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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

, First Session

SUMMARY RECORD OF THE THIRTIETH MEETING

held at the Palais des Nations, Geneva,  
on Thursday 30 August 1951, at 3.30 p.m.

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Draft statute for an international criminal court,  
prepared by the Drafting Sub-Committee (continued)

Present:

Chairman:

Mr. MORRIS

Members:

Australia

Mr. WYNES

China

Mr. WANG

Denmark

Mr. SÖRENSEN

France

Mr. PINTO

Iran

Mr. KHOSROVANI

Israel

Mr. ROBINSON

Mr. COHN

Netherlands

Mr. RÖLING

Pakistan

Mr. MUNIR

Syria

Mr. TARAZI

United Kingdom of Great  
Britain and Northern Ireland

Mr. JONES

United States of America

Mr. MAKTOS

Uruguay

Mr. PINEYRO CHAIN

Secretariat:

Mr. SANDBERG

Acting Secretary to the Committee

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, PREPARED BY THE DRAFTING SUB-COMMITTEE (continued) (A/AC.48/L.17, A/AC.48/L.5/Rev.1)

1. The CHAIRMAN requested the Rapporteur to submit the proposals of the Drafting Sub-Committee regarding outstanding amendments to the draft statute.

Article 23 - Finances

2. Mr. SØRENSEN (Denmark), Rapporteur, said that the Drafting Sub-Committee recommended the insertion in article 23 after the word "Court" in the second sentence, of the words "the Committing Authority, the Prosecution and the Board of Clemency".

The Drafting Sub-Committee's recommendation was adopted by 8 votes to none, with 2 abstentions.

Article 45 - Required Majority

3. Mr. SØRENSEN (Denmark), Rapporteur, said that the Drafting Sub-Committee proposed that article 45 be re-drafted to read:

"Required Majority"

"1. Final judgments and sentences of the Court shall require a majority vote of the judges participating in the trial.

2. The same requirement shall apply to other decisions of the Court provided that, in the event of an equality of votes, the vote of the presiding judge shall be decisive."

The new text conformed in substance with the decisions taken by the Committee at its 29th meeting. (1)

4. Mr. WYNES (Australia) feared that the proviso in paragraph 2 of the revised draft of article 45 might be interpreted as applying also to paragraph 1. He proposed, therefore, that, after the words "provided that", the words "in such cases" be added.

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(1) Summary Record of the 29th meeting (A/AC.48/SR.29) paragraphs 21 to 54.

5. Mr. RÖLING (Netherlands) and Mr. MUNIR (Pakistan) pointed out that the proviso appeared only in paragraph 2, and could therefore apply only to the provision in that paragraph. There seemed to be no grounds for the Australian representative's view that it was open to misinterpretation.

6. The CHAIRMAN put to the vote the Australian proposal.

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

7. The CHAIRMAN put to the vote the new text of article 45.

Article 45, as re-drafted, was adopted by 8 votes to none, with 3 abstentions.

8. Mr. PINTO (France) asked that the Committee proceed forthwith with the examination of the Israeli proposal concerning the crime of genocide (A/AC.48/L.5/Rev.1 and A/AC.48/L.5/Rev.1/Corr.1).

It was so agreed.

Israeli proposal concerning the crime of genocide (A/AC.48/L.5/Rev.1 and A/AC.48/L.5/Rev.1/Corr.1).

9. Mr. ROBINSON (Israel), introducing his proposal (A/AC.48/L.5/Rev.1 and A/AC.48/L.5/Rev.1/Corr.1) said that at an early stage in the Committee's discussions the Pakistani representative had proposed an amendment (A/AC.48/L.1) to article 24 of the draft statute contained in Annex II to the Secretary-General's memorandum (A/AC.48/1). The amendment specifically mentioned genocide in the statute of the court as a crime over which the court would have jurisdiction. The Committee had decided not to mention any specific crimes in the statute, and had left the question of the conferring of jurisdiction on the court in respect of specific crimes, to be dealt with in subsequent conventions. Genocide, however, was of such importance that his delegation felt that it deserved some kind of mention in the Committee's report, at least in the form of a recommendation to the General Assembly.

10. Genocide was the only crime under international law that had so far been specified in a convention, and the Convention on Genocide had already been

ratified by twenty-eight States. The International Law Commission had been invited to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes.<sup>(1)</sup> Finally, genocide had been referred to in the General Assembly resolution requesting the Committee to prepare draft conventions and proposals relating to the establishment and the statute of an international criminal court.<sup>(2)</sup> In view of such specific mention of genocide, genocide was clearly the one crime under international law on which action should be taken. His country's proposal was self-explanatory: the recommendation it contained was in the form of a voeu.

11. Mr. MUNIR (Pakistan) recalled that he had desired that genocide should be mentioned specifically in the statute, but as it had been decided that no specific crime should be mentioned therein, the Israeli proposal was the next best solution. He therefore strongly supported it.

12. Replying to a query by Mr. SÖRENSEN (Denmark), Rapporteur, Mr. ROBINSON (Israel) explained that the word "voeu" had appeared in other resolutions of the United Nations. While it had no equivalent in English, and could not be translated exactly as a wish or desire, it was well understood as being virtually a recommendation.

13. Mr. PINEYRO CHAIN (Uruguay) said that, for the reasons given in the Israeli draft resolution, it was obviously desirable that States parties to the statute of the court should accept its jurisdiction in regard to the crime of genocide, but he was opposed to mentioning any particular crime in the statute of the court.

14. Mr. PINTO (France) agreed with the Uruguayan representative's remarks. The difficulty arose from the fact that at the second reading of the draft statute the Committee had not maintained the very clear text of article 1 adopted at the first reading. It had been decided to exclude from the jurisdiction of the court the "other crimes of international concern" and to insert instead the phrase

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(1) Resolution 260 B (III) of the General Assembly of 9 December, 1948.

(2) Resolution 489 (V) of the General Assembly of 12 December 1950.

"as may be provided in conventions or special agreements among States parties to the present Statute". By virtue of that decision the expression "crimes under international law" had lost the precise meaning given to it in the Secretary-General's memorandum, and now embraced crimes referred to as "of international concern". That should not, however, prevent the Committee from adopting the Israeli proposal, even if it were not entirely satisfactory.

15. The CHAIRMAN put to the vote the Israeli draft resolution (A/AC.48/L.5/Rev.1 and A/AC.48/L.5/Rev.1/Corr.1).

The Israeli draft resolution was adopted by 5 votes to 1, with 5 abstentions.

16. Mr. ROBINSON (Israel) suggested that his resolution be included as an annex to the Committee's report to the General Assembly.

It was so agreed.

17. Mr. MAKTOU (United States of America), explaining his abstention from the vote on the Israeli resolution, said that his country had not so far ratified the Convention on Genocide.

#### Article 49 bis

18. Mr. SØRENSEN (Denmark), Rapporteur, introduced article 49 bis as drafted by the Drafting Sub-Committee<sup>(1)</sup> and reading as follows:

"A judgment of the Court shall be a bar, in a State which has conferred jurisdiction upon the Court with respect to any offence charged in the indictment / involved in the proceedings /, to subsequent trial of the accused for such offence."

19. The words in square brackets provided two alternative qualifications of the word "offence". The difference between the alternatives could best be explained by an example. If jurisdiction were conferred on the court in respect of the crime of genocide, and a person committed a murder which the court decided did not constitute genocide, under the first alternative he could be tried subsequently for murder by his own national courts. Under the second alternative, however,

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(1) See Summary Record of the 29th meeting, paragraphs 82 to 85.

he could not be tried subsequently, as murder was an offence involved in the proceedings. The alternatives had been placed before the Committee for a decision; no recommendation was made by the Drafting Sub-Committee in respect of either.

20. The CHAIRMAN, amplifying the remarks of the Rapporteur, said that he had advocated the inclusion of the second alternative to enable the Committee to decide whether it preferred the provision giving broader protection to the accused. In his own view, the first alternative had a precise meaning, whereas the second alternative would be bound to give rise to controversy as to the exact meaning of the words "involved in the proceedings".

21. As the idea had originally been put forward by the Syrian representative, he called upon him to express his views on the text.

22. Mr. TARAZI (Syria), speaking as the author of the idea adopted by the Drafting Sub-Committee noted with satisfaction that it had correctly interpreted his line of thought.<sup>(1)</sup>

23. The stipulation that the judgment was a bar to a subsequent trial should apply in the case of both alternatives. The first alternative, however, satisfactorily met the objections formulated at the preceding meeting on the non-legal aspects of the question. He himself considered that the Committee should adopt that alternative. Actually, before national courts, the acts with which an accused person was charged were set out in the indictment, but before an international court the crime under international law might have more than one aspect. In such cases, the accused would be amenable to the jurisdiction of the court only for acts considered as crimes under international law within the meaning of the convention. Thus, a subsequent trial would only be barred in respect of offences set out in the indictment. If the accused were discharged for reasons given in the judgment of the court, such acts could still be considered as different crimes under the national law of the State of which he was a national.

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(1) See Summary Record of the 29th meeting (A/AC.48/SR.29), paragraphs 65 to 67.

In such cases, the national court would not try the accused for acts considered as crimes under international law, but for other offences coming within its own proper jurisdiction.

24. Mr. MUNIR (Pakistan) said that it was difficult for him to express an opinion on the adequacy of the alternatives submitted by the Sub-Committee. So far as he understood the Rapporteur's interpretation of those alternatives, an accused could be tried by a national court after the international criminal court had found him not guilty of genocide. If that were so, the accused would receive no protection from the provision. All depended, admittedly, on the extent to which the Committee was prepared to protect an accused person. It seemed to him that the Committee did not need to draft a meticulously detailed statute, but should merely prepare the broad outlines of a statute, which would enable the General Assembly to decide on the desirability of an international criminal court. It would be sufficient merely to state that the accused should be protected from subsequent trial for the same offence. In his view, murder was included in genocide, and if an accused person were found innocent of genocide he should not be tried again for murder.

25. He accordingly proposed the following text as an alternate version of the provision of article 49 bis submitted by the Drafting Sub-Committee:

"No person who has been tried and acquitted or convicted before the International Criminal Court shall be subsequently tried for the same offence in any court within the jurisdiction of any State which has conferred jurisdiction on that Court with respect to such offence."

26. Mr. JONES (United Kingdom) agreed with the Pakistani representative. The basis, however, of the principle that an accused should not be tried twice for the same offence was not the consideration whether he had been charged with an offence or whether any offence was involved in proceedings concerning him, but whether he was in danger of being tried again on the same set of facts. He suggested, therefore, that the first part of the Pakistani proposal be amended to read:

"No person who has been tried and acquitted or convicted before the International Criminal Court shall be subsequently tried for the same offence on the same set of facts in any court ....."



27. Mr. MUNIR (Pakistan) accepted the United Kingdom amendment to his proposal.

28. Mr. SÖRENSEN (Denmark), Rapporteur, said that the Drafting Sub-Committee had based its text on the Committee's decision that there should be no re-trial for the same offence; that decision had not mentioned re-trial on the same facts. The Pakistani and United Kingdom representatives were re-opening a question that had been decided as a preliminary issue. He himself agreed with their views, but the Drafting Sub-Committee had not felt that it should go into that problem again.

29. Reverting to his example explaining the alternatives in the draft, he explained that he had meant that if a person were acquitted because it had been found that he had not committed genocide, that did not mean that he had not committed murder. The essential element of genocide was the intention to destroy national, ethnical or other groups as such, and if such intention was not present genocide could not be committed. Clearly, if the court found that not even a murder had been committed, there would be no case for a subsequent re-trial of the accused.

30. Mr. ROBINSON (Israel) agreed with the Danish representative that intention was the essential element of genocide. The concept of genocide had been defined in an international instrument, and it would be defined in any national code of crimes where the State in question had ratified the Convention on Genocide. The difference between genocide and any other mass killing lay in the intention of the killer. There was no substance in the Pakistani representative's argument that if a person were acquitted of genocide he should not be tried subsequently for murder, if in fact he had committed murder and not genocide. Nor could, nor should any State be prevented from bringing such a person before its national courts. The Pakistani amendment, however, referred to "the same offence". In other words, there was no real difference between that amendment and the first alternative text submitted by the Drafting Sub-Committee. There were two different elements in article 49 bis: res judicata, and double jeopardy. Both were covered by either the Drafting Sub-Committee's first alternative or the Pakistani amendment; consequently, either wording could be adopted.

31. In his opinion, however, the second alternative text seemed to convey a different implication, and he would hesitate to vote for it.

32. Mr. JONES (United Kingdom) thought that the acid test was whether a person was in peril of double trial, not whether the court had decided regarding its jurisdiction. A possible solution might be to leave the problem of subsequent trial to the future conventions which would confer jurisdiction on the court in respect of specific crimes.

33. Mr. RÖLING (Netherlands) pointed out that, to take the case of genocide, which involved murder, jurisdiction would be conferred on the court only in respect of genocide, not in respect of murder. That being so, both alternative drafts of article 49 bis and the Pakistani amendment all contained precisely the same provision.

34. He himself preferred the Drafting Sub-Committee's second alternative, as it was the clearer.

35. Mr. PINEYRO CHAIN (Uruguay) pointed out that in defining the act of genocide the Convention on Genocide had distinguished between two constituent elements of that act: the objective element, which was homicide, and the subjective element, which was the intention to destroy a racial, religious or other group. Hence, when the court took cognizance of a charge of genocide, it might decide that the subjective element was not proven, and acquit the accused on the count of genocide. But in that case there was nothing to prevent the accused being brought to trial before the national courts on a charge under the ordinary law. There was, therefore, no overlapping between the two jurisdictions. Should the court decide that the subjective element of the act of genocide was proven, it would convict. In that case, the State of which the accused was a national would not be entitled to bring the accused before its own courts, even if genocide constituted a crime under its criminal code. The judgment of the court would then be a bar to a subsequent trial.

36. The difficulty was to distinguish between the two elements. For that reason, he considered that it would be better not to mention the indictment and

to keep to the terms of the judgment, that was to say, to the definitions of the crime in the judgment. He accordingly considered that, of the various texts before the Committee, that originally submitted by the Pakistani representative was the best, as it only mentioned the offence and did not refer to the acts. He therefore proposed that the Committee adopt that text.

37. The CHAIRMAN pointed out that the question of double jeopardy would arise in any case where a national of a State was being tried for an offence, if he had been tried previously by the international criminal court.

38. He then put to the vote the Pakistani amendment in its original form.

The Pakistani amendment was adopted by 7 votes to none, with 5 abstentions.

39. The CHAIRMAN put to the vote article 49 bis as amended.

Article 49 bis as amended was adopted by 7 votes to none, with 5 abstentions.

40. There being no further comments on the draft statute, the CHAIRMAN ruled that the Committee would begin examination of its draft report to the General Assembly at the next meeting.

The meeting rose at 5.5 p.m.