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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE FOURTEENTH MEETING

held at the Palais des Nations, Geneva,
on Friday, 17 August 1951, at 10 a.m.

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Present:

Chairman: Mr. MORRIS

Members:

Australia	Mr. WYNES
China	Mr. WANG
Cuba	Mr. VALDES ROIG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. PINTO
Iran	Mr. KHOSROVANI
Israel	Mr. COHN
Netherlands	Mr. RÖLING
Pakistan	Mr. MUNIR
Syria	Mr. TARAZI
United Kingdom of Great Britain and Northern Ireland	Mr. JONES
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.8, A/AC.48/L.9)

Establishment of a procurator-general

1. The CHAIRMAN asked the Committee to continue its discussion on the Israeli proposal for the establishment of a United Nations procurator general (A/AC.48/L.8).

2. Mr. SÖRENSEN (Denmark) said that the ideal envisaged by the Israeli representative of a fair-minded and impartial public prosecutor, whose sole endeavour it would be to ensure that the guilty should be convicted and the innocent cleared of any imputation of guilt, was extremely impressive, and corresponded to the Danish idea of a prosecutor. As a practical proposition, however, the amendment failed to take into account the fact that in criminal jurisdiction international conditions were very different from national conditions. It was a commonplace that international development was far less advanced than national development. The Committee had earlier recognized that an international criminal court might not have much to do for long periods at a time, and the question accordingly arose whether it would be necessary for it to have such permanent machinery as was implied by the appointment of a procurator general. In his view, it would be preferable to seek other methods of achieving the same object.

3. The implication of article 34 in annex II to the Secretary-General's memorandum (A/AC.48/1) was that the complainant, whether a United Nations organ or a State, should appoint an ad hoc prosecutor. There was no reason to assume that such a prosecutor would be far removed from the ideal postulated by the Israeli representative. He would be appointed ad hoc only in as much as he would have a case to prosecute before the international criminal court; for he would probably have done the same kind of work in his own country, and might well be an attorney general or some such person whose functions corresponded exactly to what the Israeli amendment sought to guarantee. Merely to appoint a permanent

prosecutor would not necessarily ensure the element of restraint emphasized by the Israeli representative. If the permanent prosecutor were to find himself without anything to do for a period of months, or even years, he might well become as anxious to secure a conviction as any ad hoc prosecutor.

4. Denmark, like other countries, had been attempting to put a brake on the multiplication of United Nations organs, and it would view at least with concern the creation of any new machinery where alternative methods were available. It would thus approve of the establishment of an international criminal court, but hardly of the creation of a permanent prosecuting authority. In any case, the conception of an ad hoc prosecuting authority was not foreign to legal theory. In most countries, the criminal procedure in the early stage of the development of legal institutions had been that the victim of an offence himself brought a complaint before the court; the public prosecutor appeared only at a relatively late stage in development. Such an analogy was obviously imperfect, but he thought that it would be no anachronism if, at the present early stage of international criminal jurisdiction, a prosecuting authority were appointed ad hoc instead of on a permanent basis. In his own country, even at its present stage of development, prosecutors were appointed ad hoc for important cases, as, for example, the impeachment by Parliament of a high official committing an offence in the execution of his duties. The type of case that would come before an international criminal court would resemble such an impeachment, and an ad hoc prosecutor would be as suitable as, if not more suitable than, a permanent prosecuting officer.

5. For the reasons he had outlined, he opposed the Israeli proposal. It seemed to him that article 34 of annex II, or a similar provision, would be adequate; the wording might be changed, if required.

6. Replying to points raised by the CHAIRMAN, he said that the question of whether an ad hoc prosecutor should be chosen by the international criminal court would not arise if his view was accepted, as either a United Nations organ or a State would appoint the prosecutor, according to the decision reached regarding the bodies empowered to bring cases before the court. He had no strong views on whether deputies should be appointed; that problem could be left either to the

State or the United Nations organ. With regard to the suggestion in the last paragraph of article 1 of the Israeli amendment, the question of an assisting officer appointed by the State concerned to assist the United Nations procurator general would not arise if the State were to appoint a prosecutor. If it were decided that a United Nations organ should appoint the prosecutor, however, such a suggestion might well be adopted.

7. Mr. RÖLING (Netherlands) felt that the Israeli proposal, while excellent for a national court, would not be feasible for an international one. A permanent public prosecutor for the international criminal court would have an extremely high standing, and would obviously have to be paid a considerable salary, but for long periods he might have no work to do. In a new international field like that of criminal law, the assumption should not be made that a permanent officer of the court would use the same traditional procedures as he would in a given State. The great danger, however, lay in the tremendous power that it was proposed to give to a permanent prosecuting authority.

8. The Israeli representative had said that if the General Assembly decided to bring an individual before the court for trial, the procurator general would have the power to decide not to commit that individual for trial.[1] In other words, one person would be in a position to oppose the declared opinion of the sixty nations forming the United Nations. No one person was fit to bear the burden of acting counter to world opinion on the mere ground of inadequate evidence or undesirability of committal. Moreover, a permanent procurator general would always be a national of some State, with his own special loyalties and with views necessarily biassed in certain respects. Cases could easily be visualized in which it would not be possible to have absolute confidence in his attitude.

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1) Summary Record of the 13th meeting (A/AC.48/SR.13) paragraph 71.

9. For those reasons, he agreed with the Danish representative that the appointment of a permanent prosecuting authority would be undesirable. An ad hoc prosecutor would be all that was required, and his job would be solely to prosecute; the international criminal court would apply the law.

10. Replying to points raised by the CHAIRMAN, he said that an ad hoc prosecutor, if appointed by a United Nations organ, could decide whether or not to appoint deputies. The appointment by the State concerned of a qualified legal officer to assist the prosecutor seemed to him to be only a minor procedural detail, but if the Committee decided in favour of a permanent prosecuting authority, he agreed that a State should have the right to appoint one.

11. Mr. MAKTOS (United States of America), dealing with the objections to a permanent prosecuting authority, said that the question of the scale of emoluments of such a person was not of great importance, as it would presumably be met out of contributions from all the sixty Member States of the United Nations. If it was a valid objection that a permanent prosecutor might have no work to do for long periods, there was the equally valid objection to an ad hoc prosecutor that, if he should be appointed by General Assembly resolution, a case might be brought before/the court when the General Assembly was not sitting, so that it would be impossible to appoint the ad hoc prosecutor until the General Assembly was in session, possibly months later. Again, it was against the principles of national law that the complainant should also be the prosecutor; in his view, a prosecutor should always be a neutral person.

12. With regard to the claim that a permanent prosecutor would have power to overrule a decision of the General Assembly, he felt that no person of the standing contemplated in the proposal would attempt to go against such a decision. The members of the International Law Commission, for example regarded the mandate of the General Assembly as binding, and had at no time considered the question of whether it should, or could, be disregarded.

13. Considering the question as a whole, he felt that a permanent prosecuting authority would be preferable, in that it would ensure continuity of office and a greater interest in the court than that which would be shown by an ad hoc prosecutor. He felt, however, that a permanent prosecutor might well be chosen, not by the court itself, as the Israeli delegation proposed, but by the Secretary-General of the United Nations.

14. Replying to a point raised by the CHAIRMAN, he said that prosecuting authority appointed by a State would obviously not be impartial. The objection of the Netherlands representative that a permanent public prosecutor might be biassed could be met if it were decided, as in the case of the judges of the court itself, that if the public prosecutor were in any way interested in a case he should not prosecute. In such a case the Secretary-General, for example, might be asked to appoint an alternative prosecutor. The United Nations had, after all, appointed commissioners with international responsibility over refugees, for example, and had had confidence in them.

15. Mr. WANG (China) pointed out that the Committee had agreed that an investigating authority should be set up. If it also decided in favour of a prosecuting authority, it seemed that there would be some duplication of the screening process. What would be the dividing line between the powers of the prosecuting authority and those of the investigating authority?

16. Mr. PINTO (France) agreed with the United States representative that it was necessary to set up a permanent prosecuting authority, but added that, in his opinion, it would be premature to give the title of United Nations procurator general to the incumbent of that office. The Committee had not even decided yet whether the Court was to be linked with the United Nations.

17. There was, however, nothing to prevent the Secretary-General of the United Nations being asked to appoint a procurator general, whatever the subsequent relations between the court and the United Nations might be.

18. Mr. PINEYRO CHAIN (Uruguay) considered that the question under discussion could be summarized as follows: who was to be responsible for drawing up the charge, the plaintiff himself or an impartial authority?

19. Not all domestic legal systems refused to allow the plaintiff to act as prosecutor. In Uruguay, the plaintiff and the prosecutor were, in some criminal cases, such as press offences, one and the same person. That exceptional provision of domestic law might be applied on the international level.

20. Others, following a different line of thought, had proposed that the role of the plaintiff should be limited to the presentation of the complaint, and would leave it to a third party to draw up the charge. However, the dangers inherent in making one man responsible for deciding whether to prosecute or not, had been very rightly stressed by a number of representatives. The manifold guarantees with which the Committee had already decided to surround the court clearly showed the necessity for redoubling precautions. It would, therefore, appear anomalous to allow the institution of international legal proceedings to be dependant on the decision of one man.

21. Should such a course be adopted, it would at least be necessary to provide a check by stipulating that the opinion of the procurator general should not be final. Precedents for such a course were to be found in some domestic legal systems. In Italy, for instance, the prosecuting authority had always to be heard, but its decisions were not conclusive. In that event it would be a question of a cumbrous and purely advisory institution, which, however useful, would not be indispensable.

22. For those reasons, he agreed with the representatives of Denmark and the Netherlands that the prosecuting authority should be the agent of the plaintiff. If the complaint emanated from a United Nations organ, that organ should appoint the procurator general; if it were lodged by a State, the procurator general could, in order to avoid the danger of partiality, be appointed through the intermediary of the organ of inquiry.

23. In brief, his delegation considered that the prosecuting authority should be appointed ad hoc, in each individual case, by the organ lodging the complaint.

24. Mr. COHN (Israel) said that his proposal (A/AC.48/L.8) was based on the assumption that the international criminal court would be a permanent body; if it were to be ad hoc, there would obviously be no question of a permanent prosecuting authority. If it were decided that the prosecuting authority should be ad hoc, he would have no objection to it being appointed by the State concerned.

25. The Committee was endeavouring to draft a statute establishing an international criminal court. The court would be international, and would therefore deviate in procedural matters from the practice of national courts. Nevertheless, it would be a court, and a criminal court, not a United Nations organ vested with authority to imprison individuals. In modern times, courts were institutions equipped with the machinery of justice, and he submitted that a criminal court without a prosecuting authority would not be a court. The Danish representative had referred to the development of national criminal procedure relating to prosecution, and had drawn conclusions diametrically opposed to those which he (Mr. Cohn) would draw from the same premises. In the early stages of the development of criminal legal procedure, the victim had been the complainant, and admittedly some vestiges of that system remained, but later developments had tended to take the prosecution out of the hands of the victim and to place it in the hands of an impartial outsider: for the victim was primarily interested in revenge for the hurt suffered, not in upholding justice and the security of the State. In his view, the same considerations should apply in the case of an international criminal court: the prosecution should be in the hands, not of the victim, but of an impartial outsider.

26. The difficulties put forward by the Netherlands representative as an argument against the establishment of a permanent prosecuting authority all seemed to him capable of being solved. The powers of public prosecutor could be limited by express provision, although he did not think that such limitation would be necessary, for he agreed with the United States representative that the person appointed would necessarily be of high moral and intellectual integrity. Right of appeal could also be granted against a decision of the public prosecutor, either to the president of the court or to one or more judges. In his country a public prosecutor, although not appointed nor paid by the court, was nevertheless termed

an officer of the court, and it was incumbent upon him to ensure that the prosecution was fair and that the defence had full opportunity of conducting its case. While considering that it would be desirable that the procurator general for an international criminal court should be appointed by the court, he had no objection, if the Committee so desired, to his being appointed by the Secretary-General of the United Nations or by the General Assembly. But none of the objections put forward provided a sufficient reason for deciding against the creation of proper machinery for the court, part of which was a permanent prosecuting authority.

27. Turning to the Netherlands representative's criticism that the appointment of a procurator general would vest too great an authority in a single individual, he said that there was no reason why, if it were decided that a prosecuting authority should be established, that authority should not be a body rather than an individual. If the international criminal court had much work to do, clearly more than one person would be appointed to prosecute. If a procurator general was interested in any specific case, another prosecutor could be called upon. Expense and terminology were unimportant details, provided the general principle of the desirability of a prosecuting authority were accepted. He had already dealt with certain other criticisms in introducing his proposal at the 13th meeting and would not repeat those arguments.[1)]

28. The CHAIRMAN said that the first issue emerging from the discussion of the Israeli proposal was whether the prosecuting authority should be permanent or not. He put that question to the vote.

The Committee rejected the proposal for a permanent prosecuting authority by 7 votes to 4, with 3 abstentions.

29. Mr. KHOSROVANI (Iran), explaining his abstention, said that he was unable to vote on whether the prosecuting authority should be permanent or not

1) Summary Record 13th Meeting, (A/AC.48/SR.13), paragraphs 69-71.

until a decision had been reached on whether the international criminal court was to be permanent or not.

30. The CHAIRMAN said that the next question requiring a decision was who should be responsible for appointing the prosecuting authority.

31. On the suggestion of Mr. RÖLING (Netherlands), he put to the vote the question whether the complainant should be permitted to appoint the prosecuting authority.

The Committee agreed that the complainant should be allowed to appoint the prosecuting authority, by 6 votes to 5, with 3 abstentions.

32. The CHAIRMAN said that opinion was almost equally divided on the question of whether the complainant should appoint the prosecuting authority or not. It might be decided ultimately, as the result of later discussions, that the prosecuting authority should be appointed by some agency other than the complainant. He therefore called for a vote on whether, if that contingency arose, the international criminal court itself should appoint the prosecuting authority or not.

The Committee opposed the appointment of the prosecuting authority by the court, by 10 votes to 1, with 3 abstentions.

33. Mr. COHN (Israel) pointed out that whereas the Committee had decided that the prosecuting authority should be appointed ad hoc, it had not yet decided the preliminary question whether there should or should not be a prosecuting authority.

34. The CHAIRMAN said that article 34 of annex II raised that question by stating that the prosecution would be in the hands of the complainant. When that article had come up for discussion, the Israeli representative had put forward his proposal concerning the appointment of a procurator general. He thought that the Committee should now consider article 34 and decide whether the wording should be amended.

35. Mr. SÖRENSEN (Denmark), Rapporteur, considered that the Committee had disposed of the fundamental question of principle involved in the problem of a prosecuting authority. It seemed to him that what was now required was formulation of the Committee's decisions in an article for insertion in the draft statute. He proposed that that task be entrusted to the Drafting Sub-Committee, and that in the meantime, the Committee should begin the study of article 31 in annex II to the Secretary-General's memorandum.

It was so agreed.

Articles 31 and 32 of annex II (A/AC.48/1).

36. Mr. MAKTOS (United States of America) said that article 31 raised the question in whose name a case should be brought before the court. In his opinion, it should be brought in the name of the complainant.

It was so agreed.

The meeting was suspended at 11.20 a.m. and was resumed at 11.30 a.m.

37. Mr. SÖRENSEN (Denmark), Rapporteur, said that it seemed logical to follow the decisions with regard to the screening process, and with regard to who should deal with the prosecution by consideration of articles 31 and 32 of annex II to the Secretary-General's memorandum, since they dealt with the question of the form of the indictment, and the manner in which it should be brought to the notice of the accused. He personally regarded the rules in articles 31 and 32 as satisfactory, subject to possible minor drafting amendments.

38. Mr. MUNIR (Pakistan) explained that under the law of his country it was imperative that an accused should be informed not only of the facts constituting the crime with which he was charged, but also of the relevant rule of law under which those facts constituted an offence. With that consideration in mind

he proposed that article 31 be revised to read:

> "A case shall be brought before the court by means of an indictment which shall contain a succinct account of facts /and a statement of the law under which those facts constitute an offence, and, where the accused has not been present at the proceedings before the board of inquiry, shall be accompanied by a summary of the evidence oral and documentary, on which the accusation is based./ The indictment /together with the summary of evidence/ shall be deposited with the Registry."

39. Mr. COHN (Israel) supported the Pakistani proposal that the indictment should contain a statement of the law under which the facts constituted an offence, but could not agree that it should also contain a summary of the evidence on which the accusation was based. Since the accused would have the right to be present at the preliminary examination of his case, the prosecution should not be obliged, in the event of the accused failing to exercise his right to be so present, to furnish him in advance with the documents supporting the charge, whether in full or in summary form.

40. He therefore felt that article 31 should be amended to provide that the indictment include not only a concise statement of the facts constituting the offence and a reference to the law under which the accused was charged, but also the names of witnesses as well as a general description of the documents to be brought in evidence against him.

41. The CHAIRMAN gathered that in essence the Pakistani and Israeli proposals were similar, the difference being that, whereas the former would include a summary of the evidence on which the charge was based, the latter would merely include the names of witnesses and a general indication of the documents to which the accused would have access.

42. Mr. COHN (Israeli) considered that the last sentence of article 31 was superfluous, and could be deleted. As to article 32, he believed that, since there would be certification by the investigating authority, the phrase: "after due authorization by the court" could also be deleted. Again, while it was

undoubtedly essential that the indictment should be brought to the notice of the accused, he believed it advisable to make it clear in that article that the trial of the accused could not be opened unless the latter had been given due notice and had had ample time to prepare his defence. Such a wording as the following might be adopted:

> "The court shall not proceed with the trial unless it is satisfied that the accused, after service upon him of the indictment, has had sufficient time to prepare his defence."

43. The CHAIRMAN observed that while largely formal amendments had been proposed to articles 31 and 32, no objection had been taken to the fundamental rules that a case should be brought by means of an indictment and that the accused should be informed of the facts constituting the crime and of the law under which those facts constituted that crime.

44. Mr. PINTO (France) pointed out that, according to the Israeli representative's proposal, the charge should include a list of witnesses. But article 36 in annex II also referred to the hearing of witnesses. It reproduced the terms of article 32 of the Convention for the Creation of an International Criminal Court, opened for signature at Geneva on 16 November 1937[1)], in the preparation of which Mr. Basdevant, the President of the International Court of Justice, had taken part, as representative of France.

45. Rather than include in the charge a list of witnesses that might have to be amended subsequently, it would appear preferable to adhere to the provisions of article 36.

46. Mr. ROLING (Netherlands), in support of the point made by the French representative, recalled how, at the Nuremberg and Tokyo trials, the prosecution had frequently been unable to present all the documentation and names of witnesses at the beginning of a case, but had been obliged to continue to collect evidence during the actual course of the trials. Therefore, if the list of witnesses and the description of documents endorsed on the indictment was not to be exclusive he considered that the indictment should consist only of statements of the facts and of the law.

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1) See document A/CN.4/7/Rev.1, appendix 8.

47. The CHAIRMAN believed that the intention behind attaching a list of witnesses and documents to the indictment was that the accused should be afforded an opportunity of interviewing the witnesses and of examining the documentation before the witnesses were summoned to appear at the trial or the evidence was brought against him in court. On the other hand, he could quite understand the difficulties a prosecutor might encounter in providing the accused with complete information during periods of confusion following major wars. Nevertheless, at some point or other in the proceedings the accused would have to be told exactly what he had to face in the way of witnesses and documentary evidence, and it would accordingly be necessary to make suitable provision in the statute establishing the court.

48. Mr. COHN (Israel) wished to emphasize that the listing of witnesses in the indictment might in certain circumstances be particularly advantageous to the accused, for it might well be that some of those witnesses would not be called by the prosecution, but would be of service to the defence.

49. Referring to the French representative's statement, he submitted that article 36 dealt with a different problem. Its purpose was to invest the court with power to summon witnesses, whereas article 31 was concerned with what information should be given to the accused with regard to witnesses and documentary evidence.

50. In the light of the Chairman's remarks, he believed it might also be desirable to give the court the power to amend the indictment at any time and on such terms as it might deem just. Not only might additional witnesses become available in the course of the trial, but some of the charges might also require amendment in order to avoid an acquittal, for example, becuase of some technical error in the description of, say, the time or place at which a crime had been committed.

51. Replying to the CHAIRMAN, he agreed that the court should not be permitted to expand the indictment beyond its original scope.

52. Mr. JONES (United Kingdom) enquired whether the Israeli representative intended that the whole file of evidence should be placed at the disposal of an accused person, or only copies of depositions made by witnesses for the purposes of the preliminary investigation of the case. The former procedure would give rise to considerable difficulties, for under English law it was a rule that until witnesses had given evidence on oath the accused was not entitled to access to information in the possession of the prosecutor, except, of course, for any statement which the accused himself had made. On the face of it, such an arrangement might appear unjust, but it had to be remembered that the prosecutor was not entitled to ask the accused for the names of the witnesses he proposed to call. He would therefore ask at what stage the accused would be given such full information?

53. It might also be of interest to recall that during the second World War, as an emergency measure, evidence had been taken by statutory declaration in the United Kingdom. That had represented the first occasion in the legal history of the United Kingdom that evidence had been taken and used without the accused being present and being given an opportunity of defending himself.

54. Mr. COHN (Israel) said that the United Kingdom representative must have misunderstood his intention. He wished the evidence to be entirely divorced from the indictment, and that not even a summary of the evidence should be attached to it. The indictment would be endorsed only with the names of witnesses and with a general description of the documentary evidence to be adduced before the court, such as, for instance, the titles of treaties and descriptions of contracts. Had the Committee not agreed to set up a preliminary investigating authority, he would have supported the proposal for the inclusion in the indictment of a summary of evidence, but the Committee's decision ruled out the need for the provision of such information to an accused.

55. Mr. MAKTOS (United States of America) said that he had handed to the Secretariat an alternative text for article 31. The effect of that proposal was that the indictment should be drawn up by the prosecuting authority on the

basis of the findings of the investigating authority, and that it should consist of a plain statement of each charge, together with a statement of the facts of the case and of the law under which the facts constituted an offence, the approximate date and place of the commission of that offence and an account of the participation therein of each person charged under the indictment. During the trial an indictment might be amended by leave of the court, provided the defence was afforded a reasonable opportunity of taking cognizance of such amendments.

56. In document A/AC.48/L.9, which had not yet been distributed but which contained a number of amendments to annex II submitted by the United States delegation, there also appeared a proposal to amend article 32 to read:

> "A copy of the indictment and of any documents lodged with the indictment, together with any amendment, translated into a language which each defendant understands, shall be furnished to him at such time before the trial as will provide a reasonable opportunity for consultation with counsel and for preparation of his defence."

57. He believed that the last phrase of that text would meet one of the points made by the Israeli representative.

58. Mr. COHN (Israel) said that he had contemplated amendment of the indictment by the court, not by the prosecutor. While he preferred that any such amendment should be left to the court, he would not object to a proposal that it be effected by the prosecutor subject to the approval of the court, although he was still somewhat apprehensive lest a prosecutor might be tempted to exploit such an opportunity.

59. The CHAIRMAN said that the broad question before the Committee was what the indictment should contain, and what notification should be given to the accused. Many ideas had been formulated and, in the light of all that had been said, he suggested that the best course would be to request the Drafting

Sub-Committee to prepare a questionnaire bringing out the various points that had been made, in order to enable the Committee to take its decisions rapidly.

60. Mr. MUNIR (Pakistan) considered that, as there was general agreement that an accused should be given notice of the facts and of the law, and some idea of the evidence on which the charge was based, as well as an opportunity of preparing his defence, there was no reason why the Drafting Sub-Committee should not be left to prepare a text providing such guarantees.

61. Mr. RÖLING (Netherlands) felt that the members of the Committee should bear in mind the advisability of refraining from introducing into its discussions specific consideration of the procedures adopted in their own countries, for, as experience at the Tokyo trial had shown, the work of the court could suffer considerably from discussion on the significance of technical terms, usually only in one particular system of law.

It was agreed to refer the matter to the Drafting Sub-Committee in the manner suggested by the Pakistani representative.

62. Mr. PINEYRO CHAIN (Uruguay) considered that, among other things, the Drafting Sub-Committee should be instructed to make it clear that, when the case came before the court, proceedings would have to start all over again, apart from preliminaries, which would already have been dealt with. With a view to avoiding any suggestion of collusion, as between the trial itself and the preceding phase, the court should hear all the evidence. The terms of the indictment would be determined later.

63. Referring to article 32 in annex II, he said that, in his opinion, the accused should be notified of the indictment by the court, and not by the party instituting the proceedings. He proposed that change with a view to drawing a clear cut distinction between the preliminary and the final phases of the procedure. In the preliminary phase the original request by the plaintiff would be communicated to the parties. In the final phase, the court, after consideration, would draw up the indictment without necessarily following the terms of the complaint. That was the meaning of the Israeli representative's statement, that the indictment might have to be amended. When the evidence had been assembled, the trial proper would start.

64. In his opinion, the indictment should include the following: the facts; the rule of law applicable; and a statement of the evidence. That was to say, all the factors on which the judgment of the court would be based.

65. He hoped the Drafting Sub-Committee would take into account the points he had made.

66. Mr. RÖLING (Netherlands) recalled that, after the defeat of Japan, the Japanese official archives had been taken over by the Occupying Powers, with the result that persons accused before the Tokyo Tribunal had had no access to them and had consequently been unable to exercise their acknowledged right of producing such parts of that documentation as they wished. The prosecution had stated that an accused could obtain copies of particular documents, but that "fishing expedition" had not been allowed. To his mind, therefore, it would be desirable to provide in the statute that the court should be authorized to make sure that an accused was given an opportunity of exercising the right to produce evidence, even more than that the court should have the duty of assisting the accused.

67. The CHAIRMAN gathered that the Netherlands representative wanted the Drafting Sub-Committee to prepare an appropriate article covering the point he had just made.

68. Mr. TARAZI (Syria) suggested, with reference to article 32 in annex II, that the Drafting Sub-Committee substitute the words "by the Procurator General" for the words "by the party instituting the proceedings," and add the words "and the State of which the accused is a national."

69. The CHAIRMAN agreed that the indictment should also be brought to the notice of the State concerned.

70. Mr. MAKTOS (United States of America) said that he would deprecate the inclusion in the statute of any provision whereby a witness could only be called if his name appeared in the list of witnesses endorsed on the indictment.

71. The CHAIRMAN agreed, since the aim was to see that whatever procedure was adopted it was not unfair to the accused.

72. Mr. WANG (China) observed that notice would presumably be served on the accused only when the enquiry had been completed. During the period of investigation, only such evidence and such witnesses would be heard as were necessary to determine whether there was a prima facie case against the accused, and not all the evidence and witnesses available. It was only, therefore, such limited information that could be afforded to the accused.

73. The CHAIRMAN agreed with the Chinese representative. If, as the trial went on, further evidence was produced, the accused should be entitled to know of its existence so that he could, if he wished, have access to it.

Article 33 of annex II (A/AC.48/1)

74 Mr. SORENSEN (Denmark), Rapporteur, pointed out that the subject matter of article 33 had already been discussed by the Committee [1] and that a draft article on the basis of that discussion had been circulated informally, and would come up for consideration by the Committee at a later stage. He therefore proposed that the Committee pass on to article 35.

It was so agreed.

Article 35 of annex II (A/AC.48/1)

75. Mr. SORENSEN (Denmark), Rapporteur, explained that article 35 dealt with the question of guaranteeing the accused a fair trial. Perhaps the Secretary-General's draft was not sufficiently comprehensive and what was meant by a fair trial might require to be more fully defined. For one thing, a minimum guarantee would be the translation of documents and oral proceedings where the accused was not able to follow them in the language or languages used by the court.

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1) Summary Records of the 9th meeting (A/AC.48/SR.9), paragraphs 96 et seq., and of the 11th meeting (A/AC.48/SR.11), paragraphs 1 to 87.

Another essential would be the right of an accused and of his defence to cross-examine witnesses called by the prosecution. There were undoubtedly many other considerations which those more familiar with criminal court procedure would be able to develop more effectively than he could.

76. In working out such problems, it would be well to bear fully in mind that if, as was to be assumed, the court were established as a permanent body, the drafting of many of its rules of procedure could be left to the court, and the rules to be included in the statute of the court could be confined to those providing the necessary guarantees.

77. Mr. MAKTOS (United States of America) agreed with the Rapporteur that the overburdening of the statute with detailed rules should be avoided, and that it would be sufficient to provide rules offering the necessary minimum guarantees. He then referred to the proposal submitted by the United States delegation (A/AC.48/L.9), which contained certain amendments to annex II to the Secretary-General's memorandum, and, as it had not yet been distributed, read out articles 35, 36 and 36A contained therein. He explained that those articles dealt with the questions of counsel for the defendant, of evidence and witnesses, and of self-incrimination respectively, and all three were concerned with minimum guarantees to accused. He believed they also covered certain suggestions that had been made in the course of the discussion.

78. Mr. COHN (Israel) referred to the suggestion in paragraph 2 of article 35 as drafted by the United States delegation, in which it was suggested that the function of counsel for the defence might be discharged by any person specially authorized by the court to undertake such a function, and wondered whether it would be wise to leave the door open for all sorts of experts in international criminal law who might, for instance, be military men or politicians, to exercise such a function.

79. Mr. RÖLING (Netherlands) said that he would not wish to preclude the possibility of permitting the defendant to be assisted by a military expert, who might, in a particular case, be better equipped than any ordinary professional attorney to assure a defence. In that connexion, he believed that the court would take steps to prevent any abuse by a person who had been specially authorised to exercise the function of counsel for the defence.

80. Mr. PINTO (France) said that the United States representative's suggestion that only professional attorneys or other persons approved by the court should be entitled to act as counsel before the court was in line with those made by other members for the further restriction of the categories of possible counsels.

81. In his opinion, it would not be advisable to impose too great restrictions on the exercise of the functions of counsel before the court. The term "[any] counsel professionally qualified" was open to misinterpretation and might appear more restricted to continental than to United States lawyers. In the United States of America anyone who had been admitted to practice as an attorney retained that right, even if he were no longer active in the profession. In some other countries, on the other hand, the right to act as counsel lapsed through non-usage; only practising members of the profession could act as counsel.

82. In his opinion, the right to act as counsel before the court should be extended to, among others, all lawyers acting as magistrates or professors of law and to officers of the Advocate-General's Department. The accused should not be unduly restricted in his choice of counsel.

83. Mr. MAKTOS (United States of America) drew attention to the third provision in the United States draft for article 35, to the effect that, where the interests of justice so required, the court should assign to the accused counsel to be paid by the court, the idea being that a defendant might refuse to engage the services of counsel.

84. Mr. WANG (China) wondered whether it would be possible to impose counsel on a defendant.

85. The CHAIRMAN believed that it would be impossible to do so.

86. Mr. COHN (Israel) hoped that the Committee would agree to the deletion of the first sentence of article 35 in annex II reading: "The accused person shall have the right to a fair trial". The discussion appeared to have brought out that such a provision was unnecessary. If need be, however, he would explain in detail why he considered that that sentence should be deleted.

87. Mr. PINTO (France) recognized that it would be possible to devote a separate article to the concept of "fair trial", contained in the first sentence of article 35. Although it was under no obligation to draw up a detailed code of procedure, the Committee should lay down, in general terms, the principle of an impartial trial, and provide guarantees of adequate facilities for the defence. The enunciation of such a principle would make it possible to eliminate from the convention many matters of detail which should be left to the court itself to determine.

88. Should the committee attempt to draw up a more detailed text, members would be tempted to try and introduce into the statute provisions from the procedure followed in their own countries. In spite of differences in detail, however, the principle of a fair trial was respected in all civilized countries. The rule that the accused was presumed to be innocent was, for instance, recognized everywhere. The elaboration of detailed rules was therefore a purely technical problem.

89. Briefly, it was, in his opinion, sufficient to enunciate the principle in general terms and state that it was for the court to decide the methods of application.

90. Mr. LIANG, Secretary to the Committee, agreed to some extent that the terms of article 35 in annex II might be considered somewhat summary. That, however, did not resolve the question of whether or not it should be provided that the accused should have the right to a fair trial, and on that point he agreed with the French representative. Again, he saw no reason why the defendant's choice of counsel should be restricted. It would be noted that there was no such limitation imposed in the rules relating to the International Court of Justice. The international criminal court would be applying new and developing fields of international law and it would be undesirable, therefore, to limit the choice of counsel.

The meeting rose at 1.10 p.m.