficient prima facie evidence to support the charges contained in the indictment".

The Committee adopted that sentence by 8 votes to none with 5 abstentions.

The Committee adopted the Israeli proposal as a whole as amended by 6 votes to none with 7 abstentions.

26. Mr. de LACHARRIÈRE (France), speaking to a point of order, said that he had voted for the United States amendment to the first part of the Israeli proposal, but that he was also in favour of the second solution, proposed by the Danish representative. The two were in no way mutually exclusive.

27. The CHAIRMAN suggested that the French representative should submit a formal amendment based on the Rapporteur's suggestion.

28. Mr. de LACHARRIÈRE (France) replied that the question was more complex than the Chairman imagined. The United States proposal covered two points: the question of how many members the board of inquiry was to have, and the method of electing them. According to the United States proposal, they were to be chosen by the General Assembly and appointed for the same period as the members of the court. But there was another possible alternative, namely, the election of members of the board of inquiry by members of the court. In that case, there was nothing to prevent the Danish representative's proposal from being adopted and being submitted to the General Assembly. In fact, the General Assembly had requested the Committee to prepare one or more proposals relating to the establishment and the statute of an international criminal court. The decision just taken by the Committee was certainly not the only possible solution.

29. The CHAIRMAN observed that the only point at issue between the United States and Israeli proposals had been the question of the election of members of the board of inquiry, and that the suggestion made by the Rapporteur concerning the membership and terms of office of the board did not seem to be in conflict with either of the solutions proposed. He thought it would be more advisable to defer consideration of the possibility of putting forward alternative solutions until the Committee had already evolved one fairly well-knit scheme. The retention of alternative suggestions at the present stage might lead to considerable confusion.

30. He enquired whether the French representative wished to take up the amendment originally suggested by the Danish representative.

31. Mr. de LACHARRIÈRE (France) said that he wished to do so.

32. Mr. SÖRENSEN (Denmark) explained that his suggestion, which had been in the nature of an addendum rather than an amendment, had originated in the idea that the members of the investigating authority would be appointed by the court.

33. Replying to an enquiry from the CHAIRMAN, he agreed that, as a result of the vote taken, his proposal, which had originally be moved to the first sentence of the Israeli representative's proposal, had lost much of its point.

34. After a discussion in which the CHAIRMAN and the representatives of China, Iran, the United Kingdom and the United States of America took part, Mr. de LACHERRIÈRE (France) agreed to a suggestion made by Mr. KHOSROVANI (Iran) that a decision on the proposed addendum be deferred until the Committee had decided which organ would appoint the members of the board and the judges of the court.

35. Mr. SÖRENSEN (Denmark) said that the next point to be decided was whether the accused should have the right to be present during the preliminary enquiry by the investigating authority and to argue his case.

36. Mr. COHN (Israel) proposed the addition of the following clause to his own proposal:

> "The investigating authority shall, before issuing any such certificate, give the accused reasonable opportunity to be heard and to adduce such evidence as he may desire".

37. The regular procedure would be for the investigating authority first to hear all the evidence produced by the prosecution and decide whether a prima facie case had been established. Then, and then only, the accused would be invited to speak, if he wished to do so. The Committee could lay down such a procedure, but it would be better and more practical if it merely stipulated that the accused be given a reasonable opportunity of being heard, and left the decision as to the actual procedure to the investigating authority. There might, for instance, be some cases in which the evidence was so overwhelmingly clear that the accused could be heard forthwith if he so wished.

38. Mr. GORDON (United Kingdom) said that the representative of Israel had

adequately dealt with all the points he himself had wished to raise.

39. Mr. TARAZI (Syria) said that under some legal systems boards of inquiry had the power to place an accused person under arrest. Was the proposed board of inquiry to be given the right to issue warrants to prevent accused persons from disappearing or covering up traces of evidence? Moreover, would the decision of the board of inquiry be subject to appeal, and if so, how was such an appeal to be lodged?

40. The CHAIRMAN said that there would naturally be no appeal proper against any decision of the investigating authority that a prima facie case had been established. The trial would afford the accused with the opportunity of trying to prove that that decision had been wrong.

41. Mr. TARAZI (Syria) said that under the Syrian legal system, individuals could be summoned to appear before a board of inquiry at the request of the partie civile or of the public prosecutor. If the examining magistrate - refused to order a prosecution, the partie civile or the public prosecutor could bring the matter before a grand jury. That meant a board of inquiry, and not a judicial organ. He wondered whether such a form of appeal should not be allowed, even if no appeal were allowed against the judgment of the court.

42. The CHAIRMAN thought it would be advisable to defer consideration of the second question raised by the representative of Syria until the Committee took up the question of appeal as a whole.

43. The first question, namely, whether the investigating authority should have the power to compel the attendance of witnesses and the production of evidence could, however, be settled forthwith.

44. Mr. TARAZI (Syria) agreed that consideration of his second question should be deferred.

45. Mr. COHN (Israel) said he would have no objection to inserting a clause to the effect that the investigating authority should have powers equivalent to those

of the court to compel the attendance of witnesses and the production of evidence. Such a clause might come either before or after the clause relating to the presence of the accused.

46. The CHAIRMAN enquired whether there was any objection to putting the proposal of the representative of Israel to the vote before considering the question of the presence of the accused.

47. Mr. PINEYRO CHAIN (Uruguay) thought the problem raised by the Syrian representative should only come after the basic issue, namely, the appearance of the accused person before the board of inquiry. It would be well to define once and for all the nature of the board of inquiry and to specify whether it should only have the power to establish a prima facie case in accordance with the evidence available. If so, there was no need to give the accused person the right to appear before it. But if it were felt that the board of inquiry should constitute the first stage in the investigation, the presence of the accused person before it would be essential, and provision would have to be made to ensure that he did so. Hence that preliminary issue must be decided first.

48. Mr. KHOSROVANI (Iran) wondered whether the power to compel attendance of witnesses, was not a matter to be settled by special convention.

49. The CHAIRMAN said that, while agreeing with the Iranian representative that the Committee was getting involved in a matter of detail, it was clear that the representative of Syria felt unable to vote on the question of the presence of the accused until the other issue had been settled.

50. He invited the Committee to decide whether it wished to discuss the questions in the order suggested by the Syrian representative.

The Committee decided to adopt that order by 6 votes to 1.

Mr. SÖRENSEN (Denmark) said he was not in favour of the proposal to give the investigating authority the power to compel attendance of witnesses and production of evidence. The Committee would recall that when it had discussed the question of giving the court power to ask for other forms of assistance by

States, namely the execution of warrants of arrest, it had decided against doing so. If there was an argument in favour of restricting the powers of the court, that argument should be even stronger in the case of the investigating authority.

52. He asked the Syrian representative whether it would not be sufficient for the investigating authority to request the court to issue a warrant, whenever the former felt that further evidence should be produced.

53. Mr. TARAZI (Syria) explained that in making his suggestion he had merely put a question which he had not undertaken to answer, namely, whether it was the board of inquiry itself which was to make arrangements for summoning the accused person and the witnesses, or whether the Court would decide the matter.

54. If the first course were decided on, express mention would have to be made of it, otherwise the right of the board of inquiry to summon individuals before it might be contested. Personally, he would prefer that the board of inquiry itself took the decision to summon witnesses and accused persons and that it assumed the responsibility for carrying out that decision.

55. Mr. MAKTOS (United States of America) asked whether the representative of Syria was in favour of the accused being present at the preliminary enquiry.

56. Mr. TARAZI (Syria) replied in the affirmative.

57. Mr. MAKTOS (United States of America) said that, according to the Israeli proposal, there would be both an investigating authority and a prosecuting attorney. The task of the investigating authority, which was to be a judicial body, would simply be to decide whether the evidence produced was sufficient to establish a prima facie case, but not to decide whether the accused was guilty. The onus of producing adequate evidence lay with the prosecuting attorney and with the States which had laid the charge. It would be a confusion of functions to empower the investigating authority to compel attendance of witnesses and call for the production of further evidence.

58. Should the Committee reject that point of view, he would prefer the Syrian suggestion that the matter be regulated not in the statute of the court, but by a

special convention, or the Danish representative's suggestion to leave it to the court to issue such warrants at the request of the investigating authority.

59. Mr. COHN (Israel) recalled that, even if the statute of the court granted the court or its subsidiary organs such powers, no obligation would thereby rest on States. The court would have the power to call for witnesses and further evidence, but no State would be under the obligation to ensure execution of the court's desire. While the powers of the court would be embodied in the statute, the undertaking to assist the court could be entered into by States only by means of special conventions.

60. The question of the presence of witnesses arose at that moment only in connexion with the witnesses of the accused. His delegation was in favour of according the accused the right and the physical possibility of bringing evidence before the court, but did not consider that the court should have the power to compel his attendance. The observations of the Syrian representative, which he had perhaps misinterpreted, appeared to link the question of compelling the presence of witnesses with that of compelling the presence of the accused. The two questions were, however, entirely separate, and the investigating authority should merely have the right to issue a notice to the accused inviting him to be present at the enquiry, if the latter so desired.

61. Mr. GORDON (United Kingdom) asked whether the observations of the Israeli representative were based on the supposition that a public prosecutor would be performing his functions at that stage in the proceedings.

62. Mr. COHN (Israel) replied that that was so.

63. Mr. MAKTOS (United States of America) suggested that the Committee should take two separate votes, the first on the question of the power of the investigating authority to compel the attendance of witnesses and the production of evidence, and the second on the question of the presence of the accused.

It was so agreed.

The Committee rejected by 3 votes to 2 with 8 abstentions, the proposal that the investigating authority should have powers equivalent to those of the court to compel the attendance of witnesses and the production of evidence.

64. Mr. MAKTOS (United States of America) did not consider that the presence of the accused at the preliminary enquiry was at all necessary, It would be the duty of the prosecuting authority to collect serious evidence and to satisfy itself, before raising the matter at all, that there was not only a prima facie case, but also a reasonable possibility of ultimate conviction of the accused. Were that not so, it would be the duty of the investigating authority to refrain from bringing an action.

65. The defendant would not suffer as the result of his not appearing before the investigating authority, since any harm to his reputation would in fact already have been done by the mere mooting of the accusation. If he were to be present, the process would cease to be a screening one, and would become a kind of pre-trial, a trial of the issue, though not of the defendant. Some countries made no provision at all in their legal system for any preliminary investigation procedure, and did not consider that the accused suffered any hardship thereby. Indeed, the representative of the Netherlands, whose views were at the other extreme to those of the representative of Israel, thought that the whole procedure of the board of inquiry could be dispensed with. The argument in favour of an investigating authority was that it would expedite procedure. If, however, the accused were invited to produce evidence before it, procedure would be considerably protracted.

66. Mr. COHN (Israel) regarded the right of the accused to be heard at the preliminary stage as a kind of constitutional right. In point of fact, the accused hardly ever made use of that right. It would, in fact be unwise, from a tactical point of view, for the accused to speak at that stage unless he had an absolutely water-tight case to present, because he would thereby be disclosing his defense to the opposite party, whereas by keeping silent he could take his opponent by surprise at the trial. He must, however, have the right to appear if he so wished, if only in order to ascertain the nature of the evidence to be produced against him.

67. The CHAIRMAN invited the Committee to vote on the Israeli proposal that:

"The investigating authority shall, before issuing any such certificate, give the accused reasonable opportunity to be heard and to adduce such evidence as he may desire".

The Committee adopted the Israeli proposal by 6 votes to 2 with 5 abstentions.

Articles 31 to 34 of annex II (A/AC.48/1, A/AC.48/L.8)

68. Mr. SÖRENSEN (Denmark) speaking as Rapporteur, said that the Committee had completed consideration of the question of a board of inquiry or investigating authority. The next matter was the question of indictment, set forth in articles 31 to 34 of chapter III of annex II to the memorandum submitted by the Secretary-General (A/AC.48/1). He suggested that the Committee should consider, in that connexion, article 1 of the proposal submitted by the Israeli delegation (A/AC.48/L.8).

69. Mr. COHN (Israel) pointed out that article 1 of his delegation's proposal which was the only one left, the others having been disposed of by the decisions just taken by the Committee, was not really intended as an amendment to the articles of the draft statute, but rather as an addendum which should be discussed before them, since it dealt with the question of a prosecuting authority, which arose before any question of indictment.

70. He would not claim any rights of authorship since his proposal was in fact based on the Draft Convention for the creation of an International Criminal Court of 1943.[1] The fundamental idea underlying his proposal was that the prosecuting authority must be entirely distinct from the State interested in bringing the action, and should approach the question of whether to prosecute or not from a legal and semi-judicial point of view and not from a partisan standpoint. Article 34 in annex II, which, it might be pointed out in passing, contained the rather doubtful phrase "sustaining the accusation before the court", specified that the party instituting the proceedings should be responsible for conducting the prosecution. According to his proposal, however, the interested party would not be responsible either for conducting the prosecution or even for appointing the prosecuting authority. The only right it should possess was that provided for in the last paragraph of article 1 of his proposal namely, to appoint a qualified legal officer to assist the procurator general with his advice and to act under his direction in that particular case.

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1) Article 21 of that Draft Convention (A/CN.4/7/Rev.1, p. 101.)

71. In making his proposal, he had been inspired by the tradition prevailing in countries observing Anglo-Saxon law to the effect that the prosecutor had a discretionary right, and was not simply a kind of machine for ensuring the condemnation of the accused. Their tradition was that the prosecutor should be just and should see that the accused and his counsel obtained a fair hearing. He regarded as essential that there should be an impartial prosecutor who would see that justice was being done before the case was even brought before the investigating authority. If he should decide there was no case to bring before the court, the accused would go free. The prosecutor should therefore be of the highest possible standing, preferably as high as that of a judge of the court itself, and should enjoy the same diplomatic status as the members of the court. He could agree that his proposal be amended to the effect that the procurator general be elected by the same organ as would elect the members of the court.

72. Mr. LIANG, Secretary to the Committee, remarked that the phrase "sustaining the accusation before the Court" was a not particularly happy translation of the original French "soutenir l'accusation devant la Cour", and suggested that the Committee should be guided in its discussion by the French text.

73. Although the office of procurator-general was unknown in Anglo-Saxon law, it did exist in Chinese law. The functions of that officer were, however, entirely distinct from those of the court, and he did not know of any country where the procurator general was appointed by the court. He therefore welcomed the Israeli suggestion to amend article 1 accordingly.

74. The CHAIRMAN said that the Committee would consider the question of establishing a prosecuting authority and that of indictment at the following meeting.

The meeting rose at 5 p.m.