



Dual Distribution

COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE SEVENTEENTH MEETING

held at the Palais des Nations, Geneva,
on Monday, 20 August 1951, at 3 p.m.

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memorandum (continued)

Present:

Chairman:

Mr. MORRIS

Members:

Australia

Mr. WYNES

Brazil

Mr. AMADO

China

Mr. WANG

Denmark

Mr. SÖRENSEN

Egypt

MOSTAFA Bey

France

Mr. de LACHARRIÈRE

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. MAKTOUS

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.9, A/AC.48/L.1)

1. The CHAIRMAN invited the Committee to examine the proposal made by the Netherlands representative at the 16th meeting for an additional minimum guarantee of fair trial worded as follows:

"If so requested by the accused, the Court shall assist the accused in obtaining evidence pertinent to the issues involved."1)

2. Mr. de LACHARRIERE (France) said that he preferred the procedure for summoning witnesses laid down in article 36 of annex II in the Secretary-General's memorandum.

3. He was opposed to article 36 in the United States proposal (A/AC.48/L.9) not because he felt bound to defend a procedural rule which applied in continental law but on substantive grounds.

4. According to United States criminal procedure only the parties were entitled to summon and question witnesses, the sole task of the judge being to disallow questions or statements extraneous to the case. But under the continental system, it was the judge who called witnesses, although he did so from a list previously prepared by the parties, and from which he could remove names which he deemed to be unnecessary. It was also the judge who questioned the witnesses at the request of the parties. There was therefore no great difference between the two systems except in form. However the continental system did give the court the right to call witnesses or experts whose names had not been listed by the parties to the case.

5. As the representative of Uruguay had pointed out at the previous meeting²⁾, it would appear to be very important to leave the court free to collect certain evidence not voluntarily produced by the parties.

1) See Summary Record of the 16th meeting (A/AC.48/SR.16), paragraph 76.

2) Ibid, paragraphs 64 to 66.

6. While the task of the judge in a civil case was to arbitrate as an onlooker between the parties, continental law allowed the judge to call witnesses or experts in criminal cases. It would be advisable to grant the judge the same right on the international plane, since the parties might deliberately withhold certain evidence from him owing to the political nature of a case. The continental system whereby the judge called witnesses, either at the request of the parties or on his own initiative, therefore had a real advantage.

7. The adoption of article 36 in annex II, which accepted that system, would remove the need for the additional safeguard suggested by the Netherlands representative.

8. Mr. JONES (United Kingdom) thought that article 36 of annex II to the Secretary-General's memorandum was germane to the issue raised by the Netherlands proposal. It seemed to him that the first sentence of that article was irrelevant, as the investigating authority or board of enquiry to be set up would summon and hear the prosecution witnesses, and those witnesses would automatically be heard by the trial court. As for the second part of that article, it was the inherent prerogative of any court to call for any evidence it required to clarify any point arising during the trial. That part also seemed superfluous.

9. The CHAIRMAN thought that the Netherlands proposal was intended to cover a situation where an accused person was unable to procure evidence, perhaps because he was not fully aware of what such evidence consisted, or of where it was to be found. If the proposal were adopted, the court would be empowered to order investigations with a view to enabling such evidence to be brought before it.

10. Mr. RÖLING (Netherlands) pointed out that his proposal related not only to witnesses and experts, but also to documents. Provision had been made in the Tokyo Charter for the Tribunal to give such aid as an accused might require, upon his making application in writing for the production of specified witnesses or documents. But there had been no provision whereby the accused could obtain assistance in his search for pertinent evidence. A case had occurred at Tokyo

in which a request for an investigation of the type referred to by the Chairman, and which he would describe as a "fishing expedition" had been rejected, in his (Mr. RÖling's) opinion unfairly. He felt, therefore, that the court should in all circumstances assist the accused, upon his request; special circumstances required special provisions, and the provision he proposed, while unnecessary in national criminal procedures, was necessary in international criminal procedure.

11. Mr. JONES (United Kingdom) thought that the powers of any criminal court could not go farther than ensuring that all facilities were made available to the accused, to give him reasonable access to any documents he might require to prepare his case. Beyond lay the realm of policy, where governments were entitled to refuse to produce documents for various reasons. The Netherlands proposal did not constitute an innovation in criminal law, for criminal cases were certainly known in which a request by the accused for permission to examine documents was refused for reasons of policy, for example in official secrets cases. In such cases the final decision lay outside the court.

12. Mr. WANG (China) found the Netherlands proposal excellent, but thought it would prove difficult to put into practice. The international criminal court would obviously not be in a position to compel governments to produce documents, whereas the Tokyo and Nuremberg Tribunals had had at their disposal the means of commanding that documents be produced. He agreed with the United Kingdom representative that the powers of the court in that respect would necessarily be limited.

13. Mr. MAKTOU (United States of America) likewise approved of the idea underlying the Netherlands proposal, but considered that its language was too vague, inasmuch as it confused the separate questions of what the court could do, and what obligations were to be imposed upon governments. In his view, either the proposal should be framed more precisely, perhaps by the Drafting Sub-Committee, or the whole problem should be left for settlement by future conventions. As it stood, he could not vote for the proposal.

14. Mr. RÖLING (Netherlands) said that the court could only be called upon to assist the accused to the extent of its ability to do so. Obviously there

would be limits to the court's powers in that respect; but there would be a greater chance of evidence being obtained from governments if the court were to ask for it. The accused himself would clearly have little weight in making such a request of a government, whereas the court would be a body of some prestige and authority.

15. Mr. MAKTOS (United States of America) said that in the light of the Netherlands representative's explanation, he was prepared to agree to his proposal, on the understanding that no obligation would be imposed on States to produce evidence if, for reasons of policy, they did not wish to do so.

16. Mr. de LACHARRIÈRE (France) appreciated the Netherlands representative's concern. The court must, of course, give the defence the assistance it needed for collecting all the necessary evidence. However, article 36 in annex II appeared to cover all requirements. Under the terms of that article, the court could have any evidence collected, either at the request of the accused or even of its own motion. Since, in addition, the court was obviously bound to collect all the evidence required to arrive at the truth, the Committee could well approve that article.

17. Mr. RÖLING (Netherlands) said that the experience of the Tokyo Tribunal had made it clear that a provision such as article 36 of the Secretariat draft was insufficient, for a court could in that event refuse to assist an accused person on the ground that it was not its business to do so. His proposal defined the obligation of the court more clearly than did article 36; the French representative's argument might be theoretically true, but in practice the position was otherwise. He therefore maintained his proposal.

18. The CHAIRMAN called for a vote on the Netherlands proposal, which if adopted, would be added to the Committee's list of the fundamental safeguards of the accused's right to a fair trial.

The Committee adopted the Netherlands proposal by 9 votes to none, with 4 abstentions.

19. The CHAIRMAN said that the Netherlands proposal would be referred to the Drafting Sub-Committee.

20. Mr. AMADO (Brazil) pointing out that he had abstained from voting because he had not been present during the discussion, said that his delegation nevertheless supported the Netherlands representative's thesis.

21. The CHAIRMAN invited the Committee to resume its discussion of article 36 of annex II to the Secretary-General's memorandum (A/AC.48/1), and the United States amendment (A/AC.48/L.9) to it.

22. Mr. MAKROS (United States of America) said that his delegation did not seek to replace any part of article 36 of annex II, but merely to add an introductory sentence. He proposed that the Committee first vote on his amendment. When that had been disposed of, the Secretariat's text might be considered, preferably in three parts: first, the first clause of the first sentence; second, the second clause of the first sentence; lastly, the remainder of the article.

23. Mr. RÖLING (Netherlands) said that if the Committee embarked upon a discussion of details of criminal procedure it would have so much work to do that it would be unable to complete the draft statute. In his view, procedural matters should be left to the international criminal court itself, and the Committee should restrict itself to the elaboration of the fundamental principles of a fair trial. He proposed therefore that the Committee take no action, either on article 36 of the Secretariat's draft or on the United States amendment thereto.

24. Mr. WANG (China) suggested that the words "and witnesses" be inserted after the word "evidence" in the first line of the United States amendment.

25. Mr. MAKROS (United States of America), while having no objection to the Chinese amendment, felt that the word "evidence" itself included witnesses.

26. His delegation had submitted its amendment to article 36 of annex II on the ground that it was essential to mention the fundamental rights of the prosecution and of the defence. Those rights were not a question of procedure, but were

guarantees of a fair trial to the accused. He could not agree, therefore, with the Netherlands representative that no action need be taken on his amendment; he was prepared, however, to agree that the ideas expressed in it to be included among the fundamental principles drawn up by the Committee.

27. Mr. de LACHARRIÈRE (France) re-affirmed his preference for article 36 of the Secretariat's text which followed the customary procedure of continental law, to the United States amendment, which was based on Anglo-Saxon procedure.

28. Mr. COHN (Israel) pointed out that the Committee had already decided that the accused should have the right to cross-examine and question any witnesses, within certain limits. The United States amendment, however, would give the prosecution the same rights. The questions that arose, therefore, were whether that part of the United States amendment concerning the accused was not superfluous, and whether the rights of the prosecution should be dealt with at the present stage of the discussion.

29. Mr. SORENSEN (Denmark), Rapporteur, thought that the constituent parts of article 36 in annex II had already been disposed of separately, so that the question at present before the Committee was no longer one of a fair trial. In those circumstances, it seemed to him that the Netherlands representative's proposal could be accepted and procedural details left to the court to determine.

30. The CHAIRMAN pointed out that if it were decided to leave procedural details to the court and to omit article 36 from the draft statute, the question would then arise whether the Committee should take a decision or not regarding the antithesis between continental and Anglo-Saxon law brought out by the French representative.

31. Mr. RÖLING (Netherlands) said that it seemed to him that if the Committee decided to adopt his proposal, the following provision would have to be inserted:

"The Court shall have the right to prevent any abuse of the afore-mentioned rights".

32. A list of the fundamental principles of a fair trial would have to be inserted in the draft statute, and the provision he now suggested would permit the court to rule out irrelevant issues.

33. The CHAIRMAN felt that such a provision was unnecessary, as its effect would seem to be to take away from the accused with one hand what had been given to him with the other.

34. Mr. COHN (Israel) agreed that article 36 of the Secretariat's draft and the United States amendment thereto were superfluous, although some such clause as article 41 G proposed by the United States delegation would be necessary.

35. Mr. RÖLING (Netherlands) replying to the Chairman's criticism of his proposed additional provision, pointed out that unless it were adopted the guarantees given to the accused might be interpreted as being absolute. Moreover, if it were adopted, there would be no need to discuss article 41 G in the United States proposal (A/AC.48/L.9). However, if it were felt that it was not the time to consider his amendment, he would not press it.

36. Mr. MAKTOU (United States of America) was prepared to withdraw his amendment to article 36, on the understanding that the rights it gave to the accused would be maintained. With regard to the rights of the prosecution, he would later submit a proposal to cover the prosecution's right to present evidence, to cross-examine witnesses and to inspect documents and other evidence. He did, however, insist that the second clause of the second sentence of article 36 in annex II, that was, the words "even of its own motion" should be deleted, as they were contrary to his country's concept of criminal procedure.

37. Mr. de LACHARRIÈRE (France) considered the provision of article 36 of the Secretariat's draft which enabled the court to summon witnesses, whether at the request of the parties or of its own motion, to be most useful. That provision, which was a feature of continental legal systems, made it possible to compel the appearance of the witnesses summoned. Having been cited by the court, which was a public authority, they were subject in principle to penalties for non-compliance.

38. Under international law, the imposition of penalties scarcely seemed possible. However, there was reason to feel that witnesses would comply more readily with a summons issued by an international tribunal than with one issued by the parties.

39. The CHAIRMAN, explaining the Anglo-Saxon system of law, said that if the prosecution or the defence was unable to induce a witness to appear, it could request the court to issue a subpoena. The witness would then be compelled to make an appearance, just as much as if the court had summoned him in the first instance. In other words, the court had the inherent power to summon a witness at the request of either party. It might well be considered that there should be a specific provision conferring such power on an international criminal court.

40. Mr. de LACHARRIÈRE (France) said that the Chairman's explanations showed that the two systems could produce very similar results. Under the continental system, the parties submitted a list of witnesses to the court, and the latter summoned those wanted. Under the Anglo-Saxon system, it was the parties themselves who summoned witnesses. In the event of any of them failing to appear, a subpoena, issued by the court at the request of the party concerned, made it possible to compel the recalcitrant witness to attend. That procedure implied recognition of the power of the court with regard to the hearing of witnesses, and the Anglo-Saxon system coincided with the continental system in that respect. It could be said, therefore, that the parties were in both cases able, more or less, to ensure the attendance of the desired witnesses.

41. Furthermore, the option allowed to the court under continental law to refuse to hear certain witnesses very closely resembled the right granted to the court under Anglo-Saxon law of announcing that a particular question would not be put, or that a particular statement would be cut short. In practice, United States judges seemed to be much stricter about evidence which was not relevant to the actual substance of the case, and he could considerably circumscribe the giving of evidence by his use of "objection disallowed" or "objection sustained". On the other hand, in countries like France, where the continental system of law

obtained, the tendency was to give witnesses a freer hand to enlarge on points less directly connected with the case.

42. It could be concluded from that analysis that the two systems had very much in common. The one granted the court discretionary powers enabling it to reject witnesses, whereas the other enabled the court to reject evidence, or parts of it, which were not strictly relevant to the issue before the court.

43. Nevertheless, the possibility of rejecting certain witnesses seemed particularly useful in international trials, as it would enable the judge to turn down requests submitted in too great numbers or unfair requests such as the summoning of Heads of States or leading personalities. Since the judge was being given the immense power of determining the guilt of the accused and passing sentence, why should he not be trusted with powers to reject certain witnesses?

44. Mr. SÖRENSEN (Denmark) drew the attention of the Committee to articles 41 A and 41 G of the United States amendments (A/AC.48/L.9), which seemed to him to be germane to the discussion of whether article 36 and the United States amendment thereto should or should not be deleted. Articles 41 A and 41 G were nearly identical with articles 17 and 18 of the London Agreement regarding the Nuremberg Charter;¹⁾ the articles of the London Agreement had been drafted as a result of a process of compromise not dissimilar from that which was being undertaken by the Committee. In other words, they represented a common denominator of different systems of law, and in his opinion had worked fairly well. As they formed one of the few precedents available to the Committee, it seemed to him that it would be wise for the Committee to use them as a basis for its draft.

45. Articles 41 A and 41 G in the United States proposal contained in substance the provisions that article 36 and the United States amendment thereto sought to prescribe, and in his opinion both of the latter could be deleted, as the French

1) A/CN.4/5, pages 96 and 97.

representative's objection to the deletion of article 36 could be overcome by the adoption of the former articles. He proposed, therefore, that article 36 and the United States amendment thereto be rejected.

46. In making that proposal, he did not prejudge the issues whether articles 41 A and 41 G should be adopted, or whether the court should frame its own rules of procedure.

47. Mr. LIANG, Secretary to the Committee, pointed out that article 41 A, while conferring powers upon the court to summon witnesses etc., did not answer the question whether the court would be free to decide whether witnesses for the prosecution and for the defence should or should not be called. In other words, article 36 of the Secretariat's draft and the United States text for article 41 A could both be adopted without their overlapping. It seemed to him that the Committee must decide the question set by the second clause of the first sentence of article 36.

48. Mr. JONES (United Kingdom) said that the discussion had so far centred solely on whether the physical presence of witnesses could be ensured at the trial. No mention had been made of the preliminary hearing, at which stage, it seemed to him, the prosecution witnesses would normally give an undertaking that they would appear when called at the trial. He had interpreted the second clause of the first sentence of article 36 as meaning that the trial court was free to decide whether those prosecution witnesses should be summoned before it or not. Thus, if, on perusing the records of the preliminary trial, it found that a certain prosecution witness had produced evidence that was of no value, it would not need to summon him.

49. Mr. MAKTOU (United States of America) thought that the Secretary had not given due consideration to paragraphs (a) and (b) of article 41 G of the United States proposal, which specifically empowered the court to confine the trial to an expeditious hearing of the issues, to take measures to prevent action causing unreasonable delay, and to rule out irrelevant issues and evidence. If those powers were conferred upon the court it could presumably achieve the ends

sought by article 36. The latter were, however, far from clear, as the United Kingdom representative's interpretation indicated. To him it seemed that if the first sentence of article 36 of the Secretariat's draft were adopted, the court could prevent the defence from producing whatever witnesses it wished to produce. If that indeed were the meaning, his delegation could in no circumstances support such a provision, for it ran counter to all the principles of law the United States of America believed in. In order that the statute should be made acceptable to as many States as possible, the first sentence of article 36 should be deleted. With regard to the objection that it enshrined principles of law accepted by continental States, he observed that both the Netherlands and Danish representatives were prepared to reject it. In those circumstances, he felt that the French representative might find it possible to withdraw his objections.

50. The CHAIRMAN said that it would be preferable to take separate votes on the three sentences of article 36. He therefore put to the vote the first sentence of article 36 of the Secretariat's draft, (A/AC.48/1).

The Committee rejected the first sentence of article 36 by 8 votes to 2, with 3 abstentions.

The Committee rejected the second sentence of article 36 by 7 votes to 3, with 3 abstentions.

The Committee rejected the third sentence of article 36 by 6 votes to 2, with 1 abstention.

51. Mr. JONES (United Kingdom), explaining his vote, said that although he had voted in favour of the rejection of the second sentence of article 36, he did not oppose the principle laid down therein.

52. The CHAIRMAN pointed out that the principle could be re-introduced at a later stage of the Committee's work.

Article 37 of annex II (A/AC.48/1)

53, Mr. SÖRENSEN (Denmark), Rapporteur, said that the question raised in article 37 was entirely different from the other procedural questions so far examined. The problem of the competence of the court to deal with civil claims had already arisen when the question of the court's competence to try legal entities had been discussed.¹⁾ It had been agreed that as far as criminal responsibility was concerned only individuals could be tried, but the French representative had pointed out that civil claims might be made, and that the possibility could be envisaged of a State becoming a partie civile to a case. No decision had been reached, however, regarding the question of civil claims. The French representative had now submitted an amendment to article 37 (A/AC.48/L.12), which should be considered in conjunction with the Secretariat's text. There was also a United States proposal (A/AC.48/L.9) that article 37 be deleted.

The meeting rose at 5 p.m.

1) Summary Record of the 9th meeting (A/AC.48/SR.9), paragraphs 69 to 95.