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# COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

## First Session

## SUMMARY RECORD OF THE EIGHTEENTH MEETING

held at the Palais des Nations, Geneva,
on Tuesday, 21 August 1951, at 10 a.m.

CONTENTS:

Present:

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| Chairman: | Mr. HARRIS |
| **Members:** | |
| Australia | Mr. WYNES |
| Brazil | Mr. AMADO |
| China | Mr. WANG |
| Denmark | Mr. SÖRENSEN |
| Egypt | MOSTAFA Bey |
| France | Mr. LACHARRIERE<br>Mr. PINTO |
| Israel | Mr. ROBINSON<br>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:

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| 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.48/9, A/AC.48/L.12)

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

1. The CHAIRMAN requested the Committee to resume its discussion on article 37 of annex II to the Secretary-General's memorandum (A/AC.48/1).

2. Mr. COHN (Israel) pointed out that article 37 dealt with a problem entirely distinct from those which the Committee had hitherto been discussing. The amendments proposed by the United States delegation (A/AC.48/L.9) to annex II as a whole, however, were procedural in nature and closely connected with the previous discussions in the Committee. He therefore proposed that consideration of article 37 be deferred until all the United States amendments had been disposed of.

3. Mr. MAKTOS (United States of America) had no strong views on whether his amendments should be dealt with before or after article 37. He was prepared to abide by the decision of the Committee.

4. Mr. de LA BARRIERE (France) agreed that article 37 went beyond procedural questions and involved a substantive issue. But questions of substance were more important than procedural questions. The Committee had already given much time to the latter and had but little left in which to carry out the instructions received from the General Assembly. It would be well advised, therefore, to give priority to questions of substance.

5. Mr. RÖLING (Netherlands) agreed with the French representative. Yet another reason in support of that view was that a decision on article 37 would have an important bearing on the consideration of rules of procedure.

6. The CHAIRMAN put to the vote the Israeli proposal that consideration of article 37 be deferred until the United States amendments to annex II had been disposed of.

The Israeli proposal was rejected by 6 votes to 2, with 4 abstentions.

7. Mr. MAKTOS (United States of America) pointed out that, according to the rules of procedure, the first decision to be taken by the Committee was on his proposal that article 37 be deleted (A/AC.48/L.9).

8. It was important, in considering article 37, to bear in mind that the specific aim of the Committee was to prepare a draft statute establishing an international criminal court. A parallel could be drawn between the situation in which the Committee now found itself and that of the Sixth Committee at the third session of the General Assembly with regard to the drafting of the Convention on Genocide. In the latter case, certain members had been anxious that mention should be made of cultural genocide, meaning thereby the destruction of museums, monuments, artistic remains etc. All members had agreed that the punishment of cultural genocide was a worthy aim, but the majority had decided that cultural genocide had to be distinguished from the more heinous crime of killing human beings, and that the Committee's purpose was to prepare a convention relating to the punishment of genocide.[1] The Committee's present position was similar; its primary aim was to set up machinery for punishing crimes under international law, but some members had urged, and their view had been adopted provisionally, that the punishment of other crimes of international concern should also come within the competence of any international criminal court that might be set up. If it were now decided to add civil jurisdiction to the court's criminal jurisdiction, not only would the attempt be over-ambitious, but, in his view, the effect would be to distort the emphasis that should be rightly placed upon the primary aim of the court.

9. Apart from the question of heaping too many burdens on the court, it seemed to him that an international criminal court should not be able to award damages against the accused, which would be tantamount to paying blood-money. From the technical point of view, also, the question of damages would raise issues not only utterly distinct from the criminal issues before the court, but also of great complexity. Whiteman's volumes on "Damages in International Law"[2]

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1) See Official Records of the General Assembly, third session, part I, Sixth Committee 83rd meeting, pages 193 to 206.

2) Marjorie M. Whiteman, Damages in International Law, 3 vols. United States Government Printing Office, Washington, 1943.

comprised 3000 pages on subjects of great intricacy, such as who should receive the damages, who was heir to them in the event of death, how the amount of the damages could be assessed, and so on: subjects far removed from the question of the punishment of criminals. The necessity for deciding such questions would detract from the prestige of the court, protract the trial interminably, and mix together legal incompatibles. The International Law Commission had declined to recommend the establishment of a criminal chamber to the International Court of Justice, on the ground that it would be detrimental to that Court's prestige if it had to deal with subjects outside its normal range, [1] and the same considerations were valid, mutatis mutandis, against the determination of civil responsibility by a criminal court.

10. In any case, the question of damages could be dealt with by bringing civil cases or through diplomatic channels. Under the French amendment (A/AC.48/L.12) the court was empowered to declare a State liable for damages, but it must be remembered that a State could not be an accused. To declare a State liable for damages would require establishment of the nationality of the accused, determination of the international responsibility of the State under rules differing from those applicable in a criminal case, and settlement of the multifarious and highly intricate questions of ownership of property, relationships, amount of damages, etc. For those reasons he opposed the insertion in the draft statute of article 37 and the French amendment thereto.

11. Mr. ROBINSON (Israel) agreed with the United States representative, although his own approach to the problem was somewhat different. From the point of view of a judge sitting in an international criminal court who was called upon to decide the civil liability of a person found guilty of a crime under international law, there would be countless complications. Such a judge would first have to be convinced that the claimant was entitled to claim damages. All

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1) See Official Records of the General Assembly, fifth session, Supplement No. 12 (A/1316), paragraph 145.

might be well if there was only one claimant, but it could easily happen that there were thousands, or even millions, as in the case of the Tokyo and Nuremberg trials, where all the Jews of the world, or all the parents of massacred prisoners of war, might legitimately have claimed that they were entitled to damages in respect of the crimes committed by the accused. Clearly, it would be impossible for a judge to decide on the titles of such a multiplicity of claims, and equally clearly he could not give precedence to one category of persons rather than to another.

12. The French amendment made article 37 even more complicated by establishing the solidarity of the individual and the State. If it were adopted, it would only be possible to establish the liability of the State by citing it as a civil defendant. The civil dependant (whether in the singular or the plural) being interested in the acquittal of the accused, would have to be given practically all the procedural rights and duties as were granted to the accused. Thus the distinction between individual and collective responsibility at least from the point of view of its consequences in civil law, would disappear. Moreover, if the court decided that a State was not liable, would such a decision eliminate its responsibility under international law? Again, how could the pecuniary liability of a State be separated from its political liability? Numerous complications of that kind involving much study would arise.

13. Even if those problems were solved satisfactorily, there would yet be a major obstacle; the court would have to assess the damages and calculate the award. Many bulky volumes had been written on the assessment of damages in international law, and there were innumerable cases on record where arbitration on relatively small issues had dragged on for years. The Alabama Case which was settled in Geneva, was one instance, and the recent case of the Corfu Channel incident was another. In the latter case, three years had been spent on preliminary questions, the framing of issues, the judgment on the merits, and the calculation of damages. Those were minor cases compared with the damages involved in any war crime; the assessment of damages on such a stupendous scale would be such as to reduce the proper work of a criminal court, namely, the establishment of the guilt of the accused to "minimis".

14. Granted even that such a major obstacle could be surmounted, there would still remain the vast disproportion between the crime and its possible pecuniary effects. How could the extermination of an entire racial group be computed in terms of money? Conscience would revolt at the very idea of fixing a pecuniary equivalent for the shedding of so much blood. Indeed, to conceive of such crimes in terms of damages would be to reduce their heinousness to the level of that of common felonies. A great moral issue was involved, and it would be an immense disservice to the cause of international criminal jurisdiction if the computation of damages were to be made part and parcel of the functions of an international criminal court.

15. The problem remained whether criminals would be able to escape the financial consequences of their crimes. The answer to that problem was obviously in the negative, but clearly the problem was not one to be settled by the Committee. A State could pay indemnities, as Germany and Japan had done, but such payments were in accordance with the collective responsibility of States and were a corollary of their political responsibility. In other words, guilty States would continue to pay indemnities as they had done in the past, but not as a result of a judgment by an international criminal court. International criminal jurisdiction was still in its infancy, and it would be unwise to burden it with too many duties. An article such as article 37 might be of value when an international criminal court had been firmly established for some length of time, but it should not be inserted in the statute establishing it.

16. He therefore opposed the insertion in the draft statute of article 37 and the French amendment thereto.

17. Mr. TARAZI (Syria) said that the question raised by article 37 of annex II required serious study from the legal point of view. The text had been drafted in accordance with continental procedure, and was based on the essential fact that, when a criminal court dealt with an offence or crime, persons who had suffered damage by such offence or crime were entitled to request the court to award damages against the guilty. In such a case, the civil action was ancillary to the criminal action. It had been stated that it would

be extremely difficult to assess the damages to be awarded to the partie civile in the case of crimes coming under the jurisdiction of the court. That was, of course, true; but the same difficulties might arise in respect of any other court. Thus, in France the Council of State was called upon to award damages where the State had incurred liability through the action of one of its officials.

18. The question was whether article 37 should be retained in its present form. If it was agreed that the victim of a crime coming under the jurisdiction of the court could make himself partie civile, it must be decided whether a State could be condemned to pay damages to such a person on account of an act committed by one of its nationals. That, he might add, was the aim of the amendment submitted by the French delegation (A/AC.43/L.12).

19. The question was not to decide whether the State was jointly liable, but whether a State incurred liability as a result of the commission by one of its nationals of a crime under international law or of any other crime of international concern. If that thesis was accepted, the preliminary question of competence arose. The international criminal court would not be competent to convict a State. The only judicial organ able to do so was the International Court of Justice - and even the latter's Statute would have to be amended, since at present only a State could bring an action against another State before the International Court of Justice or before the Permanent Court of Arbitration. As a matter of fact, it could bring such an action to protect the interests of its nationals, as in the Mavrommatis case, but the individual concerned could never bring the matter before the Court himself. But if the French amendment were adopted, an individual would be able to sue a State for damages in connexion with a crime committed by one of its nationals.

20. When the International Court of Justice found against a State, it did so, not because the State was criminally liable, but because it was civilly liable for the acts of its nationals.

21. The French proposal would therefore only be acceptable if it were proposed to amend the Charter and the Statute of the International Court of Justice accordingly.

22. Mr. WYNES (Australia) pointed out that the French amendment to article 37 appeared to imply that a State or another legal entity could be called upon to pay damages without being heard. If that indeed were the case, the amendment, if adopted, would reverse a decision already taken by the Committee. He sought enlightenment on that point from the French representative.

23. Mr. de LACHARRIERE (France), replying to the Australian representative, pointed out that the Committee had decided that only natural persons should be subject to the jurisdiction of the international criminal court.[1] When the Committee had taken that decision, it had been asked whether a State might be declared, not criminally responsible for its nationals, but liable for damages on account of their acts; but discussion of the matter had been held over.[2] If it were accepted at the present juncture, that legal entities or States might be declared jointly liable for damages awarded against the perpetrator of a crime who had acted on behalf of that State or legal entity, States or legal entities would have to be allowed to make their depositions before the court; nor was there any legal objection to such a course.

24. Turning to the arguments adduced against the French amendment, he reminded the Committee of a matter which had been raised at the twelfth session of the Economic and Social Council. There had been and still were men and women in certain hospitals who had survived so-called scientific experiments they had been made to undergo in Nazi concentration camps, such as resection of certain bones, bone grafting, excision of the genital organs etc. After their torturers had been sentenced by international tribunals, those persons had claimed compensation from the international community for the injury they had suffered. There had been no provision of international law enabling their claims to be heard, and neither the Nuremberg Tribunal nor the Tokyo Tribunal had allowed claims for damages. Was it enough to tell the victims that the important thing was that a criminal sentence had been pronounced, and that in any case the wrong they had suffered was so great that no damages could possibly compensate them for it? Would it not have been reasonable to award damages to those victims against the

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1) Summary Record of the 9th meeting (A/AC.48/SR.9), paragraph 95.
2) ibid., paragraph 80.

State on behalf of which the criminals had acted?

25. However that might be, a number of members of the Economic and Social Council had agreed that there was a gap in international organization which required filling, and that it was highly regrettable that the Nuremberg Tribunal had not been competent to award damages. The Economic and Social Council had therefore requested the Secretary-General to approach the German authorities and ask them to consider the possibility of ensuring that the victims received compensation for the wrong done them. That example clearly showed the importance of allowing an international criminal court to award damages to plaintiffs who claimed them.

26. A further objection to the French amendment had been that the awarding of damages would be ancillary to the criminal sentence. It was true that such was the case, but the fact remained that it was an important, nay, indispensable accessory.

27. It had also been urged that the idea of the joint liability of States was a highly complex one, which had already been the subject of lengthy treaties. To introduce it into the statute of the court might therefore give rise to considerable difficulties. That was not a convincing argument. The joint liability of States was indeed a complex question, and would raise certain difficulties, but those difficulties would not in the circumstances be so serious as in the case of disputes between States. The liability to be determined would rest on a clear and specific fact: the joint liability of the State and the national of that State sentenced for having acted on its behalf. It would therefore be difficult to contest the source of that liability.

28. It had been stated that certain crimes coming within the jurisdiction of the Court would, on account of the great number of the victims and interested parties involve a liability of such a nature as to make it practically impossible to assess the damages to be awarded. That might no doubt be true if only the philosophical aspect of liability and damages was considered. It should be remembered however that in France, for example, damages were limited to the

immediate damage suffered and did not take into account the long-term consequences of the original act. It would be for the court to limit, by its jurisprudence, liability arising out of international criminal acts.

29. Lastly, the objection had been raised that before establishing the joint liability of a State, the court would first have to settle any questions of nationality which might arise. That would not be an additional difficulty for the court, since it would already have had to deal with the matter in pronouncing on its jurisdiction in the case in point.

30. The Syrian representative had said that if the French proposal were adopted, the Statute of the International Court of Justice would require amendment. He (Mr. Lacharrière) did not believe an amendment would be required. The statute of the international criminal court would lay down a different rule from that which was followed by the International Court of Justice. In actual fact, precedents already existed of individuals citing States before international tribunals. That had, for example, been done in the case of the mixed courts of arbitration set up after the First World War. It would therefore be sufficient for the convention creating the court to make suitable provision, which would in no way be prejudicial to the Statute of the International Court of Justice.

31. To sum up, there was no serious legal objection to the statute of the international criminal court laying down the principle proposed by his delegation, enabling the court, not only to punish the crimes over which it had jurisdiction, but also to award compensation for any damage the crimes might have caused.

32. Mr. PINEYRO CHAIN (Uruguay) said that he had listened with great interest to the arguments advanced by the supporters of the two opposing points of view. He himself was not a supporter of either, his position being midway between the two. In his opinion, it was necessary to distinguish between two very different actions: the punishment of the offence, which related to an action on the part of the public authorities, and reparation for the damage caused, which related to a civil action. Both were, undoubtedly, important, but it should be borne in mind that the civil action was ancillary to the action

on the part of the public authorities. At the national level the two proceedings, though linked by a common factor - the fact of the offence or crime - were entirely distinct. At the international level, they could not be entirely dissociated. It was, therefore, only necessary to consider the problem from the international angle to find, at least, a partial solution. The difficulties pointed out by the United States and Israeli representatives were, undoubtedly, real. It would not be very satisfactory to make a single international judicial organ, which was not in a position to act rapidly, responsible for both criminal and civil proceedings, and there would always be a risk that one or the other would suffer.

33. Those considerations led to the conclusion that, as the international criminal court would only have criminal jurisdiction, another international judicial organ should be made responsible for ensuring that the parties suffering injury under international law received compensation for the harm done to them by the perpetrator of the crimes, which was their due under a principle of international law whereby conviction on criminal grounds entailed a civil liability. By that means it would be possible to avoid a clash, within the same judicial organ, between the civil and the criminal aspects of a case.

34. The answer would be to set up a Cour des Réparations which would be concerned solely with the damages to be awarded to persons suffering damage by a crime coming under the jurisdiction of the international criminal court. That solution would accord with the Committee's earlier decision that the international criminal court should only have criminal jurisdiction.

35. The French amendment on the contrary, tended to give the court jurisdiction in civil matters, as the court would be called upon to take decisions in the matter of damages and the joint liability of a State or other legal entity which could not be made a party before the court. He was opposed to that principle and would accordingly formally propose that the following provision be included in the statute of the court:

"When the International Criminal Court passes sentence, it may state that the crime committed involves the civil liability of the perpetrator".[1)]

1) Provisional translation.

36. He requested that the proposal be put to the vote.

37. The CHAIRMAN considered that a vote could now be taken on article 37 of annex II to the Secretary-General's memorandum and the amendments thereto. It seemed to him that the French amendment which sought to add an extra paragraph should be voted on first; then would follow the United States proposal that article 37 be deleted, and lastly the Uruguayan proposal.

38. He put to the vote the French amendment (A/AC.48/L.12) to article 37.

The Committee rejected the French amendment to article 37 by 7 votes to 2, with 4 abstentions.

39. The CHAIRMAN put to the vote the United States proposal that article 37 be deleted.

The Committee adopted the United States proposal by 6 votes to 3, with 4 abstentions.

40. Replying to a question by Mr. MAKTOS (United States of America), Mr. PINEYRO CHAIN (Uruguay) explained that his proposal meant the accused person alone would be liable for damages. Thus, he was not suggesting that the problem of the civil responsibility of a State for acts committed by its nationals should be taken up again by a roundabout route.

41. Mr. MAKTOS (United States of America) thought that the statute should prescribe no limitation on the sentence imposed by the court, except that it should be subject to the provisions of the conventions conferring jurisdiction upon the court. When such conventions were drafted, it could be provided that guilty persons would be liable not only to imprisonment and other penalties, but also to payment of damages.

42. Mr. RÖLING (Netherlands) considered the Uruguayan proposal very attractive; the Committee however, had not been asked to frame rules of substantive law. Any provision such as that suggested by the Uruguayan representative could only be an indication that the court might in its judgment declare an accused liable under civil law. Such a declaration, however, would have no legal effect whatsoever. As the Committee's task was merely to prepare a draft statute

establishing an international criminal court, he would oppose the Uruguayan proposal.

43. The CHAIRMAN put the Uruguayan proposal to the vote.

The Committee rejected the Uruguayan proposal by 6 votes to 3, with 4 abstentions.

The meeting was suspended at 11.25 a.m. and was resumed at 11.40 a.m.

Article 38 of annex II (A/AC.48/1)

44. Mr. SÖRENSEN (Denmark), Rapporteur, considered that the question of a quorum and that of the attendance of judges in general might more profitably be deferred until the Committee came to discuss the problem of the organization of the court.

It was so agreed.

Article 39 of annex II (A/AC.48/1)

45. Mr. MUNIR (Pakistan) suggested that articles 39 and 40 should be deleted, since the matters which they covered would better be left to the discretion of the court, and could easily be dealt with in its rules of procedure.

46. The CHAIRMAN wondered whether it might not be prejudicial to the operation of the court if no specific reference to its hearings and deliberations were included in the statute.

47. Mr. RÖLING (Netherlands) drew attention to the fact that the Committee had already drafted fundamental rules to safeguard the accused. A public hearing was such an essential guarantee and it would therefore be preferable to include the text of article 39 among the safeguards provided to ensure a fair trial for the accused.

48. Mr. MAKTOS (United States of America) supported by Mr. RÖLING (Netherlands) suggested that the words "unless the Court decide otherwise" be deleted from article 39.

49. Mr. ROBINSON (Israel) said that he was somewhat perturbed by the United States proposal, because if the Committee decided to delete those words, the court would be left no discretion in the matter. He felt it should be clearly understood that the Committee was not discussing an ordinary national court, but an international criminal court, where special situations might arise in which the higher interests of the public would have to be considered. Such interests, which might be of a moral, political or other character, might well, in certain cases, prove more important than the safeguards accorded to the accused. The court must be left the possibility of holding closed sittings, since, if all its hearings had to be public, it would sometimes have to fall back on subterfuges out of keeping with its dignity. Even a national court was entitled, if it so desired, to close its doors, and he wondered why the same right should not be granted to an international criminal court. He agreed with the Netherlands' representative that a public hearing provided a further guarantee for the accused, but he wondered whether it might not, in certain cases, actually impair the safeguards he had been granted.

50. The CHAIRMAN suggested that the addition of the words "upon occasion" might satisfy the Israeli representative; the text would then read "The Court's hearings shall be public, unless the Court, upon occasion, decide otherwise".

51. Mr. ROBINSON (Israel) said that the Chairman's suggestion entirely met his point.

Article 39, as amended by the Chairman, was adopted by 10 votes to 1 with 1 abstention.

Article 40 of annex II (A/AC.48/1)

52. Referring to the Pakistani proposal that article 40 should be deleted, the CHAIRMAN pointed out that it was the fundamental right of any court to deliberate in private, and it therefore seemed superfluous to state that right specifically.

53. Mr. PINTO (France) considered that the French text of article 40 should be interpreted as meaning that the court should deliberate in private in a room to which the public and counsel would not be admitted, and that, further, the judges would be required to keep their deliberations secret. That would, moreover, appear to be the meaning which the Secretariat had desired to attach to the article.

54. Mr. SÖRENSEN (Denmark), Rapporteur, explained that the French text, from which the English translation had been made, had used the word "secret" which had been rendered by "in private" in the English text. The two terms were not, however, equivalent, since the French implied that nothing of what happened during the deliberations should be communicated to the public, even after the announcement of the findings.

55. Mr. TARAZI (Syria) pointed out to the French representative that the point he had raised was covered by article 42A in the United States proposal (A/AC.48/L.9), which related to the delivery of separate opinions by judges of the court. Any doubts that the French representative might have in regard to the matter would be removed when the Committee came to examine that article.

56. The CHAIRMAN felt that a solution might be found in article 54, paragraph 3, of the Statute of the International Court of Justice, which stated that "The deliberations of the Court shall take place in private and remain secret." The question for the Committee to decide was whether an explicit statement of that kind should be included in the statute of the international criminal court.

57. Mr. RÖLING (Netherlands) said that the right of judges to deliver dissenting opinions was something quite different from the requirement that the court's deliberations should not be divulged.

58. The CHAIRMAN called for a decision whether the principle of article 40 should be deleted or retained.

It was decided by 6 votes to 5 with 2 abstentions that the principle of article 40 should be retained.

The Committee decided, by 12 votes to none with 1 abstention, to adopt the wording contained in Article 54, paragraph 3, of the Statute of the International Court of Justice for article 40.

59. Mr. SORENSEN (Denmark), Rapporteur, said that, if the order of annex II in the Secretary-General's memorandum were to be followed, the Committee would next have to consider the draft provisions relating to the decisions and judgments of the court. He felt, however, that it would be preferable to dispose of all the rules relating to the court's proceedings first, and recalled that the United States' representative had submitted an amendment (A/AC.48/L.9) concerning the powers of the court and conduct of trials, to be inserted after article 41 of the Secretariat's draft. He suggested that the best course would be to examine chapter IV of the United States proposal on the understanding that the decisions of the court, as well as the methods it employed to reach them, would be discussed at a later stage.

It was so agreed.

Chapter IV of the United States proposal (A/AC.48/L.9)

Article 41D.

60. Mr. MAKTOS (United States of America) explained that chapter IV of his proposed amendment was based on specific provisions appearing in the Charters of the Nuremberg International Military Tribunal [1] and the International Military Tribunal for the Far East.[2]

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1) Chapter V
2) Chapter IV

61. To facilitate discussion, he suggested that the Committee should first consider article 41D in the United States proposal. That text had been taken from article 28 of the Convention for the Creation of an International Criminal Court (Geneva, 16 November 1937). He felt that if the prosecution stated that it had no intention of proceeding with its case, the accused should be discharged, the reasons for the withdrawal of the case naturally being presented by the prosecution.

62. Mr. JONES (United Kingdom) wondered whether the proposed United States text implied that the prosecution could withdraw its case without the court's consent. He assumed that any case which had been submitted to the court for trial would have been properly prepared, and even screened by the investigating authority. He therefore felt that the final decision as to whether a case should be withdrawn or not should rest with the court, and accordingly, that the prosecution should be empowered to withdraw its case only with the court's consent.

63. The CHAIRMAN suggested that the addition of the words "with the consent of the court" might meet the point raised by the United Kingdom representative. The text would then read:

> "If the prosecution is withdrawn or abandoned by the prosecuting authority with the consent of the Court, the Court shall not....."

64. Mr. JONES (United Kingdom) accepted the amendment proposed by the Chairman, subject to the necessary consequential drafting changes.

65. Mr. COHN (Israel) agreed with the United Kingdom representative that no case should be abandoned without the court's consent. He felt, however, that the whole provision was unnecessary, since the court would fix its own rules of procedure for the prosecution of a case, he therefore suggested that article 41D be not adopted.

66. Mr. RÖLING (Netherlands) agreed with the Israeli representative. The matter could be covered by the rules of procedure of the court.

67. Mr. PINEYRO CHAIN (Uruguay) recognized the importance of the point made by the United Kingdom representative, which involved the fundamental problem of the powers to be granted to the prosecution by the court. If there were no saving clause, the prosecutor would be able to announce, at any point in the trial, that it had no further interest in proceeding with the case. The court would consequently be deprived of any initiative in the conduct of the case. With the saving clause suggested by the Chairman, however, the court would remain master of its proceedings despite any decision that might be taken by the prosecution to drop the case.

68. Mr. MAKTOS (United States of America), replying to the Israeli representative, admitted that article 41D might well be considered unnecessary; but the very fact that it had given rise to so much discussion showed that it might possibly be of some assistance to the court which, in the absence of directives, might experience difficulties in deciding its course of action. He therefore suggested that the text be referred to the Drafting Sub-Committee.

69. Mr. SÖRENSEN (Denmark) said that, if the United States proposal were rejected, the court would have no definite rule before it governing a given case, but merely a general provision that it had itself prepared. He felt that some provision should be made for dealing with the possibilities envisaged in the United States text.

70. Mr. JONES (United Kingdom) could not agree with the Israeli representative's suggestion that article 41D be dropped. On the contrary, he felt that it was most important, as it would provide a large measure of protection against vexatious prosecutions. The Committee's discussions were based on the assumption that there would be an ad hoc prosecutor, over whom it would be necessary to exercise some control. He was consequently in favour of the adoption of the article.

71. Mr. TARAZI (Syria) considered that the Drafting Sub-Committee should examine the matter in the light of the following considerations. In national law, prosecution was initiated by the prosecuting authority, but the matter then passed out of its hands, and the sole responsibility for conviction or acquittal rested with the court. Should the prosecuting authority drop the charge, the court was not bound by its decision, on the basis of the maxim "La plume est serve mais la parole est libre".

72. The Drafting Sub-Committee should therefore consider whether that principle of domestic law should be adopted for the purposes of international law, or whether, in the sense of the United States proposal, the court should be bound, by the prosecuting authorities' decision, to dismiss the case and, in consequence, to free the accused.

73. In his opinion the court should retain control of the prosecution initiated by the prosecuting authority.

74. The CHAIRMAN considered that all members of the Committee were in agreement that the final decision as to whether a case was to be abandoned or not should rest with the court.

75. Mr. RÖLING (Netherlands) felt that if when it prepared the final text, the Drafting Sub-Committee took account of the Uruguayan representative's remarks, it would be impossible to re-open a case once it had been dismissed. He considered that the statute should protect the individual against the danger of being put on trial for a second time in respect of the same alleged request.

76. The CHAIRMAN put to the vote the Israeli representative's proposal that article 41D in the United States proposal be deleted.

The proposal was rejected.

It was agreed that it should be left to the Drafting Sub-Committee to prepare a suitable text for article 41D in the light of the discussion.

Article 41E

77. Mr. MAKTOS (United States of America) explained that article 41E entitled "Powers - Provisional Liberty of the Defendant" was intended to cover applications for bail. He felt it would be far better to state explicitly in the statute that the court was entitled to grant bail than to leave the issue to be covered by the rules of procedure to be drafted by the court. Otherwise requests for bail might cause the court some embarrassment.

78. Mr. MUNIR (Pakistan) wondered why the United States representative had not simply used the word "bail". The text would be clearer if the words "or be provisionally set at liberty" were amended to read "or be admitted to bail".

79. Mr. MAKTOS (United States of America) accepted the Pakistani amendment.

80. Mr. ROLING (Netherlands) pointed out that "bail" was an Anglo-Saxon concept, whereas the original United States wording covered both the Anglo-Saxon and the continental legal systems. For that reason he was in favour of retaining the original text.

The Committee unanimously adopted the original text of article 41E.

Article 41H

81. Mr. MAKTOS (United States of America) explained that article 41H entitled "Conduct - Records, Exhibits and Documents" had been taken from article 13(e) of the Charter of the International Military Tribunal for the Far East. He emphasized that the provisions had appeared in the Charter, and not in the rules of procedure, of the Tribunal.

82. The CHAIRMAN pointed out that the word "Registrar", used in the United States proposal, was subject to change in the light of later decisions.

83. Mr. COHN (Israel) proposed the deletion of article 41H. He had not been convinced by the argument that the principles expressed in the United States proposal had been included in the Charter rather than the rules of procedure of the International Military Tribunal for the Far East. On the contrary, he felt that they should have been relegated to those rules.

84. Mr. RÖLING (Netherlands) supported the Israeli representative's proposal. He recalled that there had been a great deal of misunderstanding at the Tokyo Trials as to what in fact constituted "part of the record", that was, as t to exactly what constituted evidence and what did not. He suggested that the point could best be covered in the court's rules of procedure.

85. Mr. MAKTOS (United States of America) agreed with the views expressed by the Israeli and Netherlands representatives.

The Committee decided, by 11 votes to none with 2 abstentions, to delete article 41H.

Article 41A

86. Mr. MAKTOS (United States of America), introducing article 41A entitled "Powers of the Court", said that the court might well be relieved to find in the statute an explicit statement of the powers referred to in that article.

87. Sub-paragraph (a) of his text had been taken from article 17 of the Charter of the International Military Tribunal (Nuremberg). He had purposely made no reference to the obligations incumbent on States to produce the witnesses required, since such obligations and the general problem of the provision of assistance to the court were to be covered in separate conventions.

88. Mr. RÖLING (Netherlands) considered the United States provisions far too detailed; they would more appropriately be placed in the rules of procedure of the court than in its statute.

89. Mr. PINTO (France) entirely agreed with the Netherlands representative. The Committee ought not to go into too great detail concerning procedure. It would be preferable to leave it to the court to settle the details. The judges of the court would find it easier than the members of the Committee to agree on the procedural questions involved by the differences between the Anglo-Saxon and the continental systems.

90. Mr. COHN (Israel) felt that the power of the court to compel the attendance of witnesses was a fundamental element, that must be included in the statute itself. He did, however, agree with the representatives of the Netherlands and France that the technical details were unnecessary; sub-paragraph (c), for example, might well be dealt with in the rules of the court.

91. He accordingly suggested that the principles expressed in sub-paragraphs (a) and (b) should be taken as a basis for the preparation of a general clause empowering the court to summon such witnesses as it required.

92. Mr. JONES (United Kingdom) agreed with the Israeli representative that the court should be given power to summon witnesses, but failed to see how it would be possible to force them to testify. He therefore suggested that the reference to testimony should be deleted.

93. The CHAIRMAN agreed with the United Kingdom representative.

94. Mr. PINTO (France) proposed, in order to meet the wishes of the Israeli representative, that the text of the last part of article 48 of the Statute of the International Court of Justice, providing that the Court should "make all arrangements connected with the taking of evidence", should be adopted as a general formula.

95. Mr. MAKTOS (United States of America) pointed out that the special tribunals set up after the First World War to investigate claims, had never assumed that they had the power to summon witnesses. Furthermore, the International Court

of Justice did not imagine it could serve subpoenas on a person living, for example, in the United States of America. The international criminal court would not be able to assume that it had any powers to summon witnesses unless such powers were expressly granted to it in its statute. In his opinion, the Committee would be failing in its duty if it left the whole issue to be covered by the rules of procedure of the court.

96. He admitted the validity of the arguments advanced by the United Kingdom representative, and suggested that the Committee should take a separate vote on the words "and testimony".

97. The CHAIRMAN considered that the simplest course would be to take a vote on the Israeli proposal that a general clause should be drafted on the basis of the subject matter contained in sub-paragraphs (a) and (b).

The Committee adopted the Israeli proposal by 8 votes to 2 with 2 abstentions.

98. Mr. MAKTOS (United States of America) said that provision had been made elsewhere in the statute for the idea contained in sub-paragraph (d). It was therefore superfluous, and he would withdraw it.

99. The CHAIRMAN put to the vote the principle contained in sub-paragraph (c) of article 41A.

The principle expressed in sub-paragraph (c) was rejected by 5 votes to 3 with 3 abstentions.

100. Mr. MAKTOS (United States of America), reverting to the question of testimony raised by the United Kingdom representative, thought that the international criminal court could take the same action as national courts in respect of persons who refused to reply to questions, and that, as in the case of national courts, appropriate provision for their punishment should be made.

101. Mr. PINEYRO CHAIN (Uruguay) thought that the formula ought to b amended on the lines suggested by the French representative.

The meeting rose at 1 p.m.